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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD J. GLAIR, Plaintiff and Appellant, v. HEE BAE CHO, CHRISTOPHER GOMEZ AND SPIRO RODITIS, Defendants and Respondents.	B250421 (Los Angeles County Super. Ct. No. BC485686)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Anne Murphy, Judge. Affirmed.

Richard J. Glair, in pro. per. for Plaintiff and Appellant.

Michael N. Feuer and Kjehl T. Johansen for Defendants and Respondents.

Richard J. Glair appeals the judgment entered following the successful demurrers of defendants Spiro Roditis, Hee Bae Cho, and Christopher Gomez. We agree with the trial court that res judicata barred Glair's litigation of the claims, and conclude that the court did not abuse its discretion in declaring Glair a vexatious litigant. Consequently, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Glair was arrested on January 25, 2005 by Los Angeles Police Department Officers Roditis and Gomez, based on allegations that Glair stalked Cecelia Mann, a City of Los Angeles ("City") employee. Glair was booked for violation of Penal Code section 646.9 upon the approval of Officer Cho. Charges were not filed against Glair, and he was released from custody the next day. On the same day as his release, the City filed a petition for a permanent injunction pursuant to Code of Civil Procedure section 527.8[1] seeking to prohibit Glair from engaging in violence or threatening violence against Mann. The City obtained ex parte a temporary restraining order against Glair pending trial on the petition for a permanent injunction. Following a bench trial, the City obtained a permanent injunction for a workplace violence protective order on behalf of Mann, which enjoined Glair from coming within 100 yards of Mann and within 10 yards of any entrance to Queen Anne Park, where Mann worked as the park's director, for a period of three years. Glair's appeal was dismissed for lack of jurisdiction. (*City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 816.)

Glair filed a claim with the City clerk on July 25, 2005, alleging that he was falsely arrested, and that his First Amendment, due process and equal protection rights were violated. By letter dated November 8, 2005, the City denied the claim.

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[1] Section 527.8, subdivision (a) provides in relevant part: "Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee. . . ."

On May 4, 2006, Glair filed a suit in federal court against the City and "various employees and advisors of the City," including Roditis and Gomez, alleging both federal and state law claims. He asserted that Officers Roditis and Gomez violated federal law under the First and Fourth Amendments when they arrested him, and also alleged state law claims for false arrest, intentional infliction of emotional distress, and violation of civil rights under Civil Code section 52.1. The district court granted summary judgment on all state and federal causes of action, ruling as a matter of law that Roditis and Gomez had probable cause to arrest him for stalking Ms. Mann, and that the officers did not threaten, coerce or intimidate Glair, and thus did not violate Civil Code section 52.1.

After the Ninth Circuit Court of Appeals affirmed the grant of summary judgment against him, Glair filed the instant action, alleging that Roditis, Cho and Gomez violated Civil Code section 52.1 and falsely arrested him on January 25, 2005. Roditis demurred to the complaint, but Cho and Gomez neither answered nor demurred. The trial court granted Roditis's demurrer with leave to amend. On September 17, 2012, Glair filed a first amended complaint, with a proof of service indicating that he personally delivered a copy to Deputy City Attorney Wendy Shapero. Roditis again demurred. The trial court granted this demurrer as well, with leave to amend. Glair filed a second amended complaint, which contained factual allegations not present in the original or first amended complaints. The attached proof of service stated that Glair mailed a copy to Deputy Shapero. The trial court granted Roditis's demurrer to the second amended complaint, ruling that res judicata barred the instant litigation. Judgment in favor of Roditis was entered on May 9, 2013.

In July 2013, Glair twice submitted written requests for entry of default as to Cho and Gomez, which were twice rejected for filing by the court clerk because they did not contain all required information. On August 8, 2013, Cho and Gomez filed a demurrer to the second amended complaint, and also moved to have Glair declared a vexatious litigant and for a pre-filing order pursuant to Code of Civil Procedure section 391. On September 23, 2013, Glair filed a motion to compel the clerk to enter a default judgment

against the officers, and on October 10, 2013, filed a "Motion to Strike Defendant[]s' Answer to Second Amended Complaint."[2]

After a hearing on November 5, 2013, the trial court sustained without leave to amend the officers' demurrer to the second amended complaint; denied Glair's motion to strike; and declared Glair a vexatious litigant subject to a pre-filing order. Judgment was entered on December 5, 2013.

Glair timely appealed from the May 9, 2013 judgment in favor of Roditis, the December 5, 2013 judgment in favor of Cho and Gomez,[3] and the order declaring him a vexatious litigant.

DISCUSSION

1. *Res judicata barred Glair's prosecution of the instant lawsuit*

The trial court ruled that res judicata barred Glair's claims of false arrest and violation of Civil Code section 52.1. Glair challenges this ruling on appeal.

"As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) The doctrine 'has a double aspect.' (*Todhunter v. Smith* (1934) 219 Cal. 690, 695.) 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880.) 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment . . . "operates" in 'a second suit . . . based on a different cause of action . . . "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' (*Ibid.*) 'The prerequisite elements for applying the doctrine to either an

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[2] As Cho and Gomez did not file an answer, the trial court treated this motion as one to strike the officers' demurrer to the second amended complaint.

[3] On our own motion, we consolidated the appeals from the two judgments on March 14, 2014.

entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.)" (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.)

Here, Glair's prior lawsuit in federal court, *Glair v. City of Los Angeles*, CV06-02730 R (RNBx), contained the identical state law causes of action, for false arrest and violation of Civil Code section 52.1, as are alleged in the present case. The federal district court entered summary judgment against Glair on both claims. It ruled as a matter of law that "Plaintiff cannot prove that Defendant City of Los Angeles is liable for false arrest because Defendants Roditis and Gomez had probable cause to arrest him on January 25, 2005. . . . [¶] Plaintiff cannot prove that Defendant City of Los Angeles is liable under California Civil Code section 52.1 as Defendants Roditis and Gomez did not threaten, coerce or intimidate Plaintiff."

On appeal to the Ninth Circuit, Glair waived any challenge to summary judgment of his state law claims by failing to address them. (*Glair v. City of Los Angeles* (9th Cir. 2011) 437 Fed. Appx. 581.) Said the court: "We do not consider whether the district court erred in granting summary judgment on Glair's state law claims. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977-78 (9th Cir. 1994) (matter not specifically and distinctly argued in opening brief is waived on appeal)." (*Ibid*.) Since the district court's rulings on Glair's state law claims went unchallenged, the prior adjudication of Glair's state law claims resulted in a final judgment on the merits.

Glair argues that res judicata does not apply here because the district court granted summary judgment based on qualified immunity, which is not a defense to state claims of false arrest and violation of Civil Code section 52.1. However, the district court did not grant defendants summary judgment on Glair's state law claims based on qualified immunity; that defense was relevant only with respect to his federal Fourth Amendment claim. Thus, while the district court granted summary judgment on some of Glair's

claims based in part on qualified immunity, it did so only with respect to his federal claims.

In sum, because the district court specifically found that Officers Roditis and Gomez had probable cause to arrest Glair for stalking on January 25, 2005, the principles of res judicata prohibit Glair from relitigating the lawfulness of his arrest in this proceeding.

2. *Denial of Glair's motion to strike*

Glair moved to strike the demurrer of Cho and Gomez. The basis of the motion was that the demurrer was untimely, having been filed eight months after the second amended complaint was filed and served on the Deputy City Attorney. On appeal, Glair contends the trial court abused its discretion in denying his motion to strike.

"There is no absolute right to have a pleading stricken for lack of timeliness in filing where no question of jurisdiction is involved, and where . . . the late filing was a mere irregularity [citation]; the granting or denial of the motion is a matter which lies within the discretion of the court." (*Tuck v. Thuesen* (1970) 10 Cal.App.3d 193, 196 disapproved on other grounds by *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189, fn. 26.)

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Under the abuse of discretion standard, "[w]here there is a [legal] basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.)" (*People v. Sarpas* (2014) 225 Cal.App.4th 1539, 1552.)

Glair relies on *Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 464, to argue that the trial court abused its discretion in denying his motion to strike. In that case, the appellate court found that the demurrer was filed for a dilatory purpose; that is, so that the

defendant/tenant could avoid the speediness of the unlawful detainer procedure and gain more time in unlawful possession of the rental property. Thus, the demurrer was a sham, frivolous pleading, and the appellate court affirmed the trial court's exercise of discretion in striking the defendant's late-filed demurrer in an unlawful detainer action. (*Id.* at p. 465.) As this District Court of Appeal noted in *Amacorp Industrial Leasing Co. v. Robert C. Young Associates, Inc.* (1965) 237 Cal.App.2d 724, 730, "cases upholding a motion to strike for failure to timely file all involve aggravated circumstances," including frivolous or sham pleadings and a purposely dilatory litigant.

Here, the trial court expressly found "no evidence of aggravating circumstances. . . . There is no basis to conclude that the demurrer to the second amended complaint is being filed for a dilatory purpose or [to] conclude that the demurrer is frivolous or a sham. The grounds for the demurrer to the second amended complaint are the same as those raised by defendant Roditis when the court dismissed the action by sustaining the demurrer." Accordingly, the trial court's decision not to strike Cho and Gomez's late-filed demurrer was a proper exercise of its discretion.

3. *Vexatious Litigant*

Glair challenges the trial court's finding that he is a vexatious litigant. We determine that the trial court's finding and pre-filing order were proper.

"'A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment.' (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219.)" (*Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1498-1499.)

Code of Civil Procedure section 391, subdivision (b) provides four alternative definitions of a vexatious litigant. The trial court found Glair fit within the definition of

subdivision (b)(1) of the statute, which provides that a vexatious litigant is one who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." The term "litigation" is broadly defined in section 391, subdivision (a) to mean "any civil action or proceeding, commenced, maintained or pending in any state or federal court." In *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216, the appellate court explained, "[m]anifestly, 'any civil action or proceeding' includes any appeal or writ proceeding." The "immediately preceding seven-year period" is measured retroactively from the date a motion is filed which seeks to have a court declare a party a vexatious litigant. (*Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 222-223.)

The seven-year period applicable to Glair's litigation history was August 8, 2006 through August 8, 2013, the date that defendants filed their motion to have Glair declared a vexatious litigant. The trial court identified five cases which Glair had filed in United States District Court during that seven-year period in which he was self-represented. Glair does not dispute that he filed these five cases in U.S. District Court during the relevant time period. Rather, he claims that the court "double counted" each of his prior cases by separately counting the initial filing of the complaint and the filing of an appeal in that same case. The record does not support Glair's factual allegation of double counting. However, the issue is of no moment, since it is undisputed that, in the immediately preceding seven-year period, Glair commenced, prosecuted, or maintained in propria personal at least five litigations other than in a small claims court that have been finally determined adversely against him.

Glair also argues that four of the five cases cited by the court involved different facts, different defendants, and were "years apart," indicating that he was not "targeting

‘a defendant who becomes the target of one of these obsessive and persistent litigants . . .’” citing *Golin v. Allenby* [(2010)] 190 Cal.App.4th 616, 634. While Glair does not articulate a legal argument based on the authority he cites, we take his statement to suggest that the vexatious litigant statute was not meant to apply to the circumstances of this case. We cannot agree.

“‘“The vexatious litigant statutes were enacted to require a person found a vexatious litigant to put up security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants whose conduct can cause serious financial results to the unfortunate object of his attack. The purpose of the statutory scheme is to deal with the problem created by the persistent and obsessive litigant who has constantly pending a number of groundless actions, often against the judges and other court officers who decide or were concerned in the decision of previous actions adversely to him.”’ (*Holcomb v. U.S. Bank Nat. Assn., supra,* 129 Cal.App.4th [1494,] 1504, quoting *First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 867–868.) It is to curb misuse of the court system by those acting as self-represented litigants who repeatedly relitigate the same issues. “Their abuse of the system not only wastes court time and resources but also prejudices other parties waiting their turn before the courts. (*Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 44.)” (*Golin v. Allenby, supra,* 190 Cal.App.4th at p. 635.) There is nothing in the cited case to suggest that the subject of a motion to declare one a vexatious litigant must have been a defendant in one or more of the prior unsuccessful lawsuits. The defendants in this case did indeed become “targets of one of the obsessive and persistent litigants,” that is, a

litigant unrepresented by counsel who filed at least five unsuccessful lawsuits in the preceding seven years.

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

TURNER, P.J. MOSK, J.

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