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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

LAW OFFICES OF CARLIN & BUCHSBAUM, LLP, Plaintiff and Appellant, v. STUART PAGE, Defendant and Respondent.	B255627 (Los Angeles County Super. Ct. No. NC058979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Reversed.

Law Offices of Carlin & Buchsbaum, LLP, Gary R. Carlin, Ronald L. Zambrano and Sujith Divakaran for Plaintiff and Appellant.

Law Office of James McDanel and James McDanel for Defendant and Respondent.

INTRODUCTION

Appellant, the Law Offices of Carlin & Buchsbaum, LLP, sued former client, respondent Stuart Page (Page), to recover attorney fees. Page moved to dismiss the suit with prejudice because, before suing him for fees, appellant had failed to notify him of his right to arbitration under the Mandatory Fee Arbitration Act (MFAA; Bus. & Prof. Code,[1] § 6200 et seq.) After appellant filed a first amended complaint and submitted proof that the arbitration notice had been served with the amended complaint, the trial court granted Page's motion and dismissed the entire action with prejudice. While we agree with the trial court's finding that appellant failed to provide the requisite notice prior to service of the initial complaint, dismissal with prejudice was an abuse of discretion. Further, appellant cured the MFAA defect by providing notice with the filing of a first amended complaint. We therefore reverse the dismissal and order the first amended complaint reinstated.

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[1] Statutory references are to the Business and Professions Code, unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Underlying Matters*

In 2005, Page retained appellant to represent him in the dissolution of his marriage. In 2008, Page again retained appellant to pursue a personal injury action arising from a motor vehicle accident.

On June 8, 2009, appellant filed a personal injury action on behalf of Page. On April 8, 2010, Page relieved appellant as counsel of record. On May 6, 2010, the personal injury action settled.

B. *Proceedings in the Fee Dispute*

On July 23, 2013, appellant filed a complaint against Page to recover unpaid attorney fees in representing him in the two actions. On September 9, 2013, Page filed a demurrer and a motion to dismiss the complaint with prejudice based on appellant's noncompliance with section 6201, subdivision (a), attaching his declaration in support of the motion.

On February 11, 2014, before the motion was heard, appellant filed a first amended complaint, alleging conversion, breach of contract, money had and received, money on open book account and intentional misrepresentation. On the same date, appellant served on Page a "Notice of Client's Right to Fee

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[2] The factual background is taken from appellant's first amended complaint. The original complaint is not part of the record on appeal. There was no evidentiary hearing in this case and no reporter's transcript of the hearing on the motion to dismiss.

Arbitration," using the State Bar mandatory form. Appellant also filed a written opposition to Page's motion to dismiss the complaint, supported by a declaration by the managing partner, Gary R. Carlin. In his declaration Carlin explained appellant had given notice under section 6201, subdivision (a), initially on July 7, 2009, but due to a computer failure was unable to locate a hard copy or proof of service. Page filed timely objections to the declaration.

At the hearing on the motion on February 25, 2014, the court heard argument and after taking the matter under submission, issued a written ruling, sustaining Page's hearsay objections, and granting the motion to dismiss for failure to give required notice of arbitration under section 6201, subdivision (a).

On March 14, the court entered judgment of dismissal with prejudice, from which appellant filed a timely appeal.

On November 25, 2014, the court granted Page's motion for attorney fees pursuant to Code of Civil Procedure section 1717. An appeal from that order was filed but subsequently dismissed by this court.

C. *Parties' Declarations and Trial Court's Ruling on the Motion to Dismiss*

In his declaration in support of his motion to dismiss, Page stated from the inception of his representation by appellant in 2005 through August 8, 2013, when appellant served him with the summons and complaint in this matter, appellant never gave him notice of his right to arbitrate a fee dispute under section 6201, subdivision (a). Page also stated the final correspondence he received from appellant consisted of two letters, dated June 29 and July 7, 2009, and both bearing the

signature, Gary R. Carlin, managing partner of appellant, which were attached to Page's declaration. The June 29 letter was a demand for payment and an itemization of services rendered. The July 7 letter detailed Page's and Carlin's lengthy discussions about the dissolution action and expressed Carlin's intention to withdraw appellant as Page's counsel of record in the action.

In opposing the motion, Carlin declared that "[c]oncurrently" with the July 7, 2009 letter, he had sent Page separate correspondence, formally requesting the fees Page owed and "advising [Page] of his right to arbitration in conformity with section 6200 et seq. of the Business and Professions Code." Carlin explained that he was "unable to provide a copy of this letter to the [c]ourt because it can no longer be located either physically or electronically. Unfortunately, my computer was corrupted and 'crashed' in 2011." Carlin stated while some files, like the June 7, 2009 correspondence, were recovered, the letter which provided Page with notice of his right to arbitration "was not found."

In ruling on the motion, the trial court stated in its minute order: "This is a credibility determination. The [c]ourt disbelieves Mr. Carlin, and, on that basis grants the motion." The court found Carlin's explanation untruthful because "[i]t is illogical and . . . unlikely" that notice of Page's right to arbitration would have been sent separately from correspondence mailed to Page the same day and the computer crashing scenario "lacks foundation." The court stated it believed Page's "unequivocal testimony that he did not receive the notice."

At the hearing appellant had provided a copy of the notice dated February 11, 2014, "giving [Page] notice of the right to arbitrate." The court rejected appellant's effort to cure the notice

problem by filing a first amended complaint accompanied by the notice. Indeed, the court considered the letter appellant's tacit admission of its failure to provide Page the required notice before the complaint was filed more than six months earlier. Noting "[t]he purpose" of section 6201, subdivision (a), "is to permit the client to arbitrate before the burden of defending litigation," the court concluded, that "policy . . . would not be served by allowing a very late 'cure' some time after litigation has been commenced."

Although the trial court determined Page prevailed on the merits, it also sustained Page's hearsay objection to Carlin's assertion in his declaration that appellant's missing letter to Page contained the required notice. Appellant did not appeal this evidentiary ruling.

DISCUSSION

A. *The MFAA and Required Notice Under Section 6201, Subdivision (a)*

The goal of the MFAA is to ensure the fair resolution of attorney-client fee disputes by "'alleviat[ing] the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney. [Citation.]' [Citation.]" (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1086-1087 (*Howell*); see also *Huang v. Cheng* (1998) 66 Cal.App.4th 1230, 1234.) The MFAA obligates the attorney to arbitrate, at the client's option, any fee dispute. (§ 6201, subd. (c).) In this regard, section 6201, subdivision (a), requires an attorney to "forward a written notice to the client prior to or at the time of service of summons or claim in an action

against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this article, for recovery of fees, costs, or both."

The notice must be either personally served on the client or sent to the client's last known address, and if mailed, accompanied by proof of service. (§ 6201, subd. (a); Code Civ. Proc., § 1013, subds. (a) & (b).) An attorney's failure to comply with the required notice "shall be a ground for . . . dismissal." (§ 6201, subd. (a).) Nonetheless, dismissal for noncompliance with the notice requirement is not mandatory; the client must move for dismissal and whether the action is dismissed is within the trial court's discretion. (*Howell*, *supra*, 129 Cal.App.4th at p. 1088; *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180 (*Richards*).)

B. *Standard of Review*

When a trial court's ruling on a motion to dismiss for noncompliance with section 6201, subdivision (a), is challenged on appeal, we review it for abuse of discretion. (*Howell*, *supra*, 129 Cal.App.4th at p. 1088, fn. 9.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [determining credibility of declaration supporting relief from default].)

Furthermore, where, as here, the appellate record does not include a record of the oral proceedings in the trial court—either a reporter's transcript, an agreed statement, or a settled statement—the appeal is on the judgment roll. (See *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083.) "When an appeal

is on the judgment roll, error must be affirmatively shown by the record." (*People v. American Bankers Ins. Co.* (1989) 215 Cal.App.3d 1363, 1369.) In the absence of any error on the face of the record, """all intendments and presumptions must be in support of the judgment . . . and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it . . . ."""" (*Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 575; see Cal. Rules of Court, rule 8.163.)

C. *The Trial Court Abused its Discretion in Dismissing the Action with Prejudice*

In ruling on the motion, the court properly recognized the MFAA's purpose of leveling the playing field between attorneys and their former clients. The court was justly troubled by the fact that Page had been denied the option of seeking arbitration to avoid the burden and expense of additional litigation; instead of receiving notice of that option with service of the complaint, he had to incur the expense of hiring counsel to bring a demurrer and motion to strike. The court discounted any evidence presented by appellant, striking Carlin's declaration on hearsay grounds, a ruling not contested on appeal. Thus, the only admissible evidence before the court at the time of the ruling on the motion was the undisputed testimony from Page that he had not received the required notice.

Nonetheless, the dismissal with prejudice constituted an abuse of discretion on these facts. "The statutory term 'with prejudice' clearly means the plaintiff's right of action is terminated and may not be revived." (*Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1086-1087.) In other words, a

dismissal with prejudice is the equivalent, for purposes of res judicata, to a judgment on the merits in favor of the defendant who is dismissed. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821; accord, *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1197-1198.) On the other hand, "[a] dismissal 'without prejudice' necessarily means without prejudice to the filing of a new action on the same allegations, so long as it is done within the period of the appropriate statute of limitations." (*Eaton Hydraulics Inc. v. Continental Casualty Co.* (2005) 132 Cal.App.4th 966, 974, fn. 6.)

Unlike section 6201, subdivision (a), other statutes, which authorize a discretionary dismissal in response to a party's procedural errors or omissions, specify whether it is to be "without prejudice" or "with prejudice." For example, Code of Civil Procedure section 581, subdivision (b)(5), allows the court to dismiss an action "without prejudice, when either party fails to appear on the trial and the other party appears and asks for dismissal." (See also *id.*, § 581, subd. (d) [mandating dismissal with prejudice "when upon the trial and before the final submission of the case, the plaintiff abandons it"]; *id.*, § 581, subd. (h) [allowing a dismissal "without prejudice" after a motion to quash has been granted]; *id.*, § 581, subd. (*l*) [also permitting dismissal without prejudice "when either party fails to appear at the trial and the other party appears and asks for the dismissal"].) With respect to the delay-in-prosecution statutes (*id.*, § 583.110 et seq.), a dismissal may be "without prejudice," as reflecting the plaintiff's lack of procedural diligence rather than a decision on the merits. (See *id.*, § 581, subd. (b)(4); *Mattern v. Carberry* (1960) 186 Cal.App.2d 570, 572 and cases cited therein.) "[T]he policy favoring trial or other disposition of an action on the

merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution to an action in construing [the dismissal-for-delay-in-prosecution statutes]." (Code Civ. Proc., § 583.130.)

The policy favoring a trial on the merits over termination of the lawsuit on purely procedural grounds is longstanding in California law. (See *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255-256; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 525.) It is considered the hallmark of fundamental fairness and access to justice in our judicial system. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1366.) Indeed, the California Supreme Court has repeatedly admonished that trial courts must "keep in mind the strong public policy that litigation be disposed of on the merits whenever possible." (*Hocharian v. Superior Court* (1981) 28 Cal.3d 714, 724.)

It appears the trial court may have dismissed the lawsuit with prejudice to sanction appellant for what the court concluded were misrepresentations in Carlin's declaration, without the benefit of an evidentiary hearing. While the court may have found Carlin's declaration unconvincing, its decision to dismiss with prejudice was, in effect, a terminating sanction that was overly punitive under the circumstances on the record before the court. (See *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97 ["granting a motion for summary judgment based on a procedural error by the opposing party is equivalent to a sanction terminating the action in favor of the other party"].)

Here, there was no showing appellant's failure to comply with the section 6201, subdivision (a), notice requirement met the standards for imposing terminating sanctions, i.e., that it was

willful, or preceded by a history of procedural abuse or less severe sanctions would not produce compliance. (See *Security Pacific Nat. Bank v. Bradley*, *supra*, 4 Cal.App.4th at p. 98; accord, *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1215.) Furthermore, the judgment deprived appellant of a trial on the merits by preventing it from pursuing relief in any forum—arbitration or court—should it not prevail on appeal. (*Morgan v. Ransom* (1979) 95 Cal.App.3d 664, 670 ["The sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice"].)

Further, in the instant case, dismissal with prejudice was unwarranted because appellant had already cured the notice defect by filing and serving a first amended complaint along with the required notice. The amended complaint and notice were served on Page within seven months of the initial filing. The only litigation which had taken place was the filing of the motion to dismiss and the demurrer. Page could have avoided incurring fees associated with such filings by merely invoking the right to arbitrate, thereby lessening litigation costs and benefiting from the arbitration process embodied in the MFAA. Page was plainly aware of the specific arbitration process to which he was entitled by that time, as the motion to dismiss refers specifically to the State Bar's arbitration program under section 6200. Page presented no evidence of actual prejudice in support of the motion to dismiss. On these facts, we cannot say that the delay in providing notice caused sufficient prejudice to Page to warrant the severe sanction of dismissal with prejudice.

We find support for this decision in cases interpreting other statutes requiring pre-filing procedures. For example, Code of Civil Procedure section 411.35 requires the plaintiffs in certain professional negligence cases to serve a certificate of merit on the defendant prior to service of the complaint. Recognizing the important public policy served by such pre-filing requirements, notably the discouragement of meritless cases, the Courts of Appeal have allowed the plaintiff to cure the failure by serving the certificate along with the filing of an amended complaint. (*Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 361 ["Permitting leave to amend will not frustrate the statutory purpose of preventing frivolous professional negligence claims"]; *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 47 [the plaintiff satisfies the policy of Code Civ. Proc., former § 411.30, by filing an amended complaint after receiving the certificate of merit].) So too here, allowing an amendment to cure the notice deficiency will not frustrate the statutory purpose which is to ensure the plaintiff in a fee dispute knows of his right to arbitrate and can exercise that right before being subjected to expensive and time-consuming litigation on the merits.

DISPOSITION

We reverse the judgment of dismissal and reinstate the first amended complaint. Each side to bear its own costs on appeal.

KEENY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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