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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HALEY DARIA,

Plaintiff and Appellant,

v.

MIKE NOLING,

Defendant and Respondent.

2d Civil No. B234939
(Super. Ct. No. 1341441)
(Santa Barbara County)

Plaintiff Haley Daria appeals the judgment of dismissal after an order sustaining two demurrers by defendant Mike Noling to her fourth amended complaint. Daria is a former minority shareholder in a corporation now known as Level Studios, Inc., and sought damages from multiple defendants based on an allegedly fraudulent corporate merger in 2006. She contends that the trial court erred by failing to grant leave to amend the complaint after sustaining the Noling demurrers. We affirm.

FACTS AND PROCEDURAL HISTORY

In the 1990s, Daria and others started a business named Web Associates, the predecessor of Level. In 2000, Daria settled a lawsuit with Web Associates which confirmed her status as a stockholder and the amount of stock she owned.

In 2006, Web Associates entered into a plan of merger which included a buyout of the shares owned by minority shareholders including Daria. The merger was completed and Daria's shares in Web Associates were bought out. Web Associates

continued in existence as a technology company. Although the complaint is unclear, it is undisputed that Web Associates became Level Studios, Inc. after the merger. We will refer to Web Associates as Level in this opinion.

In January 2010, Daria filed her original complaint alleging improprieties in the 2006 merger, most importantly nondisclosure of material information explaining the merger and its consequences. After some pleading missteps, Daria filed a second amended complaint. Noling and other defendants demurred to the second amended complaint and the trial court sustained the demurrers with leave to amend.

Daria filed a fourth amended complaint in December 2010 consisting of approximately 50 pages of allegations and 75 pages of attachments pertaining to the entire history of the dispute. The named defendants were Level, Level's CEO Tom Adamski, Gregory Presson, B. Riley & Co, and respondent Mike Noling. The fourth amended complaint alleges that Noling is a certified public accountant and member of Level's board of directors. Attachments to the complaint indicate that B. Riley & Co., an investment banking company, served as financial advisor for the merger. Gregory Presson was associated with B. Riley.

The fourth amended complaint briefly alleges the formation of Web Associates and the 2000 dispute over Daria's shareholder interest, but focuses on the 2006 merger. There are allegations that, in 2006, Level, its CEO Tom Adamski, "Mike Noling, CPA" and 46 percent stockholder Michael Klein established a new line of revenue by expanding Level's business into new geographic and market areas. To further their own interests in the company, these defendants sought to buy out Level's minority shareholders including Daria. In order to do so, Level planned a merger. Although the terms of the merger were disclosed to all shareholders, the defendants failed to disclose numerous material facts, such as Level's increasing value and other positive financial information. It is alleged that Level failed to research alternate methods to effectuate a merger, or follow Daria's advice regarding the future of the company. The merger was completed and Daria received 33,000 shares in Level in return for signing a release of her

claims. The complaint, however, alleges that the release was signed under duress and is unenforceable.

Based on these allegations, the complaint alleges causes of action for fraud and deceit, self-dealing and breach of fiduciary duty, "theft by conversion," aiding and abetting breach of fiduciary duty, professional negligence, rescission of contract, and imposition of a constructive trust. Only the causes of action for fraud, breach of fiduciary duty, and professional negligence were alleged against Noling.

In January 2011, Noling filed a demurrer to the fourth amended complaint, as did defendants Level, Adamski, B. Riley & Co., and Presson. Noling's demurrer covered the fraud, and breach of fiduciary duty causes of action. At the February 9, 2011, hearing, the demurrer by Noling was sustained without leave to amend.¹ Later in February 2011, Noling filed a separate demurrer to the cause of action for professional negligence. At the April 6, 2011, hearing, the trial court sustained that demurrer without leave to amend.

Noling moved for dismissal of the claims against him after his demurrers were sustained without leave to amend. Daria opposed dismissal by arguing the merits of her case and requesting further leave to amend her complaint based on purportedly new and recently-discovered evidence. Daria also sought to introduce oral testimony and written evidence at the hearing on the dismissal motion. On August 17, 2011, the trial court granted Noling's motion to dismiss the complaint against him stating, among other things, that the time to seek leave to further amend her complaint had passed, and that it would be improper to hear evidence at a dismissal hearing. Daria appeals the dismissal.

DISCUSSION

Daria contends the trial court erred in sustaining Noling's demurrers without leave to amend. She argues that the trial court should have granted leave to amend to include Noling in the cause of action for aiding and abetting a breach of fiduciary duty. We disagree.

¹ The demurrers by Level and Adamski were overruled.

When reviewing a dismissal after a demurrer has been sustained without leave to amend, we independently review the complaint to determine whether the complaint states a cause of action under any legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We accept the truth of properly pleaded factual allegations, but not contentions, deductions or conclusions of law. (*Ibid.*) We also consider exhibits attached to the complaint and, if the facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

When a complaint is deficient but there is a reasonable possibility the defects can be cured by amendment, leave to amend should be granted and it is generally an abuse of discretion for a trial court to deny leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) Conversely, "where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*Ibid.*) The plaintiff bears the burden of establishing a reasonable possibility that the complaint can be amended to eliminate its defects. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Here, we conclude that the operative fourth amended complaint fails to state any viable cause of action against Noling and there is no reasonable possibility its defects could have been cured by amendment. The trial court had previously granted leave to amend a prior version of the complaint giving Daria an opportunity to state viable causes of action, and Daria filed other amendments to the complaint to correct errors and deficiencies which otherwise could have resulted in additional demurrers.

The fourth amended complaint is 50 pages long with 75 pages of exhibits. It is often unintelligible and always difficult to understand. As the trial court stated, the complaint "is repetitive and intersperses facts with legal argument and citation to cases

and statutes." The trial court also expressed its agreement with the defendants' argument that the fourth amended complaint "includes unintelligible sentences, vague references to third parties, legal and factual conclusions and opinions" and often fails to "identify the defendants to which she refers throughout the pleading."

The trial court, however, made an extraordinary effort to understand and interpret the complaint in a manner as favorable to Daria as reasonably possible. The court issued a detailed nine-page order in ruling on Noling's first demurrer and equally detailed orders in its ruling on Noling's second demurrer and subsequent motion to dismiss. We agree with, and rely heavily upon, the trial court's analysis of the complaint and the insufficiency of its allegations against Noling.

As to the fraud cause of action, the trial court stated that the complaint failed to allege specific facts showing fraud by Noling. The court noted that there were no allegations showing Noling's involvement in the merger beyond relaying unspecified concerns expressed by Daria to Level's management or legal counsel, and distributing documents concerning the merger and Level's business ventures. The claimed failure to disclose financial information and merger provisions concerning the buyout of minority stockholders fails to factually allege any actionable wrongdoing by Noling in that regard.

As to the breach of fiduciary duty, the trial court stated that the complaint failed to allege either a fiduciary duty by Noling to Daria, or knowledge, and substantial decision-making authority by Noling in the effectuation of the merger. The court correctly noted that there was no lack of conclusory allegations, but a complete absence of factual allegations. The trial court also concluded that any viable cause of action for breach of fiduciary duty would be barred by the two-year statute of limitations.

As to professional negligence, the trial court stated that there is no allegation that Noling ever performed accounting services for Level or Daria and therefore, there was no professional duty to violate. Again, the cause of action would be barred by the statute of limitations in any event.

Finally, the trial court expressly stated that leave to amend would normally be granted but that a demurrer to a prior version of the complaint had been sustained with

a warning that it would be Daria's last chance. The court also stated that Daria had failed to demonstrate in any manner how any of the causes of action against Noling could be amended successfully.

We note that Daria's opening brief on appeal continues to present purportedly new facts to the trial court as she did in her opposition to Noling's motion to dismiss after his demurrers were sustained, but fails to address the deficiencies in the fourth amended complaint or indicate how further amendment would cure the deficiencies. The brief contains numerous references to documents but we cannot ascertain which, if any, of those documents, were before the trial court at the demurrer hearings, or how they relate to the complaint.

In her reply brief, Daria directs her attention to a defense of the sufficiency of her fourth amended complaint. She asserts that the allegations of the fourth amended complaint form the basis of a cause of action against Noling for aiding and abetting a breach of fiduciary duty by others, but still fails to identify specific facts which support the assertion. The reply also makes several references to documents which are not in the record and relate to events that occurred long after the merger without indicating how the documents and events could cure the deficiencies in her complaint. It is established that failure to present reasoned argument with references to the record and citation to legal authority results in a forfeiture of any contention that could have been raised on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239–1240.)

Daria has represented herself in propria persona, and asserts on appeal that the deficiencies in her pleadings and argument resulted from self-representation, and that this court should afford her considerable leeway for that reason. We understand the difficulties encountered by those not represented by counsel on appeal or in the trial court, but we are bound to follow the applicable procedural and substantive legal requirements for everyone. A self-representing litigant is treated like any other party and, therefore, is subject to the same rules of appellate procedure as parties represented by an

attorney. (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267; *Nwosu v. Uba, supra*, 122 Cal.App.4th at pp. 1246-1247.)

In addition, the record indicates that the trial court gave significant deference to Daria as a self-represented litigant. As stated above, the trial court carefully considered Daria's position and made yeoman efforts to understand the material allegations of the complaint and interpret these allegations in a light favorable to her.

The judgment is affirmed. Costs on appeal are awarded to respondent.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James W. Brown, Judge
Superior Court County of Santa Barbara

Haley Daria, in pro. per., for Appellant.

Kaufman Dolowich Voluck & Gonzo, Kathleen M. Hurly, Stephen M.
Caine and Gabriel N. Rubin for Respondent.