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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PIERRE GENEVIER, Plaintiff and Appellant, v. LOS ANGELES COUNTY, Defendant and Respondent.	B231298 (Los Angeles County Super. Ct. No. C364736)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

Pierre Genevier, in pro. per., for Plaintiff and Appellant.

Maranga·Morgenstern and Patricia E. Ellyatt for Defendant and Respondent.

Plaintiff and appellant Pierre Genevier ("Genevier") appeals from the dismissal of his action against the County of Los Angeles ("County") after the trial court sustained the County's demurrer to his First Amended Complaint without leave to amend. On appeal he contends that the trial court erred in sustaining the demurrer because his action is not barred by res judicata resulting from the dismissal of an earlier action; because his action is within Government Code section 815.6's exception to the immunity from liability otherwise conferred on the County by Government Code section 818.8; because Code of Civil Procedure section 471.5 does not permit the County to demur to his First Amended Complaint; and because the County's demurrer violated Code of Civil Procedure section 1008. He also contends that the trial court abused its discretion by refusing his request for entry of default against the County. Finding that these contentions have no merit, we affirm.

STATEMENT OF THE CASE AND OF THE FACTS

The February 4, 2004 state court complaint

On February 4, 2004, plaintiff and appellant Pierre Genevier ("Genevier") filed a complaint in Los Angeles Superior Court (Case No. BC310113), against the United States Citizenship and Immigration Service, the California Department of Social Services, and the County of Los Angeles Department of Public Social Services. The 44-page complaint alleged causes of action for misrepresentation and suppression of facts concerning Genevier's disputes with the government of the United States with respect to his status as a political refugee from France, and with the State of California and County of Los Angeles with respect to his entitlement to welfare benefits based on that status. (Other causes of action charged various individual employees of the governmental defendants with wrongdoing in connection with the alleged events.)

On March 18, 2004, this action was removed to the United States District Court (Case No. CV 04-1857). On May 4, 2004, the District Court denied Genevier's motion to remand the case to state court, and granted the motions of the federal, state and county governmental agencies to dismiss the claims against them. It held that because the

County's immunity under Government Code section 818.8 is absolute, the dismissal is with prejudice insofar as the claims allege intentional or negligent deceit, misrepresentation and suppression of fact. These dismissals were affirmed by the Ninth Circuit Court of Appeals, and the United States Supreme Court denied certiorari.

The February 26, 2004 claim

In the meantime, on February 26, 2004 Genevier filed a claim with the County of Los Angeles (County) under the Government Code claims statute, Government Code section 911.2, describing his injuries arising from the events alleged in his February 4, 2004 complaint. The County responded to the claim on March 12, 2004. With respect to events that occurred before February 25, 2003, it denied the claim as untimely under the one-year limitation of Government Code section 911.4; with respect to events that occurred from February 26, 2003 to August 25, 2003; it returned the claim as not within the six-month limitation of Government Code sections 901 and 911.2, advising Genevier to seek leave to present a late claim with respect to these events; and with respect to events that occurred after August 26, 2003, it said that the County would investigate the claim and advise Genevier of the results. The response advised Genevier of his obligation to file any court action on his claim within six months, as required by Government Code section 945.6. Genevier's request for leave to file a late claim was denied on April 16, 2004.

The October 25, 2005 federal court complaint

On October 25, 2005, Genevier filed another complaint, this time in United States District Court (CV 05-7517), setting forth claims under federal and state law for relief against the County (among many others) again based on the events previously alleged in the earlier-dismissed action. On January 5, 2007, the District Court adopted the extensive report and recommendation of a Magistrate Judge, dismissing the claims against the County with prejudice—except that the dismissal was without prejudice as to any state court claims that Genevier might still have against the County.

The January 12, 2007 state court complaint

Genevier filed the complaint at issue in this appeal on January 12, 2007, in the Superior Court (Los Angeles Superior Court Case No. BC 364736). His complaint purported to state a negligence cause of action against the County, alleging the same series of events on which his earlier pleadings had been based, plus a few later events: his 2002 entry into the United States; his application for refugee status; his application to the County for general relief benefits and the termination and the denial of those benefits; the County's refusal to recognize his refugee status; the County's theft of certain of his letters and failure to investigate the theft; the County's conduct negligently preventing him from obtaining appropriate medical care; and the improper federal court dismissals of his earlier actions.

On March 15, 2007, Genevier filed a Request to Enter Default, based on the County's failure to respond to his complaint within 30 days of service.[1] On March 20, 2007, the County filed a demurrer to the complaint.

On March 28, 2007 Genevier applied ex parte for an order entering the County's default. The trial court denied the ex parte application, explaining in its minute order that even if default had been entered as Genevier had earlier requested, the County "would have been late only by 15 days in filing its responsive pleading." Such a short delay, the court explained, would have supported a motion by the County to set aside the default under Code of Civil Procedure section 473.[2]

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[1] On March 28, 2007, the clerk rejected the default request, apparently due to Genevier's failure to provide an original proof of service for the complaint.

[2] This court's records show that on April 5, 2007 Genevier petitioned for a writ of mandate (2d Civ. No. B197948), which we denied on April 13. His petition for review was denied by the California Supreme Court on June 13, 2007 (S152131), and his petition for writ of certiorari to the United States Supreme Court was denied on November 6, 2007.

On April 30, 2007 Genevier filed his opposition to the County's demurrer. On May 3, 2007, the County filed its reply.[3]

Demurrer is sustained to the January 12, 2007 state court complaint

On June 21, 2007, the trial court sustained the County's demurrer to Genevier's complaint. Although it concurred with Genevier's contention that the demurrer was untimely, it heard the demurrer on its merits "in the interests of justice . . . , and thus to avoid further unnecessary delay . . . ."

On the merits, the court found that the complaint failed to adequately plead "an express statute imposing a duty of care" on the County, and thus failed to adequately plead a cause of action for negligence. It sustained the demurrer, with leave for Genevier to file an amended pleading that identifies "the specific statute imposing duty on the entity," within 20 days. However the court also cautioned Genevier to consider two factors when amending his complaint: (1) that Government Code section 818.8 "provides absolute immunity for any injury caused by the misrepresentation of an employee of the public entity, whether or not such be negligent or intentional," and (2) "the fact that [his pleading] is subject to res judicata."

The First Amended Complaint in the state court action

On June 26, 2007 Genevier filed his First Amended Complaint, for negligence, in case number BC364736. The first 41 paragraphs of the First Amended Complaint appear to be identical to the original January 12, 2007 complaint's allegations of events identified as being between September 5, 2002 to October 19, 2006. In the first 41 paragraphs of the First Amended Complaint (and the original complaint) Genevier alleges that he had entered the United States on April 16, 2002, and that he applied for political asylum refugee status and County general relief benefits; that he was identified

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[3] Genevier also moved on April 17, 2007 to strike the demurrer (and apparently then petitioned the Supreme Court to review the denial of his entry of default). The County responded to the motion to strike on April 30, 2007, and on May 4, 2007, Genevier filed his reply to the County's opposition to his motion to strike the demurrer. The trial court later found that the motion to strike had not been properly calendared, and ruled the motion to strike moot when it sustained the County's demurrer.

as a refugee (which entitled him to stay in the United States indefinitely), and although he was given some refugee assistance benefits, certain benefits were denied due to the County's improper denial or nonrecognition of his refugee status; that in February 2003 an administrative law judge had verified his refugee status and granted Genevier additional benefits, but the County refused to comply with that decision, altered the document indicating his refugee status, and terminated some of his general relief benefits; that from September, 2002 to October, 2003, the County opened and stole Genevier's letters, and refused to address his complaints about the thefts; and that from January to July, 2005, the County denied Genevier certain disability benefits. The First Amended Complaint also alleged Genevier's February 2004 complaint (that had been removed to federal court), its dismissal by the District Court, his filing of another federal-court complaint in October 2005, and that action's dismissal in December 2006.

The damages alleged in the First Amended Complaint include Genevier's loss of social benefits (housing assistance, cash benefits, medical benefits, food stamps), forcing him to be homeless for periods from August 2002 until February 2005, to suffer sickness, headaches and nausea, and symptoms of cardiovascular problems, and to lose wages and years of life expectancy; and his failure to obtain "a legal decision that could have helped him to obtain justice against France for persecutions he suffered there . . . ."

In paragraphs 46 through 49, however, the First Amended Complaint goes on to allege (and argue) that the County had a mandatory duty to deliver social services and benefits to eligible clients and to follow the procedures "described in the MPP" (apparently referring to an otherwise unidentified County Manual of Policies and Procedures); that section 815.6 imposes "a direct mandatory duty liability" on the County, despite the immunity conferred by Government Code section 818.8; and that for various reasons the authorities on which the trial court had relied in sustaining the demurer to the original complaint do not apply to his action. In paragraph 50, the First Amended Complaint repeats the original complaint's list of ways in which the County's employees violated regulations, federal statutes, and the Code of Civil Procedure. And in paragraphs 51 through 53 the First Amended Complaint repeats the original complaint's

argument that it is a timely complaint for negligence. The First Amended Complaint purports to incorporate by reference the 17 pages of exhibits from the original complaint.[4]

The County's demurrer to the First Amended Complaint

The County demurred to the First Amended Complaint on July 30, 2007, arguing that the complaint was untimely, that Genevier failed to plead compliance with the applicable claims statute, that the negligence claims are barred by res judicata, and that the First Amended Complaint failed to provide the essential pleading of breach of an express statutory duty. On August 14, 2007 Genevier filed an opposition in which he protests the demurrer's repetition of many of the arguments that appeared in the earlier demurrer—which, he argues, are no more valid with respect to the First Amended Complaint than they were with respect to the original pleading.

The opposition argues that the complaint was not untimely, because the statute of limitations was tolled during the pendency of the administrative proceeding and the federal court proceeding, because it was tolled during Genevier's disability, and because a second claim filed on September 19, 2005 and denied on November 22, 2005, extended the time for filing the action. Therefore, "[t]he second complaint filed on 10-19-05 was filed within 6 months of the denial letter of plaintiff's claim . . . on 11-22-05." The opposition adds arguments that the time for filing the action was tolled also by the County's misconduct in fraudulently concealing facts, and the relation-back doctrine (because the amended complaint alleges wrongful conduct "of a continuing nature . . . ."

The opposition argues also that the First Amended Complaint properly alleged compliance with the claims statute, by pleading that he had filed a claim and that it was denied. And it argues that Genevier's action is not barred by res judicata, for the reasons given in his opposition to the original demurrer (that res judicata does not apply when a statute imposes a direct mandatory duty on the County), and for two additional reasons:

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[4] Genevier's proof of service for the First Amended Complaint (as well as for all his other filings) declares that he served it on the County and its attorneys "by hand delivery or fax or email or post," and that he has no money to do it any other way.

(1) that the doctrine of res judicata does not apply for public entities "when it is not in the public interest like here where the wrongdoings affect many other poor also, and would lead to injustice **like here** . . . ."; and (2) the doctrine does not apply "between state statute cause of action and civil rights cause of action . . . (or for different primary right as seen above)." The opposition argues, finally, that by identifying Government Code section 815.6 as the basis for the County's duty, the First Amended Complaint alleged the County's breach of a statutory duty sufficient to sustain the negligence claim against it (and to preclude the application of res judicata).

Although the County's demurrer to the First Amended Complaint was set for hearing on September 18, 2007, Genevier was able to obtain a number of ex parte stays of the proceedings (as well as proceedings in a related federal court action), apparently in order to accommodate his deportation schedule, his health status, and his appeals from various orders in related federal and state court cases.

Request for entry of default

On February 25, 2009, Genevier applied ex parte for entry of a default judgment against the County. The request for default was based on the County's failure to reset its demurrer for hearing after learning of the Court of Appeal's, the state Supreme Court's, and apparently the United States Supreme Court's refusal to reverse the trial court's earlier refusal to enter the County's default. The County's response argued that there was no justification for seeking relief ex parte; that it was Genevier, not the County, that was required to reset the demurrer for hearing in order to continue prosecution of the case; and that Genevier's application was brought in bad faith, for an improper purpose, and with unclean hands. The trial court denied the default application; it ruled that the demurrer should be set for hearing on a date certain, but granted Genevier's oral motion for a stay of the demurrer hearing pending an appeal from the order; and it set the matter for a status hearing on May 26, 2009.[5]

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[5] This court's records show that on April 23, 2009, Genevier petitioned for a writ of mandate (2d Civ. No. B215584), which this court summarily denied on May 8, 2009. The California Supreme Court denied review on July 8, 2009 (S173079), and the United

Motion to strike demurrer to First Amended Complaint

On November 5, 2009, Genevier filed a motion to strike the County's demurrer to the First Amended Complaint, and a renewed motion to enter the County's default. According to Genevier's recitation in his moving papers, at an October 29, 2009 hearing the court had granted his oral request to review the entry of default issue, and had set a December 2, 2009 hearing for that purpose. In support of his motion to strike the demurrer, Genevier argued that because Code of Civil Procedure section 471.5 refers only to filing an *answer* to an amended pleading, it does not permit the County to demur to the First Amended Complaint. He argued also that Rule 3.1320 of the California Rules of Court makes it the moving party's duty to re-notice the demurrer hearing; and that because the demurrer rests on the same grounds as the demurrer to the earlier complaint, and because "the amended complaint is almost identical to the initial complaint," the demurrer violates Code of Civil Procedure section 1008. The County opposed the motion to strike and the accompanying request for entry of default; and Genevier filed replies to the opposition. On December 2, 2009, the trial court denied the motion to strike and the motion for entry of default, and continued the demurrer for hearing on December 11, 2009.[6]

States Supreme Court denied Genevier's petition for writ of certiorari on October 26, 2009.

[6] This court's records show that on December 7, 2009, Genevier petitioned for a writ of mandate (2d Civ. No. B220781), which this court summarily denied on December 11. The California Supreme Court denied review on February 3, 2010 (S178869), and on April 30, 2010 the United States Supreme Court denied Genevier's petition for leave to proceed in pro. per., and dismissed his petition for writ of certiorari.

Demurrer to First Amended Complaint sustained

By order entered August 16, 2010, the trial court sustained the County's demurrer to the First Amended Complaint without leave to amend.[7] The order stated that the grounds for the ruling was that the First Amended Complaint for negligence against the County "alleges the same identical First Amended Complaints twice dismissed with prejudice by the Federal District Court," and that the statutes and regulations relied upon by Genevier "do not provide the imposition of a statutory duty" on the County. However on August 27, 2010 the court granted Genevier's ex parte request for a stay of entry of dismissal while Genevier filed a writ petition.[8]

Motions for new trial and to set aside and vacate judgment of dismissal

Genevier moved on November 23, 2010 for a new trial, and to set aside and to vacate the judgment of dismissal and to enter a different judgment, arguing the same points on which he relied in his previous motions and oppositions to the demurrers. The court denied Genevier's motions to set aside and vacate the judgment of dismissal and for entry of judgment, and for new trial, on January 10, 2011, and entered judgment for the County and against Genevier. On March 2, 2011 Genevier filed his notice of appeal from the judgment of dismissal after sustaining of the demurrer.

DISCUSSION

Genevier makes five contentions of error on appeal: (1) that Code of Civil Procedure section 471.5 did not permit the County to demur to the First Amended Complaint; (2) that the County's demurrer to the First Amended Complaint violated Code of Civil Procedure section 1008; (3) that the res judicata doctrine does not apply in the context of this case; (4) that statutes and regulations impose a mandatory duty on the

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[7] The record does not contain a reporter's transcript of the demurrer hearing, nor any explanation of when it was held. It apparently was delayed pending the results of Genevier's requests for appellate relief.

[8] This court's records show that on September 3, 2010, Genevier petitioned for a writ of mandate (2d Civ. No. B227154), which this court summarily denied on September 17. On November 10, 2010, the California Supreme Court denied review (S186739).

county to provide the benefits he contends are due him, thus providing the basis for the negligence liability alleged in the First Amended Complaint; and (5) that the trial court abused its discretion by denying his request for entry of default against the County.

Genevier correctly identifies independent, or de novo, review as the standard that governs his first four contentions on appeal. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.) We do not, however, assume the truth of contentions, deductions or conclusions of law. (*Moore v. Regents of University of California* (1990) 51 Cal. 3d 120, 125.) We independently construe the meaning of statutes as a question of law. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.) The judgment must be affirmed "if any one of the several grounds of demurrer is well taken." (*Longshore v. County of Ventura* (1979) 25 Cal. 3d 14, 21.) We apply the abuse of discretion standard to determine whether the trial court erred by refusing to enter the County's default.

1. Code of Civil Procedure section 471.5 did not preclude the County from demurring to the First Amended Complaint.

Code of Civil Procedure section 471.5 provides in subdivision (a) that "if the complaint is amended," "[t]he defendant shall answer the amendments, or the complaint as amended, within 30 days after service thereof, . . . and judgment by default may be entered upon failure to answer, as in other cases."[9] Genevier contends that this provision's failure to authorize the filing of a demurrer constitutes an explicit direction that a complaint that is amended under its authority (rather than under section 472) must be *answered*, and is not subject to demurrer. (Section 472 permits a party to amend its pleading once before an answer or demurrer is filed, or after a demurrer is filed but before it is heard.) An order sustaining a demurrer is reviewable on appeal from judgment. (*Johnson v. Sun Realty Co*. (1934) 138 Cal.App. 296, 299.)

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[9] In this section of the opinion statutory references that are not otherwise identified are to the Code of Civil Procedure.

Genevier's understanding of section 471.5 is mistaken. Section 471.5 does not prohibit a defendant from demurring to an amended complaint that is filed after the court sustained a demurrer to an earlier complaint.

Subdivision (a) of section 430.30 expressly provides that a defendant may make an objection to a complaint on any ground that appears on the face of the pleading "by a demurrer to the pleading." It does not limit that right to just the first complaint filed against the defendant. (See also § 430.10 [stating grounds on which defendant may object to complaint by demurrer or answer, as provided in section 430.30].) Subdivision (a) of section 430.40, similarly, permits a defendant against whom a complaint has been filed to "demur to the complaint," without limitation to just the first complaint filed.

Section 471.5 requires that when a complaint has been amended—for whatever reason—a defendant must "answer . . . the complaint as amended" within the specified time. But in this context, the verb "answer" means "respond to"; it is not limited to the noun "answer," which identifies a particular document that constitutes one of a number of permissible responses to a complaint. "[T]the word 'answer' in §471.5 means 'respond' and thus includes the possibility for another demurrer." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group, rev. 2011) § 7:34.1, pp. 7(I)-17-18; see also *Lord v. Garland* (1946) 27 Cal.2d 840, 850 [holding that use of the word "answer" in section 597 "is broad enough to include demurrer," and citing other such examples].)

This interpretation of section 471.5 is consistent with section 586, subdivision (a)(1), which permits entry of judgment against a defendant who has failed to timely answer, *demur to*, or move to strike an amended complaint. This provision does not limit its application to instances in which the complaint had been amended pursuant to section 472, as Genevier would have it, rather than under section 471.5, subdivision (a).)

Thus after a demurrer is sustained with leave to amend, the defendant may again demur to the amended pleading. (*Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1232.) Countless cases have recognized demurrers taken from amended complaints that were filed after an earlier demurrer was sustained with leave to

amend as appropriate and valid. (E.g., *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [demurrer sustained to 3rd amended complaint filed after demurrers had been sustained to earlier amended complaints with leave to amend]; *Hills Trans. Co. v. Southwest Forest Industries* (1968) 266 Cal.App.2d 702 [demurrer sustained to 2nd amended complaint filed after demurrers had been sustained to original and 1st amended complaint with leave to amend]; *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 616 [demurrer sustained to 3rd amended complaint filed after demurrers had been sustained to original complaint and earlier amended complaints with leave to amend]; see also *Skrbina v. Fleming Cos., Inc*. (1996) 45 Cal.App.4th 1353, 1365 [second demurrer is permitted after amended answer is filed when demurrer to fewer than all causes of action is sustained].)[10]

The case of *McGary v. DePedrorena* (1881) 58 Cal. 91, relied upon by Genevier, does not hold or indicate otherwise. There, defendant Pedrorena appeared in the trial court, and demurred to the original complaint, unsuccessfully. Another defendant, McDonald, was served with the original complaint but made no appearance in the trial court. The plaintiff nevertheless amended the complaint, and Pedrorena filed an answer to it; but McDonald was not served with the amended complaint. Judgment eventually was entered against all the defendants. The Supreme Court held that McDonald could not pursue an appeal from the plaintiff's failure to serve him with the amended pleading, for he had not appeared and objected to that failure in the trial court. And it held that

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[10] See also *Stewart v. Douglas* (1906) 148 Cal.511, 512; *Johnson v. Ehrgott* (1934) 1 Cal.2d 136, 138; *Willson v. Security-First Nat. Bank of Los Angeles* (1943) 21 Cal.2d 705, 711; *Ruinello v. Murray* (1951) 36 Cal.2d 687, 690; *Lemoge Elec. v. San Mateo* (1956) 46 Cal.2d 659, 664; *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 327; *Loeffler v. Wright* (1910) 13 Cal.App. 224, 232; *Consolidated Concessions Co. v. McConnell* (1919) 40 Cal.App. 443, 446; *Lamb v. Ward* (1950) 101 Cal.App.2d 338, 343; *Taliaferro v. Wampler* (1954) 127 Cal.App.2d 306, 310; *Potter v. Richards* (1955) 132 Cal.App.2d 380, 385; *Knox v. Streatfield* (1978) 79 Cal.App.3d 565, 575; *Tovar v. Southern Calif. Edison Co.* (1988) 201 Cal.App.3d 606, 615; *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967.

Pedrorena could not appeal from the failure to serve McDonald and other defendants, for that failure did not affect him; he had been served.

The decision has no application to this case. In the course of its discussion of these points, the opinion discusses the provisions of statutory predecessors to section 471.4 and 472. (*McGary v. DePedrorena*, *supra*, 58 Cal. at pp. 93-94. But it had no occasion to address or to determine the issue in this case: whether those or any other provisions did or did not permit a demurer to an amended pleading that had been filed after a demurrer to the underlying pleading had been sustained with leave to amend.

Even if Genevier were correct that a demurrer may not be used to challenge a complaint that has been amended after an earlier demurrer was sustained with leave to amend, the error in considering and ruling upon the County's demurrer to the amended complaint would be of no consequence at this stage of the proceedings, and of no prejudice to Genevier. That is because "[s]ignificantly, the pleading at issue here is a general demurrer, which attacks the fundamental validity of the cause of action—a challenge that may be raised at any time. '. . . [E]ven for the first time upon appeal.'" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 283, citing *Horacek v. Smith* (1948) 33 Cal.2d 186, 191, and § 430.40, subd. (b).) Therefore even if there had been no demurrer in the trial court, the trial court nevertheless could have dismissed it, and if it did not, this court would be required to do so. (*Neal v. Bank of America* (1949) 544 Cal.2d 321, 324; *Barr Lumber Co. v. Shaffer* (1951) 108 Cal.App.2d 14, 23.) Genevier's claims thus "were not lost because of the procedures employed; rather they were rejected because they lack substantive merit . . . ." (*McAllister v. County of Monterey*, *supra*, 147 Cal.App.4th at p. 283.)

Section 471.5 did not prevent the County from demurring to the amended complaint. The trial court therefore acted within its discretion in considering and ruling on the demurrer, and in refusing to strike it. We address in section 3 of this opinion, below, the question whether the trial court erred by sustaining the demurrer without leave to amend.

2. The County's demurrer to the First Amended Complaint did not violate Code of Civil Procedure section 1008.

Genevier's opening brief contends that the County's demurrer to his amended complaint violated the restrictions of Code of Civil Procedure section 1008 on obtaining reconsideration of a trial court decision without adhering to its specific procedures and requirements, and that the trial court erred by disregarding that violation. Genevier represents to this court that in his First Amended Complaint, "no new cause of action and/or facts were added and . . . the facts were not changed" from the original complaint. His contention, as we understand it, is that section 1008 precluded the County from asserting a demurrer to the First Amended Complaint on the same grounds as its demurrer to the original complaint, because the demurrer to the amended complaint effectively sought reconsideration of the earlier order. Because the First Amended Complaint was factually unchanged, he argues, the demurrer to it amounted to a request to reconsider the ruling granting Genevier leave to amend the original complaint.

This argument highlights the problem with Genevier's position. If, as he contends, his First Amended Complaint alleges no new facts and rests upon only those facts that were alleged in the original complaint to which the earlier demurrer was sustained (a representation we accept as true), the amended complaint therefore is no less defective, and no less subject to demurer, than was the original complaint. It thus is Genevier's First Amended Complaint, rather than the County's demurrer, that seeks reconsideration in violation of Code of Civil Procedure section 1008.

The trial court sustained the County's demurrer to the original complaint on the ground that Genevier's allegations of negligence were insufficient, because "[f]or a public entity to be held liable in tort, there MUST be an express statute imposing a duty of care on that entity," and Civil Code section 1714 cannot fulfill that requirement. The court granted Genevier leave to amend to plead "the specific statute imposing duty on the entity"; but in doing so it also cautioned that in amending his pleading Genevier would have two additional hurdles to overcome: the County's absolute immunity under Government Code section 818.8 for any injury caused by negligent or intentional acts or

misrepresentations of county employees," and the bar of the federal District Court's rulings on his earlier claims, based on the same facts, under the doctrine of res judicata.

Genevier nevertheless expressly affirms in his opening brief that his amended complaint alleges no new facts. His additions to his First Amended Complaint merely constitute arguments that—notwithstanding the trial court's contrary ruling when it sustained the demurrer—his original complaint *did* plead "the specific statute imposing duty on the entity" from which he seeks relief. His amended complaint identifies "the specific statute imposing duty on the entity" as Government Code section 815.6 and certain regulations contained in the County's Manual of Policies and Procedures.

Whether the original complaint did or did not adequately plead "the specific statute imposing duty on the entity" from which he seeks relief is not an issue in this appeal, for by filing the First Amended Complaint Genevier superseded the original complaint, "which ceases to perform any function as a pleading." (*Fireman's Fund Ins. Co. v. Sparks Const., Inc.* (2004) 114 Cal.App.4th 1135, 1144.) By amending his pleading Genevier waived his ability to challenge the trial court's ruling on the initial demurrer, for the amended pleading supplants all prior complaints, and "[i]t alone will be considered by the reviewing court.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal. 3d 875, 884.)

Nor do we address whether the allegations of the First Amended Complaint are sufficient to plead the existence of a duty on the County's part to Genevier. Because we affirm the trial court's dismissal of the First Amended Complaint based on its ruling that the claims asserted in it are barred by the doctrine of res judicata, it is of no consequence whether those claims otherwise would or would not constitute a valid cause of action. Moreover, because (as Genevier affirmatively represents to this court) his amended pleading alleges no new facts, his opposition to the County's demurrer effectively asked the trial court to reconsider its order sustaining the demurrer to the original complaint. Yet the trial court gave no notice that it intended to revisit its previous ruling that no specific statutory duty had been pleaded. (Code Civ. Proc., § 1008, subd. (e); *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1109 & fn. 6 [affirming that trial court errs by

reconsidering prior ruling trial without first giving other party notice and opportunity to be heard].)

3. The trial court correctly ruled that Genevier's First Amended Complaint was barred by res judicata.

In ruling on the demurrer, the trial court found (confirming Genevier's affirmative representation) that the First Amended Complaint "alleges the same identical facts twice dismissed with prejudice by the Federal District Court." It held also that "the statutes and Manual of Policy & Procedures cited by plaintiff . . . do not provide the imposition of a statutory duty upon defendant Los Angeles County." On these grounds it sustained the demurrer to the First Amended Complaint without leave to amend.

A pleading is subject to general demurrer if the facts set forth in the pleading show that the action is barred by res judicata. (*Olwell v. Hopkins* (1946) 28 Cal.2d 147, 152; *Legg v. United Benefit Life Ins. Co. of Omaha* (1960) 182 Cal.App.2d 573, 580; see 5 Witkin Cal. Proc. (5th ed. 2008) Pleading §965, p. 378.) Res judicata operates to bar a second suit between the same parties on the same cause of action that was adjudicated on the merits in an earlier suit, even if the later suit is prosecuted on a different legal theory. (*Weikel v. Tcw Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245; *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285.) And it does not matter whether the identical claims were in fact adjudicated in the prior action; it is enough that the plaintiff had the opportunity to have litigated them in that action. (*Weikel v. Tcw Realty Fund II Holding Co.*, *supra*, 55 Cal.App.4th at p. 1245; *Thibodeau v. Crum* (1992) 4 Cal. App. 4th 749, 755 ["'[T]he rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable'"].) The issue to be determined therefore is whether the causes of action—the "primary rights"—that were resolved or that Genevier had an *opportunity* to litigate in the earlier suit embrace the claims asserted in his First Amended Complaint.

Genevier's October 25, 2005 complaint in the United States District Court (CV 05-7517), set forth claims under federal and state law for relief against the County for injuries allegedly based on events "related to the delivery of social services" and "the

immigration proceedings and employees misconduct complaints" to Genevier between September 2002 and February 2003; "related to the compliance with Judge Tolentino's decision" between February 2003 and August 2003; and "related to the civil complaints, the Assistant US attorney statements and Federal judge decisions" between February 2004 and January 2005. Based on these allegations, Genevier pleaded that the County had violated his civil rights under 42 U.S.C. section 1983, and was negligent in violating statutory and regulatory provisions and failing "to deliver honestly and promptly all social services or benefits to eligible claims . . . ."

The County requested dismissal of the complaint on at least three grounds: (1) the claims are barred by the applicable statutes of limitations; (2) the claims are barred by res judicata; and (3) the negligence claim fails because the County had no duty to Genevier.

On January 5, 2007, the United States District Court adopted the Final Report And Recommendation Of The United States Magistrate Judge in case no. CV 05-7517, dismissing the claims against the County, without prejudice to the re-filing of the state law claims in a court of competent jurisdiction.[11] In adopting the Magistrate Judge's report and recommendations, the District Court ruled that Genevier's claims against the County were barred by res judicata, as well as being untimely.

Genevier filed the complaint in this case on January 12, 2007, a week after that ruling. Although the trial court concurred with Genevier's contention that the County's demurrer was untimely, it heard the demurrer on its merits "in the interests of justice . . . , and thus to avoid further unnecessary delay . . . ." On its merits, the court found that the complaint failed to adequately plead "an express statute imposing a duty of care" on the

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[11] In adopting the Final Report and Recommendation of the United States Magistrate Judge in case no. CV05-7517, the District Court took judicial notice of (among other documents) Genevier's February 4, 2004 state court complaint, which had been removed to the federal court as Case No. CV04-1857; the May 16, 2005 memorandum opinion of the Ninth Circuit Court of Appeals affirming the denial of Genevier's claims; Genevier's Los Angeles Superior Court Case No. BC340712, filed September 30, 2005; and "the existence of various pleadings and a transcript of a proceeding in plaintiff's case in Los Angeles Superior Court Case No BC340712."

County, and thus failed to adequately plead a cause of action for negligence. It sustained the demurrer, with leave for Genevier to file an amended pleading that identifies "the specific statute imposing duty on the entity," within 20 days. However the court also cautioned Genevier to consider two factors when amending his complaint: (1) that Government Code section 818.8 "provides absolute immunity for any injury caused by the misrepresentation of an employee of the public entity, whether or not such be negligent or intentional," and (2) "the fact that [his pleading] is subject to res judicata."

Like Genevier's October 25, 2005 complaint in the United States District Court (CV 05-7517), his original complaint and his First Amended Complaint in this case set forth claims for relief allegedly based on events "related to the delivery of social services" to Genevier between September 2002 and February 2003; "related to the compliance with Judge Tolentino's decision" between February 2003 and August 2003; and "related to the civil complaints, the Assistant US attorney statements and Federal judge decisions" between February 2004 and January 2005.[12] These claims are based on the County's alleged failure to deliver the social service benefits he contended were due him.

Based on these alleged events, Genevier pleaded purported causes of action against the County for violation of civil rights in violation of 42 U.S.C. section 1983, and for negligence in violating statutory and regulatory provisions and failing "to deliver honestly and promptly all social services or benefits to eligible claims . . . ." The United States District Court granted the County's motion to dismiss, "thereby dismissing with prejudice [Genevier's] Causes of Action for Deceit, Misrepresentation, Suppression of Fact and Punitive Damages."

California has consistently applied the "primary rights" theory of pleading, under which the invasion of a single primary right gives rise to a single "cause of action." (*Slater v. Blackwood* (1975) 15 Cal. 3d 791, 795.) Genevier's allegations fall within a

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[12] The earlier complaint's allegations relating to "the immigration proceedings and employees misconduct complaints" were dropped from the pleadings in this case, apparently because they related only to the federal defendants in earlier pleadings.

single primary right. Although in his earlier suits Genevier had alleged that the County breached that duty through misrepresentations and other such intentional or negligent acts, in his original complaint and First Amended Complaint in this action he alleged that the County breached its duty negligently. Either way, however, the alleged cause of action has its basis in a single right—the right to be free of the County's intentional or negligent deprivation of benefits due him.

The federal court's dismissal with prejudice of Genevier's pleading in Case No. CV 04-1857—which had its origin in Los Angeles Superior Court Case No. BC310113—for its failure to state a claim upon which relief can be granted, constituted an adjudication on the merits of the claim. ~(2 CT 216)~ (*Holder v. Nelson* (9th Cir., 1975) 514 F.2d 1091, 1092 [dismissal for failure to state a claim is a disposition on the merits].) It therefore was res judicata, binding on the trial court in this case. "[A] judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one." (*Keidatz* v. *Albany* (1952) 39 Cal.2d 826, 828, quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 794.)

When it cautioned Genevier in ruling on the demurrer to the original complaint in this action, that his complaint, even if amended, would be "subject to res judicata," the trial court recognized the bar of res judicata from the federal court dismissals. As the County contends in this appeal, Genevier "has been litigating his claims in the state and federal courts for seven years. It is time to put this litigation to its final rest."[13]

In light of our conclusion that the demurrer to Genevier's First Amended Complaint was properly sustained because his action against the County is barred by the

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[13] Genevier's appeal does not argue that he should have been granted further leave to amend his pleading, or that he would have been able to do so had leave been granted.

doctrine of res judicata, we need not address Genevier's contention that his action is not barred by the governmental immunity provided under Government Code section 815.6.[14]

4. The trial court did not abuse its discretion by declining to enter the County's default under Code of Civil Procedure section 585.

Genevier argues that, because the County was 20 days late in demurring to the original complaint, the trial court abused its discretion by refusing his request for dismissal of the demurrer. We find no abuse of discretion.

A trial court's discretion is abused only when its ruling "exceeds the bounds of reason, all circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *Walker v. Superior Court* (1991) 53 Cal.3d 3257, 272.)
Code of Civil Procedure section 430.40 provides that a defendant may demur to a complaint within 30 days after its service on him, her, or it. Nevertheless, the trial court would be within its discretion in setting aside a default taken as a result of the defendant's inadvertence, surprise, or excusable neglect. (Code Civ. Proc. § 473.) It is the policy of the law to have cases litigated on their merits, "and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage" of his adversary's minor default. Where the trial court has granted relief from that default, "in the absence of a clear showing of abuse of discretion" the appellate court will not disturb the order. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855; see also *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863 [Court has broad discretion to grant continuances]; *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 978-979 [Court has broad discretion to grant consolidation of actions]; *CLD Const., Inc.*

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[14] Section 815.6 of the Government Code provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." This requires that the plaintiff must prove that the defendant public entity failed to perform an express mandatory obligation that is imposed by statute. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179-1180; *Gray v. State of California* (1989) 207 Cal.App.3d 151.)

v. City of San Ramon (2004) 120 Cal.App.4th 1141, 1145 [trial court has broad discretion to determine whether or not to strike pleadings as improper]; *Marriage of Barthold* (2008) 158 Cal.App.4th 1301 [trial court has discretion to overlook procedural error to enter substantively correct order].)

The record in this case shows that the trial court denied Genevier's ex parte motion for an order requiring the clerk to enter the County's default, because Genevier failed to submit a conformed copy of his proof of service of the pleading. It noted also that even if the clerk had entered the County's default, it would have granted relief from that default to the County.

The interests of justice and judicial economy support the decision to hear the demurrer despite its slight tardiness. Although Genevier argues on appeal that he was greatly prejudiced by the delay, it is clear from the reasoning expressed by the trial court that its decision to hear the demurrer on its merits saved the court and the parties substantial time, effort and expense. The trial court did not abuse its discretion by declining to enter the County's default, thereby requiring the court and the parties to expend the additional time, effort, and expense required to hear a motion to set aside a needless and pointless default.

CONCLUSION

Many years ago Genevier began his efforts to force the County to compensate him for conduct and events that he believes wronged him. His efforts have been unsuccessful because they are legally without merit; the law is clear that he is not entitled to the relief he continues to seek from the County. The demurrers to his successive pleadings having been properly sustained, it is time to affirm the dismissal of his action against the County.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.