

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

|   |
|---|
| California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. |
|---|

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HELEN FUNG,

Plaintiff and Appellant,

v.

OREGON TRAIL CORPORATION,

Defendant and Respondent.

B279366

(Los Angeles County  
Super. Ct. No. YC070991

APPEAL from a judgment and order of the Superior Court  
of Los Angeles County, Ramona G. See, Judge. Affirmed.

Helen Fung, in pro. per., for Plaintiff and Appellant.

Sherry Anne Lear for Defendant and Respondent.

---

## INTRODUCTION

Helen Fung appeals from the judgment entered after the trial court granted a motion by Oregon Trail Corporation to dismiss Fung's wrongful foreclosure action with, as opposed to without, prejudice. Fung argues the trial court erred in granting that motion and in awarding Oregon Trail \$17,500 in attorneys' fees. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Trial Court Sustains Oregon Trail's Demurrer with Leave To Amend*

In December 2015 Fung, representing herself, filed this action against Oregon Trail and others, asserting numerous causes of action, including for negligence and breach of contract, based on allegations the defendants wrongfully foreclosed on her home. In January 2016 Fung amended her complaint to name additional defendants.

Oregon Trail demurred to the amended complaint, and Fung filed written opposition and attended the hearing. On June 30, 2016 the trial court sustained the demurrer to two causes of action, "fraud conversion" and "Defendant's Closure Sell Destroy Plaintiff's Business," without leave to amend and sustained the demurrer to the remaining causes of action with 30 days leave to amend. The court ordered counsel for Oregon Trail to give notice of the court's ruling.

The next day Oregon Trail filed a proof of service showing it had served Fung with a notice of ruling by overnight delivery

on June 30, 2016.<sup>1</sup> On July 6, 2016 Fung filed an “ex parte objection” to the notice of ruling, arguing the notice misstated aspects of the court’s ruling on the demurrer, but acknowledging, in the course of her argument, that the trial court gave her “30 days to re-write her amended Complaint.” The trial court denied Fung’s ex parte application, referred her to the court’s June 30, 2016 minute order, and instructed her to obtain a copy of that minute order from the clerk’s office if she was unclear about the ruling.

B. *The Trial Court Grants Oregon Trail’s Motion To Dismiss the Action with Prejudice and Its Motion for Attorneys’ Fees*

On August 11, 2016 counsel for Oregon Trail notified Fung that Oregon Trail intended to ask the court to dismiss her action with prejudice because Fung had not filed a second amended complaint within the time allowed. The following day, Fung filed three requests to dismiss the action without prejudice.

On August 15, 2016 Oregon Trail appeared ex parte to request dismissal of the action with prejudice pursuant to Code of Civil Procedure section 581, subdivision (f)(2).<sup>2</sup> Fung appeared

---

<sup>1</sup> The proof of service states counsel for Oregon Trail sent the notice to Fung at an address in Rancho Palos Verdes. That address matches the one Fung gave on her July 6, 2016 “ex parte objection” to the notice of ruling and on many of her other filings in the trial court, beginning at least June 15, 2016, although documents she filed as late as June 13, 2016 provide a different address. In any event, Fung does not suggest that any proofs of service relevant to this appeal misstated her address.

<sup>2</sup> Statutory references are to the Code of Civil Procedure.

and opposed the application in writing, arguing that the 30-day period to file a second amended complaint had not yet begun to run because she never received a copy of the trial court's June 30, 2016 minute order and that, in any event, Oregon Trail's application was "too late and irrelevant" because she had filed and served a request for dismissal of the action without prejudice. The trial court denied the application, finding no good cause for ex parte relief.

Oregon Trail then filed a motion on statutory notice for dismissal of the action with prejudice, as well as a motion for attorneys' fees pursuant to the attorneys' fees provision in the contract on which Fung had sued.<sup>3</sup> On October 13, 2016 the trial court heard the motion for dismissal. Fung did not file written opposition, but counsel appeared for her at the hearing and argued in opposition to the motion. The trial court took the matter under submission.

On October 18, 2016 the court heard Oregon Trail's motion for attorneys' fees and an ex parte application by Fung objecting to the request for attorneys' fees (apparently in lieu of filing written opposition to the motion). The trial court granted Oregon Trail's motion to dismiss the action with prejudice, granted Oregon Trail's motion for attorneys' fees in the amount of \$17,500, and overruled the objection in Fung's ex parte application. The trial court entered an order dismissing the

---

<sup>3</sup> Oregon Trail later filed a request for judicial notice of documents showing that, on September 21, 2016 (after Oregon Trail had filed its motion for dismissal with prejudice), Fung filed a new wrongful foreclosure action against Oregon Trail and others.

action with prejudice “as to [Oregon Trail] only,” and Fung timely appealed.

## DISCUSSION

### A. *The Trial Court Did Not Err in Granting Oregon Trail’s Motion To Dismiss the Action with Prejudice*

Fung contends the trial court erred in granting Oregon Trail’s motion to dismiss her action with prejudice pursuant to section 581, subdivision (f)(2). That provision “gives the defendant the right to obtain a court order dismissing the action with prejudice once the court sustains a demurrer with leave to amend and the plaintiff has not amended within the time given.” (*Cano v. Glover* (2006) 143 Cal.App.4th 326, 330; see *Parsons v. Umansky* (1994) 28 Cal.App.4th 867, 870.) We review a trial court’s order dismissing an action under section 581, subdivision (f)(2), for abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612; accord, *Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827.)

Fung argues the trial court erred in granting Oregon Trail’s motion to dismiss the action with prejudice because she had already filed requests to dismiss the action without prejudice. Generally, “section 581 allows a plaintiff to voluntarily dismiss, with or without prejudice, all or any part of an action before the ‘actual commencement of trial.’ . . . ‘Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.’” (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 261, fns. omitted; accord, *Mossanen v. Monfared* (2000) 77 Cal.App.4th 1402, 1409; see § 581, subds. (b)(1), (c).)

But a plaintiff's right to voluntarily dismiss an action under section 581 "is not absolute." (*Mossanen v. Monfared*, *supra*, 77 Cal.App.4th at p. 1409; see *ibid.* [noting exceptions recognized by section 581 and "other limitations [that] have evolved through the courts' construction of the term "commencement of trial""].) In particular, "once a general demurrer is sustained with leave to amend and plaintiff does not so amend within the time authorized by the court or otherwise extended by stipulation or appropriate order, he [or she] can no longer voluntarily dismiss his [or her] action pursuant to [section 581], even if the trial court has yet to enter a judgment of dismissal on the sustained demurrer." (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 877; see *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788 ["[p]ermitting a plaintiff to exercise an absolute right to dismiss his action without prejudice to recommencing suit based upon the same allegations, even after the trial court has ruled definitively and adversely on the sufficiency of those allegations, makes neither good sense nor good law"].) Because Fung did not amend her first amended complaint within the time allowed, she could not voluntarily dismiss her action without prejudice under section 581.

Fung asserts she did not learn of the trial court's order giving her 30 days to amend her first amended complaint until October 18, 2016, the date of the hearing on Oregon Trail's motion for attorneys' fees. The record does not support that assertion. Indeed, Fung acknowledged in her July 6, 2016 objection to Oregon Trail's notice of ruling that the trial court had given her 30 days to amend her first amended complaint. More to the point, the record shows that on June 30, 2016 Oregon Trail

served Fung by overnight delivery with the trial court's order sustaining the demurrer to her complaint and giving her 30 days to amend. The time to amend "runs from the service of the notice of the decision or order" sustaining the demurrer and giving time to amend. (§ 472b; see *People v. \$20,000 U.S. Currency* (1991) 235 Cal.App.3d 682, 689 ["the time to amend thus runs specifically from the *service of the notice*"].) Service by overnight delivery gave Fung two additional court days. (See § 1013, subd. (c); *People v. \$20,000 U.S. Currency*, at p. 689). Therefore, the time for Fung to amend expired before she filed her request(s) for dismissal on August 12, 2016.

Finally, Fung suggests Oregon Trail did not serve her with its motion to dismiss her action with prejudice. Again, the record contradicts that suggestion: A proof of service shows Oregon Trail served Fung with the motion by overnight delivery on August 19, 2016, and Fung cites no evidence to the contrary. The trial court did not abuse its discretion in granting Oregon Trail's motion to dismiss Fung's action with prejudice.

B. *The Trial Court Did Not Err in Granting the Motion for Attorneys' Fees*

“““An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the “determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.” [Citations.]”” [Citation.] An issue of law concerning entitlement to attorney fees is reviewed de novo. [Citations.] ‘When a trial court has resolved a disputed factual issue, an appellate court reviews the ruling according to the substantial evidence rule. The trial court’s resolution of the factual issue

must be affirmed if it is supported by substantial evidence. [Citation.] We look at the evidence in support of the trial court's finding, resolve all conflicts in favor of the respondent and indulge in all legitimate and reasonable inferences to uphold the finding.” (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378.)

In challenging the trial court's ruling granting Oregon Trail's motion for attorneys' fees, Fung does not dispute Oregon Trail was entitled to attorneys' fees as the prevailing party in the action. Rather, she suggests the court erred in granting the motion because Oregon Trail had already recovered its attorneys' fees. Specifically, she points to documents in the record she contends establish that, as of October 8, 2015, attorneys for Oregon Trail received approximately \$36,000 from the proceeds of the foreclosure sale of Fung's home for services performed in connection with the foreclosure. Fung, however, did not file this action until December 4, 2015, and Oregon Trail's motion sought to recover attorneys' fees incurred only in connection with defending this action. Fung has not shown Oregon Trail's motion for attorneys' fees in this action sought an award of any fees it had already recovered. The trial court did not abuse its discretion in granting the motion.

## **DISPOSITION**

The judgment of dismissal of the action against Oregon Trail with prejudice and the order granting Oregon Trail's motion for attorneys' fees are affirmed. Oregon Trail is to recover its costs on appeal.



SEGAL, J.

We concur:

ZELON, Acting P.J.

FEUER, J.