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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHRISTOPHER O'BRIEN,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF
THE CALIFORNIA STATE
UNIVERSITY,

Defendant and
Respondent.

B279603

(Los Angeles County
Super. Ct. No. NC060699)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Ross Klein, Judge. Affirmed.

Christopher O'Brien, in pro. per., for Plaintiff and
Appellant.

California State University Office of General Counsel and
Thy Monaco for Defendant and Respondent.

Christopher O'Brien, representing himself as he did in the trial court, appeals the judgment of dismissal entered after the court ruled his Pro Se Petition Alleging Age Discrimination, which named as defendant California State University, Long Beach (CSULB), was barred by res judicata (claim preclusion) and granted its own motion for judgment on the pleadings. O'Brien argues the court erred in denying his motion for default judgment, filed three days after the date he contends an answer or other pleading was due, and in permitting counsel for the Board of Trustees of the California State University to appear at hearings by telephone. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. O'Brien's First Petition

On July 17, 2015 O'Brien filed his first Pro Se Petition Alleging Age Discrimination against the Board of Trustees of the California State University (erroneously sued as CSULB), Los Angeles Superior Court No. NS030630. O'Brien sought to be readmitted to CSULB, alleging he had met every requirement for admission, had previously been admitted to the school and was now being denied admission because he was more than 40 years old.

The Board demurred and moved to strike a portion of the complaint. No opposition was filed. On March 15, 2016 the Board's demurrer was sustained without leave to amend, and the motion to strike was granted. A judgment of dismissal was entered on April 4, 2016. O'Brien did not appeal the judgment.

2. O'Brien's Second Petition

On June 28, 2016 O'Brien filed a second Pro Se Petition Alleging Age Discrimination, again naming as defendant CSULB,

Los Angeles Superior Court No. NC060699. The new petition was substantively identical to the petition filed the previous year, again alleging O'Brien was qualified for admission as a transfer student to CSULB but had been denied admission because of his age. The pleading sought temporary and permanent injunctive relief, as well as actual and punitive damages.

From a document attached to O'Brien's appellate brief, but not otherwise in the record on appeal,¹ it appears O'Brien purported to serve the lawsuit by sending the summons and complaint by certified mail to Dr. Timothy P. White, CSULB's chancellor. Although no date appears on the document provided, O'Brien states his lawsuit was served on July 1, 2016.

On August 4, 2016 O'Brien moved for entry of a default judgment based on the Board's purported failure to answer or otherwise plead within 30 days of service of his lawsuit. The caption of O'Brien's motion indicates a September 1, 2016 hearing date.²

On August 11, 2016 the Board demurred to O'Brien's second petition and moved to strike portions of the pleading. The Board also moved for judicial notice of the judgment of dismissal and related documents from Los Angeles Superior Court

¹ O'Brien's designation of the record on appeal omitted most of the material necessary to evaluate his claims of error. We granted the Board's motions to augment the record and for judicial notice, which supplied many of the missing documents.

² Although not in the clerk's transcript or the supplemental materials provided by the Board, the superior court case summary indicates the Board filed an opposition to the motion for default judgment on August 16, 2016 and a declaration from its counsel in support of that opposition on August 19, 2016.

No. NS030630. The following day, in a ruling made in chambers, the court took judicial notice of the pleadings filed by O'Brien in Los Angeles Superior Court Nos. NS030630 and NC060699 and of the fact a judgment of dismissal had been entered in No. NS030630 on April 4, 2016. The ruling then stated, "The two pleadings are identical and seek identical relief. [¶] Pursuant to CCP section 438(b)(2) the Court intends to grant judgment on the pleadings in case NC060699 on the grounds that [it] is barred by the doctrine of res judicata. The Court's motion will be based on judicial notice of both pleadings." A hearing on the court's motion was set for September 16, 2016.

Although the court gave O'Brien an opportunity to file opposition papers prior to the September 16, 2016 hearing, he did not do so. (O'Brien did file an ex parte application for a temporary restraining order directing his immediate admission to CSULB on August 19, 2016. That application was denied.)

On September 16, 2016 the court denied O'Brien's oral motion to strike the Board's demurrer and, after taking the matter under submission, granted the motion for judgment on the pleadings. A judgment of dismissal was entered the same day.

On January 5, 2017, more than two months after O'Brien had filed his notice of appeal from the September 16, 2016 judgment, O'Brien moved in the trial court for a statement of decision. The motion was denied.

DISCUSSION

1. *Standard of Review*

“A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review.’ [Citation.] ‘All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law’ [Citation.] Courts may consider judicially noticeable matters in the motion as well.” (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777; accord, *Burd v. Barkley Court Reporters, Inc.* (2017) 17 Cal.App.5th 1037, 1042.)

2. *The Second Pro Se Petition Was Barred by Res Judicata (Claim Preclusion)*

“Claim preclusion, the ““primary aspect”” of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties.” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) “Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether.” (*Ibid.*; accord, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 727.)

O’Brien does not contend on appeal, nor could he, that the trial court erred in finding present the three elements necessary for application of the doctrine of claim preclusion to bar his second pro se petition. O’Brien’s first and second Pro Se Petitions

Alleging Age Discrimination made the same factual allegations and asserted the same causes of action (or primary rights) against the same (erroneously named) government entity. As to the third element, a judgment after a demurrer has been sustained, even if leave to amend were granted (which it was not in O'Brien's first case, NS030630), "is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts." (*Keidatz v. Albany* (1952) 39 Cal.2d 826, 828; accord, *Crowley v. Modern Faucet Mfg. Co.* (1955) 44 Cal.2d 321, 323; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1165; see *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 794 ["a judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one"].)

2. *O'Brien Was Not Entitled to a Default Judgment*

O'Brien's principal argument on appeal is that the trial court erred by not granting his motion for a default judgment, an argument predicated on his contention the Board failed to file a timely answer to his lawsuit. However, as discussed, the document submitted by O'Brien with his brief to support this claim of error, as well as the proof of service attached to his Pro Se Petition Alleging Age Discrimination, indicates he improperly attempted to serve the summons and complaint by certified mail, rather than by personal delivery, as specified in Code of Civil Procedure section 415.10; by leaving a copy of the summons and

complaint with a competent person during usual business hours at the office of the person to be served and thereafter mailing it to the same address, as provided by Code of Civil Procedure section 415.20; or by mailing the summons and complaint with an acknowledgment of receipt of summons, which, as set forth in Code of Civil Procedure section 415.30, must be signed and returned by the person served to be effective. Thus, from the record on appeal, it does not appear that the Board was ever properly served, and O'Brien's motion for a default judgment lacked merit.³

3. *The Court Did Not Err in Permitting Counsel for the Board To Appear by Telephone*

O'Brien complains that counsel for the Board appeared by telephone at the September 16, 2016 hearing on the motion for judgment on the pleadings and again at the January 5, 2017 hearing on his belated motion for a statement of decision.⁴ California Rules of Court, rule 3.670 expressly authorizes a party or its counsel to appear by telephone at hearings and proceedings

³ The trial court never ruled on the motion, having granted the motion for judgment on the pleadings before addressing it.

⁴ In addition to asserting it was error to allow counsel for the Board to appear by telephone at the January 5, 2017 hearing, O'Brien attempts to recast his belated motion for a statement of decision as, in effect, a motion for reconsideration (Code Civ. Proc., § 1008) or to vacate the judgment and enter a new judgment in his favor (Code Civ. Proc., § 663). O'Brien failed to comply with the statutory time requirements for either type of motion. Moreover, for the reasons discussed in the text, the motion for judgment on the pleadings was properly granted, and O'Brien's motion for a default judgment lacked merit.

in civil cases except at specific hearings identified in rule 3.670(e). Neither of the hearings involved in this case is listed in rule 3.670(e). Even if they were, rule 3.670(f) authorizes the court to permit a telephonic appearance in any instance when the court determines that it is appropriate. There was no error.

4. *The Board's Use of the Incorrect Case Number on Its Motion To Strike Was Harmless*

O'Brien's final claim of error is that the Board's demurrer included the wrong case number in its caption. In fact, the notice of demurrer and demurrer had the correct case number (NC060699) on the caption page, but the motion to strike portions of O'Brien's complaint, filed concurrently with the demurrer, inadvertently used the number of O'Brien's earlier action (NS030630).⁵ Given that the trial court never ruled on the Board's demurrer and motion to strike, instead granting its own motion for judgment on the pleadings after notice to the parties, O'Brien has failed to demonstrate that any error in this regard was prejudicial—that is, that it is reasonably probable a result more favorable to him would have been reached in the absence of the purported error. (Code Civ. Proc., § 475 “[n]o judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different

⁵ Notwithstanding this error, the motion to strike was filed in the correct action, as reflected on the superior court's case summary.

result would have been probable if such error, ruling, instruction, or defect had not occurred or existed”].)

DISPOSITION

The judgment is affirmed. The Board of Trustees of the California State University is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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