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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THERESA TORRICELLAS,

Plaintiff and Appellant,

v.

PHYLLIS BURKHARDT, et al.

Defendants and Respondents.

E069330

(Super.Ct.No. RIC1509979)

OPINION

APPEAL from the Superior Court of Riverside County. John W. Vineyard, Judge.

Affirmed.

Theresa Torricellas, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Monica N. Anderson, Senior Assistant Attorney General, Misha D. Igra and Virginia I. Papan, Deputy Attorneys General, for Defendants and Respondents.

I.

INTRODUCTION

Plaintiff and appellant, Theresa Torricellas, appeals from a judgment of dismissal entered after the trial court sustained, with leave to amend, a demurrer by defendants and respondents, Phyllis Burkhardt and P. Dixon-Stamps (defendants), to plaintiff's first amended complaint (FAC). The court entered a judgment of dismissal after plaintiff failed to file a second amended complaint, failed to respond to the court's order to show cause (OSC) regarding dismissal for failure to amend and declined the court's offer of additional time to amend.¹

Plaintiff contends the trial court abused its discretion by dismissing the FAC after sustaining defendants' demurrer to the FAC, because she was deprived of meaningful access to the court in violation of her constitutional rights to due process and equal protection. Plaintiff argues she was denied the opportunity to oppose the demurrer, and the court abused its discretion in denying a continuance of the hearing on defendants' demurrer. We reject plaintiff's contentions and affirm the judgment.

¹ This action remains pending as to a third defendant, California Department of Corrections and Rehabilitation (CDCR). CDCR is not a party to this appeal.

II.

FACTS AND PROCEDURAL BACKGROUND²

At all times relevant to this case, plaintiff has been an inmate incarcerated at the California Institute for Women, within the custody of CDCR. Burkhardt is a teacher and college coordinator employed by CDCR. Dixon-Stamps is a correctional counselor II and appeals coordinator, also employed by CDCR.

Plaintiff's lawsuit concerns defendants issuing plaintiff three chronos and documenting plaintiff's behavior leading to the chronos. A chrono is a report documenting misconduct by an inmate. (Cal. Code Regs., tit. 15, § 3312, subd. (a).) In May 2014, Burkhardt issued plaintiff's first chrono, which was a custodial counseling chrono documenting that, while plaintiff was performing her job assignment as a tutor, she was rude, offensive, and disrespectful when interacting with another inmate. Burkhardt indicated in the chrono that she wanted plaintiff removed from her position as a tutor.

Two months later, Burkhardt issued a second chrono requesting plaintiff be removed from her position as a tutor because plaintiff had consistently exhibited aggressive and callous behavior toward staff and other inmates seeking assistance.

In September 2014, Dixon-Stamps issued a third chrono documenting her interview with plaintiff regarding properly filing prison grievances. Plaintiff repeatedly

² The record on appeal does not include a reporter's transcript.

failed to follow instructions on filing CDCR inmate appeals, and during the interview, plaintiff was unreceptive to counseling and became verbally combative.

A. First Hearing on Demurrer to FAC

In August 2015, plaintiff filed a lawsuit against defendants and CDCR based on the three disciplinary chronos against plaintiff. Plaintiff's FAC included 11 causes of action, including causes of actions against defendants for defamation, false light, intentional infliction of emotional distress, and violations of the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.)(IPA). Plaintiff alleged defendants issued the three chronos knowing they contained false information and would be placed in her prison file. Plaintiff maintained that the chronos were, or could be, used against her during her parole determination hearings. They could also be used to remove her from her prison position in the education department and to restrict her use of the prison grievance process. Plaintiff requested monetary damages and injunctive relief.

Defendants demurred to plaintiff's FAC. Plaintiff did not file opposition. Although the court gave plaintiff leave to appear by CourtCall at the hearing on defendants' demurrer, plaintiff did not appear or call. In April 2016, the court sustained defendants' demurrer with 30 days leave to amend.

Plaintiff filed a writ petition seeking to disqualify two superior court judges assigned to her case. (*Torricellas v. Riverside County Superior Court* (June 10, 2016, E065723 [nonpub. opn.].) This court found the two trial court judges were disqualified "by operation of law," and issued a peremptory writ of mandate directing the trial court to

vacate its order striking plaintiff's statement of disqualification and dissolve the stay of the proceedings.

Meanwhile, plaintiff moved for relief from the order sustaining defendants' demurrer to the FAC, requested a new hearing, and filed six requests for fee waivers.

In September 2016, after this court issued its peremptory writ of mandate order, the case was reassigned to a new judge and the trial court vacated its ruling on defendants' demurrer to the FAC. The court also permitted plaintiff to file opposition.

B. Second Hearing on Demurrer to FAC

On November 16, 2016, defendant's demurrer to the FAC was reheard by a different judge. Plaintiff did not appear by telephone or otherwise. The court adopted its tentative ruling and sustained defendants' demurrer, with 90 days leave to amend. Defendants served plaintiff with notice of the court's ruling on the demurrer.

On November 16, 2016, the day of the demurrer hearing, the court received by mail plaintiff's opposition to the demurrer. The proof of service of the demurrer on defendants is dated November 10, 2016. Plaintiff argued in her opposition that her access to the court was being obstructed by court clerks and judicial staff, who denied her fee waivers, which were necessary to filing her motions, continuance requests, and other documents. The court rejected her documents because of her inability to pay the filing fees. Plaintiff also argued her access to the court was obstructed by the lack of adequate law library access and because of numerous prison lockdowns, "modified programs," and other scheduling that interfered with her ability to conduct research and prepare timely

filed legal documents. The court rejected her documents because of her inability to pay the filing fees. Plaintiff requested counsel appointed to represent her because of “the repeated injustice being perpetuated against her.” She therefore requested the demurrer hearing be taken off calendar or continued until counsel was appointed for her and the erroneous partial denial of her fee waiver request was resolved.

On February 14, 2017, the 90-day period to amend the FAC expired. Because plaintiff failed to file a second amended complaint, the court issued an OSC why defendants should not be dismissed from the action. Plaintiff filed a notice of intent to appear by telephone at the OSC hearing on June 28, 2017.

On June 26, 2017, the court continued the case management conference and OSC hearing to August 23, 2017. On the court’s own motion, the court ordered plaintiff to appear by telephone no later than 8:20 a.m. and provided a telephone number to call. Notice was sent to plaintiff. In August, plaintiff filed another case management conference statement.

C. OSC Hearing

On August 23, 2017, plaintiff appeared by telephone for the case management conference and OSC hearing. During the OSC hearing, the court denied plaintiff’s request for appointment of counsel, stating that the court did not have the resources to grant the request. The court also denied plaintiff’s request to vacate the court’s ruling on defendants’ demurrer. The court ordered the FAC dismissed with prejudice as to defendants Burkhardt and Dixson-Stamps.

Defendants filed a notice of judgment of dismissal of defendants. The notice states that the court denied plaintiff's request to vacate the court's ruling on defendants' demurrer "because the [c]ourt ruled on the merits and the opposition would not have changed the ruling since plaintiff did not state a claim against defendants." The court however offered plaintiff leave to file a second amended complaint to cure the defects, but plaintiff informed the court that she declined to do so. The court therefore dismissed defendants from the lawsuit with prejudice. The case remained pending against CDCR. The court reminded plaintiff that she was responsible for arranging the CourtCall appearance with the prison staff. The court also noted that defendants' counsel had notified the litigation coordinator at the prison that plaintiff may appear by telephone at the proceedings in the case.

On October 6, 2017, plaintiff filed a notice of appeal of the judgment of dismissal. Plaintiff also appealed the order denying her request to vacate and orders denying requests for counsel and refusing to grant a fee waiver.³ On January 10, 2018, the court entered an order dismissing with prejudice defendants from plaintiff's lawsuit.

³ We note, plaintiff, in her appellant's reply brief, is not requesting the trial court vacate its order sustaining defendants' demurrer to causes of action 4 and 8, which are founded on the IPA.

III.

COMPLAINT DEFECTS REQUIRING AMENDING THE FAC

Plaintiff contends there were insufficient grounds for sustaining defendants' demurrer to the FAC. We disagree. First, defendants, as public employees, were statutorily immune from liability for monetary damages (causes of action 1-3, 5-7, 9-10). Government Code section 820.2 provides immunity to public employees from liability for "an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Government Code section 821.6 also provides public employee immunity from liability for injury caused by the public employee "instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

Under Government Code section 821.6, "[a] public employee acting within the scope of employment is immune from liability for an injury caused by the employee's 'instituting or prosecuting any judicial or *administrative proceeding* . . . even if he acts maliciously and without probable cause.' (Gov. Code, § 821.6.) California courts construe [Government Code] section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits. [Citations.]" (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1047-1048, italics added.)

“Government Code section 821.6 immunizes not only the act of filing or prosecuting a judicial or administrative complaint, but also extends to actions taken in preparation for such formal proceedings. [Citation.] . . . The immunity applies even if the officers abused their authority. [Citation.]” (*Gillan v. City of San Marino, supra*, 147 Cal.App.4th at p. 1048.) Immunity under Government Code section 821.6 extends to “causes of action arising from conduct protected under the statute, including defamation and intentional infliction of emotional distress.” (*Gillan v. City of San Marino, supra*, at p. 1048; see also *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 808-809.)

Plaintiff’s FAC is founded on allegations that defendants, who were carrying out their job responsibilities as CDCR public employees, committed wrongful acts, including issuing chronos containing false statements regarding plaintiff’s conduct, knowing the false information would be placed in plaintiff’s prison file and could be used against her during parole determination hearings. Plaintiff also alleged the false information could be used to remove her from her prison job and lead to restricting her use of the prison grievance process. Based on these FAC allegations, defendants are immune from liability for monetary damages under Government Code sections 820.2 and 821.6, because defendants’ alleged wrongful acts were committed in their capacity as public employees, incident to their duties and for the benefit of their employer, CDCR. Furthermore, such acts were in furtherance of inmate discipline and investigation impacting official administrative proceedings, including plaintiff’s parole hearings and

potential disciplinary and prison grievance proceedings. (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.)

Defendants likewise are immune from damages under Civil Code section 47 from liability based on their statements made while carrying out their CDCR job responsibilities. Under Civil Code section 47, a privileged statement is one made “(a) In the proper discharge of an official duty. [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law” (*Ibid.*) The FAC alleges defendants acted wrongfully while discharging their official duties as CDCR public employees, and such acts impacted, or would impact, the official proceedings of the parole board evaluating plaintiff’s suitability for parole.

In addition to being immune from liability for monetary damages, defendants are not proper defendants of plaintiff’s IPA claims seeking injunctive relief under Civil Code sections 1798.45 and 1798.47, because such IPA claims can only be brought against agencies. (Civ. Code, §§ 1798.45 [“An individual may bring a civil action *against an agency* whenever such agency does any of the following” (italics added)], 1798.47 [“*Any agency* that fails to comply with any provision of this chapter may be enjoined by any court of competent jurisdiction” (italics added)].)

Because of the defects in the FAC, the trial court properly sustained defendants’ demurrer to the FAC with leave to amend.

IV.

DISMISSAL FOR FAILURE TO AMEND FAC

We conclude that, because plaintiff failed to amend the defective FAC, the trial court did not abuse its discretion in dismissing the FAC against defendants. (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827.)

When reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, “[w]e first review the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory or to determine whether the trial court erroneously sustained the demurrer as a matter of law.” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) Normally, we must next determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend. (*Ibid.*) The appellant has the burden of demonstrating that the trial court erred. (*Ibid.*) In the instant case, the court granted plaintiff leave to amend but plaintiff failed to do so.

Under Code of Civil Procedure section 581, subdivision (f), “[t]he court may dismiss the complaint as to that defendant when: [¶] . . . [¶] (2) . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal.” (Code Civ. Proc., § 581, subd. (f).) “[B]y failing to amend, the plaintiff may be implied to have abandoned the case or to have admitted that no further amendment is possible.” (*Gitmed v. General Motors Corp., supra*, 26 Cal.App.4th at p. 829.) “The decision to dismiss an action under

[Code of Civil Procedure] section 581, subdivision (f)(2) rests in the sound discretion of the trial court and a reviewing court will not disturb the ruling unless the trial court has abused its discretion. [Citation.] It is appellant's burden to establish an abuse of discretion." (*Gitmed v. General Motors Corp.*, *supra*, at p. 827.)

Plaintiff argues the prison and court impeded her ability to appear at the November 16, 2016, hearing and file opposition. But regardless of whether there is any validity to this objection, the record demonstrates that the court gave plaintiff ample opportunity to amend the FAC on several occasions, including during the OSC hearing on August 23, 2017. Defendants' demurrer to the FAC was initially sustained with 30 days leave to amend. After the first ruling, the trial court vacated the first ruling sustaining the demurrer and reassigned the case to a new judge, who also sustained the demurrer with 90 days leave to amend. After both rulings, plaintiff did not amend the FAC, even though she was given notice of the rulings and had ample time to do so. Rather than dismissing the action against defendants after the second ruling on November 16, 2016, the trial court issued an OSC for failing to amend the FAC. Plaintiff did not file a response to the OSC.

When plaintiff appeared by telephone at the OSC hearing on August 23, 2017, nine months after the court sustained defendants' demurrer to the FAC, the court offered to grant plaintiff additional time to amend the FAC, but plaintiff declined the offer. Plaintiff was given repeated opportunities to amend the FAC to correct the defects stated in defendants' demurrer to the FAC, yet plaintiff made no attempt to amend the FAC.

Plaintiff also failed to demonstrate she could cure the defects in the FAC. During the OSC hearing on August 23, 2017, plaintiff appeared by telephone and had the opportunity to argue why the court should vacate the November 16, 2016, order sustaining defendants' demurrer. The trial court indicated it considered plaintiff's late demurrer opposition filed on November 16, 2016, and concluded the court had properly sustained defendants' demurrer because plaintiff had not alleged valid claims against defendants, and it did not appear plaintiff was able to do so by amending. Nevertheless, the court offered plaintiff additional time to amend the FAC, which plaintiff rejected. Under these circumstances, the trial court did not abuse its discretion in dismissing the FAC for failure to amend under Code of Civil Procedure section 581, subdivision (f)(2).

Plaintiff argues that, nevertheless, this court must vacate the judgment of dismissal and order sustaining defendants' demurrer to the FAC because she was denied access to court as a consequence of the court and prison staff impeding plaintiff from litigating her case while incarcerated. Plaintiff argues she was prevented from researching issues, filing pleadings and motions, and appearing in court by telephone. But there is no showing that any acts by the prison or court staff had any direct effect on the outcome of plaintiff's case. The record shows the court ultimately considered plaintiff's opposition to defendants' demurrer to the FAC, the court properly sustained the demurrer of the FAC, the court permitted plaintiff to appear in court by telephone, plaintiff appeared by telephone at the OSC hearing, the court gave plaintiff a meaningful opportunity to

attempt to cure the defects in the FAC by amending the FAC, and plaintiff failed to amend the FAC.

Under these circumstances, plaintiff received meaningful access to the court for purposes of curing the defects in her FAC, and failed to do so despite having been given numerous opportunities to amend the FAC.

V.

FAILURE TO STATE REASONS FOR SUSTAINING DEMURRER

Plaintiff contends the trial court erred in not stating its reasons for sustaining defendants' demurrer to the FAC. The minute order for the November 16, 2016, hearing on defendants' demurrer to the FAC states that oral argument was not requested and the court sustained defendants' demurrer to the FAC with 90 days leave to amend.

The August 23, 2017, minute order for the hearing on the OSC states that plaintiff's request to vacate the ruling on the demurrer was denied and the FAC against defendants was ordered dismissed with prejudice. The notice of the judgment of dismissal provides additional information, including that the court "denied [p]laintiff's request to vacate the demurrer because the [c]ourt ruled on the merits and the opposition would not have changed the ruling since plaintiff did not state a claim against defendants."

Code of Civil Procedure section 472d provides: "Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based

which may be by reference to appropriate pages and paragraphs of the demurrer. [¶] The party against whom a demurrer has been sustained may waive these requirements.”

The order sustaining defendants’ demurrer to the FAC does not state the court’s reasons for its ruling. “It must be considered harmless error, however, absent a demonstration of prejudice to plaintiff. [Citation.] The requirement of stated grounds is very useful as a guide when plaintiff wishes and is able to amend the complaint, but on appeal its importance is minimal since the ruling will be upheld on any sufficient ground, whether relied on by the court below or not. [Citation.]” (*Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 846, fn. 3; accord, *Brown v. State of California* (1993) 21 Cal.App.4th 1500, 1506.)

Plaintiff has not demonstrated that the trial court’s failure to state its reasons for sustaining the demurrer to the FAC constitutes prejudicial error, because the ruling may be upheld on appeal on any sufficient ground, whether relied on by the court below or not. (*Brown v. State of California, supra*, 21 Cal.App.4th at p. 1506.) In addition, at the OSC hearing, plaintiff had the opportunity to ask the court to state its reasons for sustaining the demurrer. Since there is no reporter’s transcript of either the hearing on the FAC demurrer or the OSC, it is unknown whether the court stated its reasons for sustaining the FAC demurrer or whether plaintiff asked the court to do so. There is also no evidence plaintiff requested the court to state its reasons after receiving notice of the ruling on the FAC demurrer.

We thus conclude, based on the record before us, that plaintiff has forfeited her objection to the court not stating its reasons for sustaining the FAC demurrer by failing to call it to the attention of the trial court. (*Brown v. State of California, supra*, 21 Cal.App.4th at p. 1506; *Cohen v. Superior Court* (1966) 244 Cal.App.2d 650, 655; *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 962.) Furthermore, there was no prejudice caused by the court not stating in the minute order its reasons for sustaining defendants' demurrer to the FAC.

VI.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.