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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

JENNI JONES, Plaintiff and Appellant, v. HENRY YU et al., Defendants and Respondents.	B248853 (consolidated with B251816) (Los Angeles County Super. Ct. Nos. BC486518, BC496574)

APPEAL from judgments of the Superior Court of Los Angeles County. William F. Fahey, Judge. Reversed (No. B248853). Reversed (No. B251816).

Steven L. Sugars for Plaintiff and Appellant.

Mousavi Law Group and Amy A. Mousavi for Defendants and Respondents Henry Yu et al.

The trial court dismissed Jenni Jones's first action after sustaining the defendants' demurrer without leave to amend. Jones did not appeal this judgment. The court dismissed Jones's second action against the defendants after sustaining their demurrer without leave to amend on the ground that the dismissal of the first action was res judicata. The court dismissed Jones's third action against the defendants after sustaining their demurrer without leave to amend on grounds that are not reflected in the record. We consolidated Jones's appeals from the judgments in the second and third cases.

We conclude that the second and third actions are not barred by res judicata. Accordingly, we reverse the judgments in the second and third cases and remand them for further proceedings described below.

FACTS AND PROCEEDINGS BELOW

Jenni Jones filed three actions against the defendants. Only the latter two cases are here on appeal but the proceedings in the first case are key to those appeals so we begin with it.

A. The First Case (No. BC 466725)

Jones filed her first case (Case No. 1) in propria persona against defendants Henry Yu and Huisoon Kim. Her second amended complaint charged defendants with fraud, libel, slander, breach of contract, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress. Defendants filed a demurrer to this complaint on the grounds of failure to state a cause of action and uncertainty and on the ground of misjoinder of parties as to the second through fifth causes of action.

While the demurrer to the second amended complaint was pending, Jones retained an attorney who made an ex parte request for leave to file a third amended complaint. The court denied the request on March 16, 2012 for failure to comply with the California Rules of Court governing the amendment of pleadings. On March 19, 2012, in chambers, the court sustained the defendants' unopposed demurrer to the second amended

complaint without leave to amend and ordered Case No. 1 dismissed. The order was entered in the court's minutes the following day, March 20, 2012.

In the meantime, on March 19, 2012, Jones's attorney filed a request to dismiss Case No. 1 without prejudice. The clerk of the court entered the dismissal the same day.

In August or September 2012, Jones's attorney filed an ex parte application asking the court to declare void its order dismissing Case No. 1. The court denied the application without prejudice to the filing of a noticed motion. No noticed motion was filed and no appeal was taken from the order of dismissal.

B. The Second Case (No. BC 486518)

The second case (Case No. 2) was filed by Jones's attorney three months after the court dismissed Case No. 1. The first amended complaint added Pear Yu and Angie Yi as defendants. It retained the claims in Case No. 1 for libel, slander and breach of contract and pleaded new allegations of wrongful discharge, unlawful prevention of employment, conspiracy, failure to pay minimum wage and violation of the unfair competition law. (Bus. & Prof. Code, § 17200 et seq.)

Defendants demurred to the first amended complaint in Case No. 2 on the ground, among others, that it was barred by res judicata based on the court's order dismissing Case No. 1. On March 1, 2013, the court sustained the demurrer to the complaint in Case No. 2 without leave to amend on the ground that the order dismissing Case No. 1 "is final and res judicata." Notice of entry of judgment was served on March 21, 2013. Jones filed a timely appeal of that judgment on May 17, 2013 (B248853).

C. The Third Case (No. BC 496574)

On November 30, 2012, while Case No. 2 was still pending in the trial court, Jones's attorney filed a third case (Case No. 3) against Pearl Yu and a defendant in Case No. 1, Henry Yu, alleging violations of the unfair competition law and seeking restitution and injunctive relief. Defendants demurred to the first amended complaint on the ground, among others, that Case No. 3 was barred by res judicata in light of the court's judgments dismissing Case No. 1 and Case No. 2. The court sustained the

demurrer without leave to amend on grounds not reflected in the record and entered a judgment of dismissal. Jones filed a timely appeal.

Because the facts material are undisputed our review is de novo. (*Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, 1171.)

DISCUSSION

I. JONES'S DISMISSAL OF CASE NO. 1 WITHOUT PREJUDICE DID NOT DEPRIVE THE COURT OF JURISDICTION TO SUSTAIN DEFENDANTS' DEMURRER TO THE COMPLAINT AND DISMISS THE ACTION.

The court's orders sustaining the demurrers and dismissing the complaints in Case No. 2 and Case No. 3 were based at least in part on its conclusion that those actions were barred by res judicata in light of its order sustaining the demurrer to Case No. 1 without leave to amend and the final judgment dismissing that case. The court's finding of res judicata was in turn based on its implied conclusion that its orders sustaining the demurrer and dismissing Case No. 1, entered in the court's minutes on March 20, 2012, trumped Jones's voluntary dismissal of Case No. 1 entered in the court's minutes on March 19, 2012. Thus, the first question we need to decide is whether Jones's voluntary dismissal of Case No. 1 entered by the clerk on March 19 deprived the court of jurisdiction to sustain the demurrer to that case and order the case dismissed on March 20.

Code of Civil Procedure section 581 gives a plaintiff the right to voluntarily dismiss her action without prejudice at any time before "the actual commencement of trial." (§ 581, subd. (b)(1)(c).) "Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.)

It has long been the rule in California that a "trial" includes the consideration of a demurrer. (*Goldtree v. Spreckels* (1902) 135 Cal. 666, 670-671.) The court in *Goldtree* reasoned that if a plaintiff could as a matter of right dismiss the action after it has been *submitted* to the court, "'litigation would become interminable, because a party who was

led to suppose a decision would be adverse to him could prevent such decision and begin anew, thus subjecting the defendant to annoying and continuous litigation. The statute, therefore, limits the right of the plaintiff to dismiss to the final submission of the case.'" (*Id*. at p. 671, quoting *State v. Scott* (1888) 22 Neb. 628.)

The more difficult question is: When does the trial of an issue of law commence? After reviewing cases on this issue the court in *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 200 concluded that a trial on an issue of law commences when (1) there is "a public and formal indication by the trial court of the legal merits of the case," e.g., a published tentative decision, or (2) there is "some procedural dereliction by the dismissing plaintiff that made dismissal [with prejudice] otherwise *inevitabl*e," e.g., the plaintiff filed no opposition to the demurrer.

In our case it does not appear from the record that the trial court issued a tentative decision or other public pronouncement concerning defendants' demurrer to the second amended complaint before granting it. The record does show, however, that Jones's newly retained counsel did not oppose the demurrer. Instead, he attempted to file a third amended complaint two weeks prior to the hearing. Jones's conduct was tantamount to a concession that sustaining the demurrer without leave to amend was inevitable. (Cf. *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, 257 [plaintiff's failure to file opposition to defendants' motion for summary judgment meant that judgment for defendants "became a formality which appellant could not avoid by the stratagem of filing a last minute request for dismissal without prejudice"].)

We conclude, therefore, that under these facts, Jones's dismissal of Case No. 1 without prejudice did not deprive the court of jurisdiction to sustain defendants' demurrer without leave to amend and dismiss the action.[1]

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[1] Jones claims that our Supreme Court held in *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 785 that the plaintiff retains the right to voluntarily dismiss without prejudice until the trial court enters an order sustaining the demurrer without leave to amend. Jones is mistaken. What the court actually said in *Christensen* was that the right to voluntarily dismiss without prejudice "would not be impaired *prior* to a *decision*

We turn next to the question whether the court's final judgment in Case No. 1 bars Case No. 2 or Case No. 3 under the doctrine of res judicata.

II. THE CAUSES OF ACTION IN CASE NO. 2 ARE NOT BARRED BY RES JUDICATA.

Jones contends that the court erred in ruling the causes of action in Case No. 2 are barred by res judicata. We agree.

Res judicata takes two forms: Claim preclusion and issue preclusion (sometimes referred to as collateral estoppel). (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) Here we are concerned with the claim preclusion aspect of res judicata which requires that: "'(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.'" (*Ibid.*)

Here, there was not a final judgment in Case No. 1 "on the merits."

Although defendants' demurrer in Case No. 1 asserted on its face that Jones's complaint failed to state causes of action for breach of contract, libel and slander our examination of defendants' actual legal arguments shows that they cited only technical defects in the complaint. Defendants demurred to the breach of contract cause of action on the grounds that the complaint did not state whether the contract was oral or written, did not allege the terms of the contract and did not allege that the named defendants were the ones who breached the contract. Defendants demurred to the libel and slander causes of action on the grounds that they were "combined herein as one action," the allegations were not "coherent," and defendant Kim was not mentioned.

"[A] judgment based upon the sustaining of a special demurrer for technical or formal defects is clearly not on the merits and is not a bar to the filing of a new action." (*Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52.)

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sustaining the demurrer" not prior to entry of an order sustaining the demurrer. (*Id.* at p. 785, second italics added.) The other cases cited by Jones are consistent with the ruling in *Christensen* as we have explained it.

III. THE COMPLAINT IN CASE NO. 3 STATES A CAUSE OF ACTION FOR UNFAIR COMPETITION AND IS NOT BARRED BY RES JUDICATA OR THE STATUTE OF LIMITATIONS.

Defendants demurred to the first amended complaint in Case No. 3 on the grounds that it failed to state a cause of action for unfair competition and, even if it did, the cause of action was barred by the four year statute of limitations under Business and Professions Code section 17208 and by res judicata under the court's judgments dismissing Case No. 1 and Case No. 2. The court sustained the demurrer without leave to amend. The grounds for the court's ruling are not contained in the record.[2]

A. The Complaint States A Cause Of Action For Violation Of The Unfair Competition Law.

All that is required to plead a cause of action for unfair competition under Business and Professions Code section 17200 et seq. is to allege that the defendant is engaged in business practices that are "unlawful, unfair or fraudulent" and that the plaintiff was harmed thereby. (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 837.)

Here, Jones alleged that defendants operated Yuin University in violation of Education Code section 94050, provisions of the Private Postsecondary and Vocational Education Reform Act of 1989 (former Ed. Code, § 94700 et seq.) and regulations of the Bureau for Private Postsecondary and Vocational Education by among other things: Failing to offer classroom instruction in the courses described in the school's course catalog; failing to follow the graduation requirements set by law; awarding Jones a degree in Oriental Medicine which it had no authority to confer; and calling the school a university without the authority to do so. She further alleged that she paid defendants $9,400 in tuition and fees for "worthless" diplomas.

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[2] Defendants also demurred on the ground the complaint was uncertain. They did not brief that claim in the trial court nor on appeal. We consider it abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [failure to raise issue in brief waives issue on appeal].)

These allegations stated a cause of action for unfair competition.

B. The Complaint Is Not Barred By Res Judicata.

Defendants maintain that the complaint is barred by the doctrine of res judicata based on the judgments of dismissal in Case No. 1 and Case No. 2. We disagree.

The complaint for unfair competition is not barred by the judgment in Case No. 1 for the same reasons that the judgment in Case No. 1 does not bar Case No. 2. (See discussion *ante*, at pp. 6-7.) "The doctrine of res judicata applies only to final judgments, that is, to judgments which are free from attack on appeal." (*Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 973.) In any event, because we are reversing the judgment in Case No. 2 (see discussion *ante*, at pp. 6-7), there is no final judgment on the merits in that case.

C. The Complaint Is Not Barred By The Statute of Limitations.

Jones's complaint in Case No. 3, filed November 30, 2012, alleges that defendants committed a series of unlawful, fraudulent and unfair practices between the time she entered the school in 2003 and the time she graduated with a doctorate in acupuncture in 2010. Defendants' demurrer argued the complaint was barred by the four-year statute of limitations in Business and Professions Code section 17208.

The expiration of the statute of limitations is an affirmative defense to a cause of action but it can also be the ground of a demurrer if the dates in question are shown on the face of the complaint. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1190-1191 (*Aryeh*); *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1533-1534.)

Generally speaking, the period in which the plaintiff must bring suit "runs from 'the occurrence of the last element essential to the cause of action'"—those elements being wrongdoing, harm and causation. (*Aryeh*, *supra*, 55 Cal.4th at p. 1191) Assuming that the harm to plaintiff occurred when she paid tuition to defendants for an allegedly "worthless" education the wrongdoing caused plaintiff injury, and her claim accrued, no later than October 2006—the date she alleges she made her last tuition payment for her

degree in Oriental Medicine. Thus, in the absence of an exception, the four-year statute of limitations would have run no later than October 2010, and would bar Jones's complaint filed in November 2012.

An exception exists, however. Education Code section 94809.5, subdivision (a) provides a two and a half year tolling period—from June 30, 2007 to December 31, 2009—"[f]or any claims that a student had based on a violation of the Private Postsecondary and Vocational Education Reform Act of 1989 on or before June 30, 2007[.]" Assuming Jones made her last tuition payment to defendants on October 1, 2006, eight months of the four-year limitations period expired before the tolling provision of section 94809.5 kicked in. When the tolling period expired in December 2009, Jones had 40 months of the four-year limitations period remaining which means she had to file on or before May 1, 2013. She filed November 30, 2012.

DISPOSITION

The judgments in case number B248853 (referred to in this opinion as Case No. 2) and case number B251816 (referred to in this opinion as Case No. 3) are reversed. Appellant is awarded her costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.*

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