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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ARLETTE OSORNIO, Plaintiff and Appellant, v. VISTA HOSPITALITY, INC., Defendant and Respondent.	B267777 (Los Angeles County Super. Ct. No. BC534253)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Ramin R. Younessi, Ramin R. Younessi, Christina M. Coleman, and Fumio R. Nakahiro, for Plaintiff and Appellant.

Miles L. Prince and David L. Prince for Defendant and Respondent.

In this case involving allegations of pregnancy discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.),[1] plaintiff Arlette Osornio appeals from a judgment of dismissal after the trial court sustained a demurrer to her third amended complaint (TAC) without leave to amend. Applying the doctrine of sham pleading, the court concluded Osornio improperly attempted to avoid defects in previous pleadings by alleging inconsistent facts. Comparing the successive pleadings, we find no contradictory factual allegations and conclude the TAC states viable claims under FEHA and for wrongful termination. The court also sustained the demurrer to Osornio's claim for retaliation under the California Family Rights Act (CFRA) (§ 12945.2) on the basis that the TAC did not allege Osornio was eligible for leave under CFRA. We agree. Accordingly, we affirm in part, reverse in part, and remand with directions to the trial court to enter a new order overruling respondent's demurrer to Osornio's claims, with the exception of the claim for retaliation under CFRA.

FACTUAL AND PROCEDURAL SUMMARY

Respondent Vista Hospitality, Inc. (Vista) is the owner and operator of the Ramada Hotel located on West Olympic Boulevard in Los Angeles (the Hotel). Osornio alleged she was hired in February 2004 as a housekeeper by the Hotel's previous owner, Magilink, Inc. (Magilink). In July 2012, Osornio was placed on pregnancy disability leave. Sometime thereafter, during Osornio's leave period, Vista and Anna Chung purchased the Hotel and assumed operational management. Subsequently,

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[1] All further statutory references are to the Government Code, unless otherwise indicated.

Osornio brought this action naming Vista, Magilink, and Chung as defendants. Osornio has reached a full resolution with both Magilink and Chung, leaving Vista as the sole respondent to this appeal.

Osornio filed her initial complaint on January 27, 2014, naming Magilink and Chung as defendants. At that time, Chung's full name was unknown. After Osornio learned Chung's full name and discovered the Hotel had been sold to Vista, she moved for and was granted leave to file a first amended complaint (FAC). Other than the correction of Chung's name and the addition of Vista as a defendant, the factual allegations in the initial complaint and the FAC are identical.

The FAC alleged Osornio was placed on pregnancy disability leave on or around July 15, 2012, when she was eight months pregnant. Osornio was reassured by her manager, Maricruz Ruiz, and several other Hotel employees that she could return to work after her leave ended. The FAC alleges "[o]n or about August 10, 2012, Plaintiff experienced complications during the delivery of her baby, requiring delivery by Caesarean section and, consequentially, additional leave." The next paragraph alleges:

> "On or about December 7, 2012, Plaintiff, Maricruz Ruiz, and another manager of the Hotel, Stacy (last name unknown), spoke with CHUNG regarding Plaintiff's return to work. Plaintiff informed CHUNG that because of her Caesarian section and abnormally difficult period of labor and delivery, Plaintiff was unable to lift heavy objects and would therefore require an accommodation when she returned to work. CHUNG told Plaintiff that there was no work available for her, and that the fact she was on leave was of no consequence."

The FAC alleged Osornio contacted defendants again in January 2013 to inquire about her position, but effectively was terminated when they refused to rehire her. The FAC asserted five causes of action against defendants under FEHA: (1) gender discrimination, (2) retaliation, (3) failure to prevent discrimination and retaliation, (4) failure to provide reasonable accommodations, and (5) failure to engage in a good faith interactive process. The sixth cause of action alleged retaliation in violation of CFRA. The seventh and eighth causes of action were, respectively, for wrongful termination and declaratory judgment.

Vista demurred to the FAC. On February 4, 2015, the trial court sustained the demurrer to the first through seventh causes of action with leave to amend.[2] The court concluded the FAC failed to state facts sufficient to constitute causes of action for discrimination and retaliation under FEHA because Osornio failed to return to work within the four-month statutory period of protected leave. The court noted that because Osornio's pregnancy leave began on July 15, 2012, Vista could have terminated her after November 15, 2012. Thus, when Osornio returned to work on December 7, 2012, she "did not have any right to . . . bring a discrimination or retaliation [claim] under FEHA as she was no longer employed." The court sustained the demurrer to the remaining causes of action with leave to amend on the ground that these claims were predicated on proof of discrimination or retaliation.

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[2] The trial court also sustained the demurrer to the eighth cause of action for declaratory judgment without leave to amend. Osornio does not challenge that portion of the trial court's earlier order in this appeal.

Osornio filed her second amended complaint (SAC) on February 24, 2015. It provided additional information regarding what the FAC referred to as "additional leave" between August and December, 2012. The SAC alleged in paragraph 23:

> "In approximately mid- to late-September, 2012, Plaintiff went to the Hotel and spoke with the Hotel's general manager, Kenny Shin. Plaintiff informed Mr. Shin that, according to her doctor, she would not be able to return to work until three to four months after her Caesarean section. Mr. Shin told Plaintiff that she was free to return to her job whenever she was able."

The SAC further alleged Osornio returned to the Hotel on or about December 1, 2012, and spoke with Ruiz and Stacy about her return to work. Osornio stated that she was prepared to return to work soon, and the managers agreed she would return on December 7. In paragraph 25, which described Osornio's return to work on December 7, part of a sentence regarding her request for a heavy lifting accommodation was omitted. The partial sentence reads: "Plaintiff informed CHUNG that because of her Caesarian section and abnormally difficult period of labor and delivery." In addition, the following sentence was added to paragraph 65 under the description of the fourth cause of action for failure to provide reasonable accommodations: "Here, Plaintiff requested approximately one additional month of leave in order to allow her to heal from having received a Caesarian section, which was an available accommodation."

Chung and Vista demurred to the SAC. Applying the doctrine of sham pleading, the trial court sustained the demurrer. The court reasoned Osornio's new allegation that she

requested and was granted additional leave as an accommodation contradicted the FAC's allegation that she requested an accommodation relieving her of heavy lifting duties. The court adopted defendants' position that it was inconsistent for Osornio "to first argue she was able to work apart from lifting heavy items but also not able to work at all because she needed to heal from the Caesarian." The court concluded Osornio had "supplemented and modified the facts pled in [an] attempt to satisfy this Court's observations and rulings." The court granted leave to amend, giving Osornio "one last opportunity" to amend her complaint.

Osornio filed her third amended complaint (TAC) on May 1, 2015. The TAC restored the previously omitted clause in paragraph 25 regarding Osornio's request on December 7 for a heavy lifting accommodation. The TAC also added the following language to paragraph 65:

> "[I]n mid- to late-September, 2012, by asking for three to four months after her August 10, 2012 Caesarean section to heal therefrom, Plaintiff was requesting approximately one additional month of leave beyond the November 16, 2014 [*sic*] leave expiration in order to allow her to heal from having received a Caesarian section, which was an available accommodation, and which Plaintiff understood Mr. Shin had approved. On December 7, 2012, when Plaintiff was ready to return to work, she requested a further accommodation by advising CHUNG, Maricruz Ruiz, and Stacy (last name unknown) that she was unable to lift heavy objects and would therefore require an accommodation when she returned to work."

Finally, the TAC added a new allegation regarding her meeting with hotel management on December 1. The SAC had alleged

Osornio indicated she was prepared to return to work shortly. The TAC alleged: "Stacy . . . offered to let Plaintiff begin immediately, however Plaintiff requested that her return begin in a week in order to allow her time to procure a babysitter."

Chung and Vista demurred to the TAC, arguing that since Osornio failed to explain her prior contradictory pleadings and introduced new inconsistent factual allegations, the sham pleading doctrine applied and the demurrer should be sustained without leave to amend. In her opposition, Osornio argued the inclusion of the missing clause in paragraph 25 was not inconsistent with any prior pleading. To the extent an explanation was necessary, Osornio indicated that the omission was inadvertent. Osornio rejected the argument that she had requested contradictory accommodations, maintaining that neither the TAC nor any prior pleading ever alleged she was both able and unable to work during the same time period.

The trial court sustained the demurrer without leave to amend, concluding the TAC was a sham pleading. The court reasoned that even if it accepted Osornio's explanation concerning the inadvertently omitted clause in paragraph 25, Osornio still provided no explanation regarding the new allegation in the SAC and TAC that she requested and was granted additional leave beyond the four-month statutory period. The court also sustained the demurrer to the sixth cause of action because Osornio failed to allege facts sufficient to state a cause of action for retaliation in violation of CFRA as "[t]here are no facts alleged in the TAC that Plaintiff requested, was eligible for, or took a leave of absence under the CFRA."

This timely appeal followed.

DISCUSSION

This appeal involves three issues: (1) whether the trial court erred in applying the sham pleading doctrine; (2) whether the trial court erred in sustaining respondent's demurrer to the sixth cause of action for retaliation in violation of CFRA; and (3) whether the trial court abused its discretion in denying leave to amend.

I

The function of a demurrer is to test the legal sufficiency of the pleading. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383.) Thus, when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, we must assume the truth of the complaint's factual allegations. (*Ibid.*) The sham pleading doctrine operates as an exception to this general rule, and applies "where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.]" (*Id.* at p. 384.) Under these circumstances, the court is permitted "to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citations.]" (*Ibid.*) "[A] proposed amendment which contradicts allegations in an earlier pleading will not be allowed in the absence of 'very satisfactory evidence' upon which it is 'clearly shown that the earlier pleading is the result of mistake or inadvertence.' [Citations.]" (*American Advertising & Sales Co. v. Mid-Western*

Transport (1984) 152 Cal.App.3d 875, 879.)

The sham pleading doctrine ""does not exist in a vacuum and cannot be mechanically applied."" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 946 (*Berman*), quoting *Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 950.) Given the strong policy favoring liberality in the amendment of pleadings, the rule is not "intended 'to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous statements of facts.'" (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 457, p. 589.) "[T]he rule was not intended to preclude plaintiffs from providing additional and noncontradictory allegations." (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 404, fn. 6 (*Leasequip*).) Rather, the "purpose of the doctrine is to enable the courts to prevent an abuse of process." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751, citing *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426.)

In light of the foregoing principles and the general rule that we must construe a plaintiff's pleadings "liberally . . . with a view to substantial justice between the parties" (Code Civ. Proc., § 452), we conclude that the amendments to the complaint in this case do not render the TAC a sham pleading. Respondent maintains there are three contradictory allegations in the pleadings related to the date of Osornio's return to work and her requests for accommodation, and that Osornio failed to adequately explain any of these alleged inconsistencies, each of which is independently sufficient to affirm the judgment.[3] We

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[3] The trial court appears to have based its determination that the TAC was a sham pleading on more limited grounds, focusing on the unexplained, perceived inconsistency between the

examine each in turn.

First, respondent argues the TAC is a sham pleading because of the purportedly inconsistent dates Osornio alleges to have first returned to work. Under FEHA, an employee is permitted "to take a leave for a reasonable period of time not to exceed four months" due to pregnancy-related disability. (§ 12945, subd. (a)(1).) An employer is not required to reinstate an employee who cannot perform her job duties after this period of protected leave expires. (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487.) However, the protected leave period may exceed four months if additional leave constitutes a reasonable accommodation that would not impose an undue hardship on the employer. (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1339 (*Sanchez*).) Without additional leave beyond the four-month statutory period, Osornio could have been terminated on or after November 15, 2012.

The FAC alleged that on August 10, 2012, Osornio experienced complications during labor "requiring delivery by Caesarean section and, consequently, additional leave." The FAC next alleged that on December 7, 2012, she spoke with hotel management about her return to work. The SAC and TAC included a new allegation that Osornio met with the Hotel's general manager, Shin, in September, 2012, and was told that

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dates Osornio alleged she returned to work. However, "[w]e are not bound by the trial court's stated reasons . . . we review the ruling, not its rationale." (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.) A judgment of dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well-taken and disposes of the entire complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We therefore address each alleged inconsistency raised by respondent.

she could take additional leave. Respondent reads these pleadings to be directly contradictory, arguing that the FAC clearly alleges Osornio first attempted to return to work on December 7. The new allegation that Osornio returned to work in September is therefore inconsistent. The trial court agreed, noting that Osornio "has provided no explanation why such allegation was not originally included in her [FAC]."

Osornio maintains, and we agree, that the allegations are not inconsistent. The FAC does not allege that the first time she returned to the Hotel was on December 7. According to Osornio, the new allegation in the SAC regarding additional leave approved by Shin was added to clarify what she meant by "additional leave" in the FAC. Respondent urges us to construe the pleadings against Osornio in order to find unexplained, inconsistent allegations. In light of the rule that we must liberally construe the pleadings (Code Civ. Proc., § 452), we decline to do so.[4] Orsonio should be permitted to clarify

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[4] Some decisions, outside the context of the sham pleading doctrine, continue to apply the common law rule that a pleading must be strongly construed against the pleader. Under this view, "[d]oubt in the complaint may be resolved against plaintiff and facts not alleged are presumed not to exist." (*C. & H. Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1062.) However, "[t]he statutory rule of liberal construction [Code Civ. Proc., § 452] is an explicit repudiation of the common law view." (4 Witkin, Cal. Procedure, *supra*, Pleading, § 448, p. 581.) The California Supreme Court has recognized an exception to the statutory rule that applies when a plaintiff, following the sustaining of a demurrer with leave to amend, fails to remove a defect in the complaint. (*Id.* at p. 582.) In this circumstance, the complaint will be construed against the plaintiff on appeal. (*Ibid.*) Apart from this exception, "there appears to be no

ambiguous facts; her doing so does not constitute an abuse of process. (See *Berman*, *supra*, 56 Cal.App.4th at p. 946 [the sham pleading doctrine does not prevent correction of ambiguous statements of fact]; *Leasequip, supra*, 103 Cal.App.4th at p. 404 & fn. 6 ["[T]he rule was not intended to preclude plaintiffs from providing additional and noncontradictory allegations"].)

The second purported inconsistency in the pleadings relates to Osornio's requests for accommodation. The FAC alleged that when Osornio returned to the Hotel on December 7, she informed Chung she "was unable to lift heavy objects and would therefore require an accommodation when she returned to work." This clause was omitted from paragraph 25 in the SAC. The SAC included a new allegation: Osornio requested and was granted additional leave by Shin after their meeting in September. In describing the fourth cause of action for failure to provide reasonable accommodations, the SAC added that Osornio "requested approximately one additional month of leave in order to allow her to heal from having received a Caesarian section, which was an available accommodation."

Respondent argues, and the trial court agreed, that these two requests for different accommodations are inherently contradictory. As respondent explains, "[i]t is physically impossible for Plaintiff to have been simultaneously unable to return to work due to the need for bed rest to heal at the same time that she supposedly was ready to work, so long as no heavy

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justification for a construction against the pleader." (*Id.* at p. 581.) Osornio sought to remedy her defective complaint by adding additional information and clarifying her factual allegations; she has not failed to remove any defect. Accordingly, the exception is inapplicable, and we find no other reason to depart from the statutory rule of liberal construction in this case.

lifting was needed." After the trial court sustained the demurrer to the SAC, Osornio attempted to clarify this apparent inconsistency by alleging she requested and was granted additional leave as an accommodation in September, and subsequently requested the heavy lifting accommodation on December 7. She also restored the missing clause in paragraph 25 regarding the heavy lifting accommodation, and explained it had been omitted due to an inadvertent drafting error.

Reading the successive pleadings side by side, we decline to infer that Osornio requested both accommodations during the same time period. There is nothing inherently contradictory about Osornio requesting additional leave as an accommodation, and subsequently requesting a heavy lifting accommodation when she returned to work following her extended leave period.

Respondent's third alleged inconsistency between the pleadings involves Osornio's new allegation in the TAC that Stacy offered to let her return to work on December 1, but Osornio requested an additional week so she could secure a babysitter. Respondent contends this allegation is inconsistent with her accommodation requests, suggesting she could not be incapacitated while simultaneously searching for a babysitter, nor could she be unable to return to work due to lack of childcare at the same time she was ready to work with a heavy lifting accommodation. But in her pleadings Osornio does not allege she was incapacitated such that she would be incapable of looking for a babysitter. Nor does the TAC allege she asked for an additional week to secure a babysitter at the same time she requested the heavy lifting accommodation; these events were alleged to have occurred a week apart.

Finding no inconsistencies or inherently contradictory

allegations in the pleadings, we conclude the sham pleading doctrine should not have been applied in this case. Accordingly, we find the trial court erred in sustaining the demurrer to the first, second, third, fourth, fifth, and seventh causes of action.[5]

II

The trial court sustained the demurrer to Osornio's sixth cause of action for retaliation in violation of CFRA without leave to amend on the ground that the pleadings never alleged she "requested, was eligible for, or took a leave of absence under CFRA." Osornio argues the trial court misunderstood the difference between interference and retaliation claims under CFRA, and contends the TAC alleges facts sufficient to state a cause of action for retaliation under CFRA. We disagree, and affirm the trial court's ruling on this cause of action.

The CFRA (§ 12945.2) is a part of FEHA that "entitles eligible employees to take up to 12 weeks of unpaid medical leave during a 12-month period for certain personal or family medical conditions, including care for their children, parents, or spouses or to recover from their own serious health condition.

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[5] Respondent argues the TAC, in and of itself, fails to allege facts sufficient to survive demurrer because it did not allege Osornio made an affirmative request for additional leave as an accommodation. We disagree; the TAC clearly states Osornio requested and was granted additional leave as an accommodation. The case on which respondent relies is inapposite. *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255 (*Dudley*) involved a claim for retaliation under CFRA. However, with the exception of the sixth cause of action, Osornio did not allege claims under CFRA. (See *Sanchez*, *supra*, 213 Cal.App.4th at p. 1340 [finding CFRA cases inapposite to action brought under FEHA for pregnancy discrimination].)

[Citations.]" (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 516, fn. omitted.) The statute's definition of "[f]amily care and medical leave" includes "[l]eave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions." (§ 12945.2, subd. (c)(3)(C).) CFRA regulations further provide that "[a]n employee's own disability due to pregnancy, childbirth or a related medical condition is not included as a serious health condition under CFRA." (Cal. Code Regs., tit. 2, § 11093, subd. (b).)

Osornio's complications during labor and delivery of her child by Caesarean section do not qualify as a "serious health condition" under CFRA as the law expressly excludes childbirth-related medical conditions. Even though the TAC's allegations demonstrate Osornio was not eligible for CFRA leave, she maintains her claim for retaliation under CFRA is viable. In order to establish a prima facie case of retaliation under CFRA, the plaintiff must show "(1) the defendant was a covered employer; (2) *the plaintiff was eligible for CFRA leave*; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action because he or she exercised the right to take CFRA leave." (*Rogers v. County of Los Angeles, supra,* 198 Cal.App.4th at p. 491, italics added and omitted, citing *Dudley*, *supra*, 90 Cal.App.4th at p. 261.) Because the TAC does not allege facts showing Osornio had a qualifying "serious health condition," she was ineligible for CFRA leave and therefore her retaliation claim under CFRA fails as a matter of law. Accordingly, the trial court did not err when

it sustained the demurrer to this claim for failure to allege facts sufficient to state a cause of action.

III

The trial court sustained the demurrer to the TAC without leave to amend. We generally review an order denying leave to amend by determining "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

With regard to the sixth cause of action, Osornio has not presented a proposed amendment that could salvage her claim for retaliation under CFRA. We therefore conclude the trial court did not abuse its discretion in denying leave to amend with respect to this claim. Regarding the remaining causes of action, it is unnecessary for us to consider whether there is a reasonable possibility of amending the TAC because we already have determined that the complaint is not defective. Accordingly, determining whether Osornio should be granted leave to amend in order to further clarify any factual allegations or assert new claims is properly made by the trial court in the first instance. (See *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 371 [concluding that because plaintiff's complaint was not defective, the issue of "[w]hether the pleadings can or should be amended is for the trial court to decide on remand"].)

DISPOSITION

The judgment of dismissal is affirmed solely with respect to the sixth cause of action for retaliation under CFRA, and reversed with respect to the other causes of action in the TAC. The matter is remanded to the trial court with directions to vacate the orders sustaining the demurrer to the TAC without leave to amend, and to enter a new order overruling the demurrer to the TAC with the exception of the cause of action for retaliation under CFRA, to which the demurrer was properly sustained without leave to amend. Osornio shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.