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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ELIZABETH J. TENORIO,

Plaintiff and Appellant,

v.

KABUKI JAPANESE RESTAURANT
& SUSHI, INC.,

Defendant and Respondent.

B276443

(Los Angeles County
Super. Ct. No. BC515236)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Howard L. Halm, Judge. Affirmed.

Law Offices of Pius Joseph and Pius Joseph for Plaintiff
and Appellant.

No appearance for Defendant and Respondent.

Kirk & Myers and Dordaneh Ghaemi for Kabuki
Restaurants, Inc., as amicus curiae.

Plaintiff and appellant Elizabeth J. Tenorio challenges a trial court order denying her postjudgment motion to vacate a default judgment and for leave to amend her complaint pursuant to California Code of Civil Procedure section 473.¹

Because the trial court did not abuse its discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2012, plaintiff was a patron at Kabuki Japanese Restaurant, located at 3539 E. Foothill Boulevard in Pasadena. A server at the restaurant tripped into plaintiff, causing plaintiff to fall on her back and causing plaintiff to sustain substantial injuries.

After the incident, plaintiff retained counsel, who corresponded with Golden Eagle Insurance (Golden Eagle) from February 24, 2012, to March 18, 2013. Golden Eagle's insured was identified as "Kabuki Restaurant, Inc. dba Kabuki Japanese" by both plaintiff and Golden Eagle.

Even though Golden Eagle indicated that its "insured appear[ed] to be liable for" plaintiff's damages, the matter was not resolved. Thus, on July 16, 2013, plaintiff filed a complaint alleging negligence against "Kabuki Japanese Restaurant & Sushi, Inc." Plaintiff completed service on "Kabuki Japanese Restaurant & Sushi, Inc.," on its agent for service. Kabuki Japanese Restaurant & Sushi, Inc., did not answer plaintiff's complaint, and, on October 30, 2013, its default was entered.

Plaintiff then took steps to obtain a default judgment. As is relevant to this appeal, on January 6, 2016, she requested that

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

all Doe defendants be dismissed; her request was granted on January 6, 2016. That same date, a default judgment was entered in favor of plaintiff and against Kabuki Japanese Restaurant & Sushi, Inc., in the amount of \$141,743.25.

On March 10, 2016, plaintiff's counsel received a letter from Dordaneh Ghaemi, counsel for "Kabuki Japanese Restaurant, Inc. dba Kabuki Japanese." He indicated that his client had not been served with a summons or complaint in plaintiff's action. According to the attorney, Kabuki Japanese Restaurant & Sushi, Inc., is a "completely unrelated third party." The party that plaintiff meant to sue was "Kabuki Japanese Restaurant, Inc. dba Kabuki Japanese Restaurant," the entity referenced in the correspondence with Golden Eagle. "Kabuki Japanese Restaurant, Inc. dba Kabuki Japanese Restaurant" and "Kabuki Japanese Restaurant & Sushi, Inc." are "two wholly different entities registered with the California Secretary of State, and they have no relation to one another. They have two different registered agents, two different entity numbers, and two different addresses." In fact, a cursory review of the California Secretary of State's Web site shows that Kabuki Japanese Restaurant & Sushi, Inc., "was not even a business before 2013, a year [after] the date of the alleged incident."

Plaintiff's counsel responded on March 16, 2016, pointing out that the California Secretary of State Web site reveals no entity named "Kabuki Japanese Restaurant, Inc. dba Kabuki Japanese." Rather, the search results of "Kabuki Japanese Restaurant" returned two entity records: Japanese Restaurant Kabuki, Inc., and Kabuki Japanese Restaurant & Sushi, Inc.

On March 17, 2016, plaintiff's counsel conducted a further search on the California Secretary of State Web site, using just

“Kabuki” as the keyword. The search returned 19 entity records, one of which was “Kabuki Restaurants, Inc.” A look at the business entity detail for “Kabuki Restaurants, Inc.” on the same Web site reveals its entity address as 4465 Wilshire Boulevard, #100. Curiously, the Web site for “Kabuki Japanese Restaurant” reveals the same corporate entity address as that of “Kabuki Restaurants, Inc.” And, “Kabuki Japanese Restaurant” lists among its locations the restaurant located at 3539 E. Foothill Boulevard, the property where plaintiff sustained her injuries.

On March 22, 2016, plaintiff’s counsel received a letter from Mr. Ghaemi, clarifying that his client is “Kabuki Restaurants, Inc., dba Kabuki Japanese.”

The following day, plaintiff filed a motion pursuant to section 473, subdivision (a), for leave to amend her complaint and to vacate the default judgment against Kabuki Japanese Restaurant & Sushi, Inc. She argued that as soon as she discovered the true identity of the entity controlling the property where she was injured, she prepared the instant motion and a copy of a proposed amended pleading, which names “Kabuki Restaurants, Inc., dba Kabuki Japanese” as the defendant.

Kabuki Restaurants, Inc., specially appeared and opposed plaintiff’s motion.² It argued that an amendment was years beyond the statute of limitations. And, plaintiff was not ignorant as to the proper defendant’s true identity. After all, its attorney had contact with Kabuki Restaurant, Inc.’s insurance company

² The names of the entities are similar and therefore confusing. We note that the party that appeared identified itself as “Kabuki Restaurants, Inc.” without any “dba.” In her appellate papers, plaintiff identifies the entity as “Kabuki Restaurants, Inc. dba Kabuki Japanese.”

before she ever filed the complaint. While plaintiff's attorney properly identified the "Kabuki Restaurant, Inc. dba Kabuki Japanese" in his correspondence with Golden Eagle, he did not name the proper defendant when he filed the complaint on her behalf.

On May 24, 2016, the trial court denied plaintiff's motion for leave to amend and to vacate the default judgment. It found that plaintiff did not commit an error of misnomer; rather, she failed to name the right party as a defendant. And the law does not permit a substitution or change of defendants after the statute of limitations has run. Moreover, plaintiff did not provide a sufficient excuse for not naming the proper defendant. Her attorney was in contact with Golden Eagle, insurer of "Kabuki Restaurant, Inc. dba Kabuki Japanese," for almost a year before her complaint was filed.

Plaintiff's timely appeal ensued.

DISCUSSION

I. Standard of review

We review the trial court's order denying plaintiff's motion for leave to amend for abuse of discretion. The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. Even if we might have ruled otherwise in the first instance, the trial court's order will not be reversed unless, as a matter of law, it is not supported by the appellate record. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1162–1163.)

II. The trial court did not abuse its discretion

Plaintiff seeks to vacate the default judgment and then amend the complaint, pursuant to section 473, subdivision (a). Based upon the arguments raised below and in plaintiff's opening

brief, it seems that she seeks to correct a mistake in the name of a party—essentially changing the defendant from “Kabuki Japanese Restaurant & Sushi, Inc.” to “Kabuki Restaurants, Inc., dba Kabuki Japanese.”

Section 473, subdivision (a), provides, in relevant part: “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect.”

Section 473, subdivision (a) permits amendment to correct a misnomer or a defect in the description or characterization of a party. (*Hawkins v. Pacific Coast Bldg. Products, Inc.* (2004) 124 Cal.App.4th 1497, 1504–1505 (*Hawkins*).) “Whether an amendment of a pleading will be allowed to change the description or characterization from an individual, a partnership or other association, after the statute of limitations has run depends on whether the misdescription or mischaracterization is merely a misnomer or defect in the description or characterization, or whether it is a substitution or entire change of parties. In the former case an amendment will be allowed; in the latter, it will not be allowed.” (*Thompson v. Palmer Corp.* (1956) 138 Cal.App.2d 387, 390.) Relation back applies when an amended complaint simply corrects a misnomer. (*Hawkins, supra*, 124 Cal.App.4th at p. 1503.) But section 473, subdivision (a) does not authorize the addition of a new party, one whom the plaintiff failed to name as a defendant, after the statute of limitations has run. (*Kerr-McGee Chem. Corp. v. Superior Court* (1984) 160 Cal.App.3d 594, 598–599 & fn. 3; *Stephens v. Berry* (1967) 249 Cal.App.2d 474, 478–479; *Thompson v. Palmer Corp.*,

supra, at p. 396.) An amended complaint that adds a new defendant does not relate back to the date of filing of the original complaint. (*Ibid.*) Section 473, subdivision (a) does not permit amendments to add a new party to an action after the statute of limitations has run. (*Stephens v. Berry, supra*, 249 Cal.App.2d at pp. 478–479; *Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 525 [the plaintiff could not amend her complaint to replace Los Angeles County Flood Control District for the County of Los Angeles after the statute of limitations had run, even if she made an honest mistake in the naming of the defendant, because the Flood District and the County are distinct entities]; *Milam v. Dickman Constr. Co.* (1964) 229 Cal.App.2d 208, 212–213.)

Although plaintiff now claims this case involves an accidental misnomer, the record shows otherwise. Prior to filing her complaint, plaintiff’s attorney had been in touch with Golden Eagle, the insurer of “Kabuki Restaurants, Inc., dba Kabuki Japanese.” All of those communications contained the name of the entity that plaintiff now wants to hold accountable for her injuries.

The case authorities cited by plaintiff are inapposite to the extent they involve plaintiffs who made mistakes because a defendant conducted business under a fictitious name or used business names interchangeably. (See, e.g., *Mayberry v. Coca Cola Bottling Co.* (1966) 244 Cal.App.2d 350; *Smith v. Pickwick Stages System* (1931) 113 Cal.App. 118.) That is not the situation here.

As in *Stephens v. Berry, supra*, 249 Cal.App.2d 474, it may be that plaintiff intended to sue Kabuki Restaurants, Inc., but that is not what she did. She named and served Kabuki

Japanese Restaurants & Sushi, Inc. and then attempted to substitute Kabuki Restaurants, Inc., after the statute of limitations had expired on her claims against it, under the guise of an amendment to correct a mistake in a party's name. But there was no misnomer here; rather, there was a failure to name the correct party as a defendant. As such, plaintiff's claims against Kabuki Restaurants, Inc., are time-barred, and the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend.

To the extent plaintiff advances some sort of argument pursuant to section 474, it fails. At plaintiff's request, the Doe defendants were dismissed on January 6, 2016, and plaintiff never sought leave (1) to vacate the dismissal against them, and/or (2) to add Doe defendants to her amended action. Without Doe defendants named, she cannot replace one of them with "Kabuki Restaurants, Inc., dba Kabuki Japanese."

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT