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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

CYNTHIA MASON-EALY et al., Plaintiffs and Appellants, v. POMONA UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B278651 (Los Angeles County Super. Ct. No. BC561247)

APPEAL from judgment of the Superior Court of Los Angeles County, Suzanne G. Bruguera, Judge (Ret.). Affirmed.

Chang Mattern, Grace Lea Chang, for Plaintiffs and Appellants.

McCune & Harber, Dana McCune, Joshua A. Kuns, for Defendant and Respondent.

Plaintiffs Cynthia Mason-Ealy and Roshanna Franklin appeal from judgment following an order dismissing their lawsuit against defendant Pomona Unified School District (the District) in this action for employment discrimination and retaliation under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). In contravention of the trial court's order, Franklin attempted but never filed a fourth amended complaint. Mason-Ealy filed an untimely fourth amended complaint after receiving notice of the District's ex parte application to dismiss the lawsuit. Plaintiffs contend the trial court lacked authority to dismiss their lawsuit under *Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, because Mason-Ealy filed an untimely fourth amended lawsuit on the eve of the ex parte hearing. Given the clear difference in procedural posture in *Gitmed*, we conclude it does not apply. The trial court properly exercised its discretion to dismiss the case. We affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs jointly filed a complaint for damages on October 21, 2014, against the District, alleging three causes of action: discrimination based on race and gender, failure to prevent discrimination, and retaliation. The complaint alleged that both plaintiffs, who are African American women, served as campus security for the District and applied for the same position that paid out a higher salary. The District required applicants to submit a completed

application, complete two classes, pass an agility test, and submit to an interview. Rather than hire plaintiffs, who passed the agility test on the first attempt, the District hired three Hispanic applicants with less experience who failed the agility test on the first attempt. Several applicants with less experience were also hired. The District permitted plaintiffs to be discriminated against on the basis of race and gender by not promoting "qualified candidate[s] to the position" they sought. The District retaliated against plaintiffs because it ignored their "pleas for help and instead further humiliated and ridiculed Plaintiffs." Mason-Ealy alleged the District retaliated against her because she had a pending lawsuit against the Pomona Police Department.

On December 10, 2014, the District filed a demurrer and motion to strike portions of the complaint. On May 21, 2015, the District filed a motion to sever Mason-Ealy's claims from Franklin's claims. Plaintiffs did not oppose the demurrer or motion to strike. In place of any opposition, plaintiffs filed a first amended complaint on June 10, 2015, asserting the same common allegations and causes of action against the District. The hearing on the motion to sever was continued.

On July 30, 2015, the District filed a demurrer to the first amended complaint. Plaintiffs opposed the demurrer, but also concurrently filed a second amended complaint, again asserting the same causes of action. Plaintiffs contended their amendments "cured the alleged defects raised in [the District's] demurrer." The trial court

sustained the demurrer to the first amended complaint, but deemed the second amended complaint filed and served.

On October 1, 2015, the District filed a demurrer to plaintiffs' second amended complaint. On October 29, 2015, plaintiffs dismissed with prejudice their third cause of action for retaliation but did not otherwise oppose the demurrer. At a hearing on November 17, 2015, the court sustained the unopposed demurrer to the second amended complaint with 10 days leave to amend. The court also granted the District's motion to sever and ordered that Mason-Ealy's claims be severed from Franklin's claims.

On November 30, 2015, in contravention of the court's prior order to sever, and despite previously dismissing their retaliation claim, plaintiffs jointly filed a third amended complaint with the same three causes of action, including their cause of action for retaliation. On December 31, 2015, the District filed a demurrer to the third amended complaint. Plaintiffs did not file an opposition. During a hearing on April 11, 2016, the trial court on its own motion struck the third amended complaint because the amended complaint violated the court's prior order severing plaintiffs' claims. The court granted plaintiffs 20 days leave to amend. Pursuant to the court order, each plaintiff had until May 2, 2016 to file a fourth amended complaint.

Neither plaintiff Mason-Ealy nor plaintiff Franklin timely filed a fourth amended complaint. On May 11, 2016 at approximately 9:30 a.m., the District provided plaintiffs' counsel notice of its intent to appear ex parte for an

application to dismiss the entire action for plaintiffs' failure to file a fourth amended complaint. Mason-Ealy filed a fourth amended complaint later that day, alleging discrimination based on race and gender and retaliation. The clerk's office rejected Franklin's fourth amended complaint, asking counsel to "specify if this is an amended complaint." No other filing on May 11, 2016 appears in the record.

On May 12, 2016, the District filed its ex parte application and plaintiffs filed a written opposition. In the opposition, plaintiffs' counsel states that one reason for not filing timely amended complaints was due to confusion with the superior court clerk's office. Counsel "attempted to research the issue by referring to the Court rules with negative results." The other reason was "through inadvertence as counsel did not appropriately calendar the time allotted for filing amended or new complaints." The May 12 minute order notes that the matter was taken under submission, but it is unclear if the parties engaged in oral argument.

On May 16, 2016, the court issued a minute order giving plaintiffs an opportunity to file aditional written opposition to the ex parte application on or before May 27, 2016, and giving the District an opportunity to file a reply by June 3, 2016.[1] After further briefing by all three parties, on

[1] The court did not specify the focus of the briefing in its order. Plaintiffs' counsel submitted a supplemental opposition to the ex parte application, wherein it states that

August 26, 2016, the court granted the "motion to dismiss for failure to file timely and proper fourth amended complaint pursuant to court order." Plaintiffs timely appealed. The record on appeal does not include a reporter's transcript of the proceedings on May 12, 2016, or suitable substitute for the transcript, such as a settled or agreed statement.

DISCUSSION

Code of Civil Procedure section 581, subdivision (f)(2) provides that a court "may dismiss the complaint as to that defendant . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."[2] "The phrase 'may dismiss' means discretionary dismissal," and the provision affords the defendant the right to obtain a court order dismissing the action with prejudice. (*Cano v. Glover* (2006) 143 Cal.App.4th 326, 329–330 (*Cano*).)

We review a trial court's grant of a motion to dismiss under section 581, subdivision (f)(2) for abuse of discretion. (*Harlan v. Department of Transportation* (2005) 132

"[p]laintiff [*sic*] was at a quandary as to how to file separate complaints in the action" because plaintiffs' counsel sought to file two separate complaints, but only one was accepted on May 11, 2016.

[2] Further statutory references are to the Code of Civil Procedure unless otherwise specified.

Cal.App.4th 868, 874; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 (*Leader*).) "Discretion is abused when the trial court's ruling is arbitrary, capricious, exceeds the bounds of reason or prevents a fair hearing from being held." (*Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321.) "It is appellant's burden to establish an abuse of discretion." (*Gitmed*, *supra*, 26 Cal.App.4th at p. 827.)

"[A] judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court.' . . . (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 (*Foust*).)

Analysis

Plaintiffs' sole contention[3] on appeal is that because Mason-Ealy presented an amended complaint prior to the ex

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[3] Plaintiffs claim in their reply brief that the ex parte notice provided by the District was "insufficient to comply with the procedures set forth in *Gitmed*." Notwithstanding the fact plaintiffs waived this contention by failing to raise it in their opening brief (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6), it has also been squarely rejected. (See *Cano*, *supra*, 143 Cal.App.4th at p. 330, citing *Datig v. Dove Books, Inc.* (1999)

parte hearing, the trial court lost its authority to dismiss their action under section 581, subdivision (f)(2), pursuant to *Gitmed*, *supra*, 26 Cal.App.4th 824. We disagree.

The court of appeal in *Gitmed*, *supra*, 26 Cal.App.4th 824, carefully tailored its holding to the facts and procedural history in that case. In *Gitmed*, the trial court sustained a demurrer to the plaintiff's original complaint with 20 days leave to amend. (*Id.* at p. 826.) Plaintiff filed and served on defendant the first amended complaint one day past the court's deadline. (*Ibid.*) Ten days later, and "without [providing] notice to [plaintiff, defendant] brought an ex parte application for an order of dismissal pursuant to section 581, subdivision (f)(2)." (*Ibid.*) In the application, defense counsel admitted to having already received the amended complaint prior to filing defendant's ex parte application. (*Ibid.*) The trial court granted the motion and dismissed the case. (*Ibid.*) Relying on "uncontradicted evidence that the amended complaint was *filed and served* prior to the date [defendant] sought the ex parte dismissal," the court of appeal reversed. (*Id.* at pp. 827, 829, italics

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73 Cal.App.4th 964, 978, fn. 13; *Wilburn v. Oakland Hospital* (1989) 213 Cal.App.3d 1107, 1110 [defendant "responds that an ex parte application to dismiss after failure of the party to amend does not require a noticed motion, and we agree"]; see also Cal. Rules of Court, rule 3.1320(h) ["A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2)"].)

added.) "We conclude that when an amended pleading has been served, it is incumbent upon the party moving to strike the pleading or dismiss the action to give notice of the motion. We find the fact that [defendant] gave no notice in this case, after receiving service of the amended complaint, to be a practice not condoned by this court." (*Id.* at p. 829.)

"*Gitmed* found only that where an amended pleading had been served before a motion to dismiss for failure to amend was brought: '[t]he proper procedure would have been for the defendant to bring a motion to strike the amendment *before* moving to dismiss the complaint.' . . . [Citation.]" (*Leader*, *supra*, 89 Cal.App.4th at p. 614.) Under those circumstances, the trial court may then choose to exercise its discretion to strike the amendment as untimely and therefore consider the motion to dismiss. (See *ibid.*)

The procedural posture of this case at the time of dismissal was entirely different from that at issue in *Gitmed*. Here, the District waited more than a week past the deadline to serve and file an amended complaint to provide notice of its intent to move ex parte for an order dismissing the case. The District moved for dismissal before either plaintiff sought to file and serve an amended complaint and, unlike the moving party in *Gitmed*, the District gave plaintiffs proper ex parte notice. It was only until after plaintiffs received that notice that they sought to file amended complaints on the eve of the hearing. Plaintiffs never served the District with Mason-Ealy's fourth amended

complaint, which alone takes this case out of *Gitmed's* reach. (See *Leader*, *supra*, 89 Cal.App.4th at p. 614.) Finally, the court here set a briefing schedule and provided plaintiffs with sufficient time to submit written opposition to the application to dismiss. The concerns expressed by the appellate court in *Gitmed*, dismissing a case on ex parte application with "no notice" and "after [defendant] receiv[ed] service of the amended complaint," are not present here.

This case is distinguishable from *Gitmed* in another important respect. Franklin never filed a fourth amended complaint, and Mason-Ealy never properly filed a fourth amended complaint. As leave to amend had expired, plaintiffs "no longer had an unfettered right to file an amended complaint. '[A] litigant does not have a positive right to amend [her] pleading after a demurrer thereto has been sustained. "[Her] leave to amend afterward is always of grace, not of right. [Citation.]" [Citation.]' . . . After expiration of the time in which a pleading can be amended as a matter of course, the pleading can only be amended by obtaining the permission of the court." (*Leader, supra,* 89 Cal.App.4th at pp. 612–613, citing §§ 472, 473, subd. (a).)[4]

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[4] Section 472, subdivision (a) provides in pertinent part: "A party may amend its pleading once without leave of the court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike."

To obtain the court's permission, plaintiffs were required to file a noticed motion for leave. (*Id.* at p. 613.) A court can deny a motion to dismiss and allow the plaintiff to file an amended complaint, provided plaintiff gives an excuse for the delay. (*Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 948.) "'The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment. [Citation.] [Citation.]'" (*Leader, supra,* at p. 613.) This is true even if the plaintiff proposes a good amendment in proper form. (*Ibid.*)

Plaintiffs either did not file a fourth amended complaint, or did so without seeking leave to file an untimely amended complaint. Nothing in the record evidences that plaintiffs served a fourth amended complaint on the District.

No court reporter was present and plaintiff did not obtain an agreed or settled statement. (See Cal. Rules of Court, rule 8.120(b).) The only evidence of good cause for the delay appears in plaintiffs' opposition to the application to dismiss, which they claimed was due to confusion with the superior court clerk's office, as well as "through inadvertence as counsel did not appropriately calendar the time allotted for filing amended or new complaints." In the absence of a

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Section 473, subdivision (a)(1) provides in pertinent part: "The court may likewise, in its discretion, after notice to the adverse party, allow . . . an amendment to any pleading or proceeding in other particulars . . . ."

contrary showing, we presume the trial court acted appropriately. (*See Foust*, *supra*, 198 Cal.App.4th at p. 187; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 ["[i]n many cases involving the substantial evidence or abuse of discretion standard of review . . . a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable"]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [to overcome presumption on appeal that an appealed judgment or order is presumed correct, appellant must provide adequate record demonstrating error].)

Ultimately, plaintiffs did not timely or properly file fourth amended complaints. Plaintiffs did not seek leave and did not serve the complaints on the District so as to bring themselves within *Gitmed* such that their conduct deprived the trial court of its authority to rule on the ex parte application to dismiss the action before hearing a motion to strike. There being no motion for leave to file amended complaints properly before the court, the only motion upon which it could rule was the District's ex parte application to dismiss. Plaintiffs' contention on appeal is premised on *Gitmed*, which we have concluded is inapposite. Plaintiffs were afforded a fair hearing on the District's ex parte application, and with the record before us, we cannot say the trial court acted arbitrarily or capriciously.

DISPOSITION

The judgment is affirmed. Defendant and respondent Pomona Unified School District shall recover its costs on appeal from plaintiffs and appellants Cynthia Mason-Ealy and Roshanna Franklin.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J.*

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