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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EDWARD CHANG,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA et. al,

Defendants and Respondents.

A132326

(Alameda County
Super. Ct. No.RGO9461643)

Edward Chang appeals from a judgment of dismissal following the court's order sustaining a demurrer to his second amended complaint. He contends that the trial court incorrectly ruled that his action was untimely commenced and that the trial court abused its discretion in sustaining defendant's demurrer to his second amended complaint without leave to amend. We affirm.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 7, 2009, Chang filed a complaint in Alameda County Superior Court against the University of California, Berkeley (UC Berkeley), alleging breach of a written contract. He alleged that UC Berkeley dismissed him in violation of an academic probation agreement, grossly misrepresented the terms of the agreement, and failed to properly handle and review an appeal.

On March 19, 2010, Chang filed a first amended complaint repeating the same allegations against UC Berkeley, but correcting the defendant to be the Regents of the University of California (the Regents) and adding two new defendants: Sally Fairfax and

Donna Symon. The Regents and Symon (collectively, the Regents) demurred to the complaint on November 8, 2010, on the grounds that the amended complaint was time-barred and hopelessly uncertain. They contended that Chang's breach of contract claim was incomprehensible, that it was time-barred, and that it should be dismissed. The court sustained the demurrer with leave to amend, finding that Chang "should be given an opportunity to address the deficiencies by filing a Second Amended Complaint because there is a reasonable possibility that he can state a valid claim."

On December 30, 2010, Chang filed a second amended complaint and attached exhibits including the written contract between the parties. The agreement, entered on or about January of 2005, required Chang to bring his GPA to a 2.0 in two academic terms (one year), and to remove his entire academic deficit by the end of the fall 2005 semester. The agreement also stated that if Chang were to add to his deficit at the end of the spring 2005 semester, he would be immediately dismissed. Chang alleged he was dismissed "at the end of the spring 2005 semester," in violation of the agreement.

On February 25, 2011, the Regents demurred to the second amended complaint. They argued that the letter attached to the complaint constituted an implied-in-fact contract that was time-barred under the two year statute of limitations under Code of Civil Procedure section 339.¹ They further argued that even if the letter was a written contract subject to the four year statute of limitations period of section 337, the breach occurred at the end of the spring term of 2005, making his July 7, 2009 filing untimely.

Although Chang's opposition to the demurrer was due on March 15, it was not faxed to the court until March 23, 2011 at 3:46 p.m. and it was not filed until March 24, the date of the hearing. The parties did not appear at the hearing on the motion. In the meantime, the court had issued its tentative ruling, sustaining the demurrer. The court's minutes state that the tentative ruling was published and was not contested. Finding that the demurrer was unopposed, the court adopted the tentative ruling and sustained the

¹ Unless otherwise indicated all further statutory references are to the Code of Civil Procedure. Section 339 provides a two year statute of limitations for an action upon an oral contract.

demurrer without leave to amend. The court ruled that Chang’s allegations in the second amended complaint establish as a matter of law that his original complaint “was filed more than four years after the alleged breach of the written agreement by Defendants not to dismiss him at the end of the spring 2005 semester as long as he did not ‘add to his deficit.’ ” Chang appealed.

II. DISCUSSION

Chang contends that the trial court abused its discretion in sustaining the demurrer because it was under the mistaken belief that the demurrer was unopposed.

Pursuant to section 1005, subdivision (b), Chang was required to file and serve his opposition to the motion at least nine court days before the hearing. The record shows that, while Chang did attempt to oppose the demurrer, his response was filed after the trial court issued its tentative ruling. In accordance with the local rules, the court’s tentative ruling was available prior to the hearing.² Because the response was filed less than 24 hours before the scheduled hearing on the demurrer, the court correctly ruled that the demurrer was unopposed.

A court has discretion to consider a late filing (See *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 549). Here, however, the opposition was filed far too late—after the court had issued its tentative ruling and less than 24 hours prior to the hearing. Assuming the court was even aware of the opposition, the court did not abuse its discretion in not considering it. (See *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, [courts have broad discretion to regulate the submission of materials regarding pending motions], overruled on other grounds in *Colmenares v. Braemar Country Club, Inc.*, (2003) 29 Cal.4th 1019, 1031, fn. 6.)

Nor is it error for a court to make a ruling without being aware that a late opposition had been filed. If Chang wanted the court to exercise its discretion to consider his opposition, it was incumbent upon him to seek relief under any applicable procedures.

² Pursuant to Alameda Superior Court Local Rule 3.30(c), “[t]he tentative ruling or notice to appear will generally be available by 4:00 p.m. two court days prior to the scheduled hearing and no later than 3:00 p.m. the court day before the hearing.”

(See, e.g., § 473.) He failed to do so. Chang’s status as a pro per litigant did not excuse him from the duty to comply with rules. A litigant who proceeds in propria persona is held to the same standard of conduct as that of an attorney. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

Chang also contends that the trial court erred in finding that his action was barred by the statute of limitations under section 337. We disagree.

When an appeal arises after the sustaining of a demurrer, we “assume the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn therefrom.” (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 789, fn. 3.) “ “ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.]’ ”³ (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) When the court has sustained a demurrer without leave to amend, we must decide whether “there is a reasonable possibility that the defect can be cured by amendment.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden of proof that an amendment would cure the defect is on appellant. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) “A demurrer is properly sustained without leave to amend where the pleading discloses on its face that the action is barred by the applicable statute of limitations.” (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524.)

Here, the most generous limitations period for Chang’s cause of action for breach of contract is found in section 337, which provides that “[a]n action upon any contract, obligation or liability founded upon an instrument in writing” is four years. Chang alleged in his second amended complaint that the “[Regents] breached the contract by dismissing [him] from university.” He further alleged that the dismissal was “at the end of the spring 2005 semester.” Chang acknowledges that the spring semester ended on

³ Chang requested that we take judicial notice of his correspondence with the Superior Court showing that he tried to file his original complaint on June 29, 2009. We decline the request. There is no indication that these documents were before the trial court. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [court will generally not take judicial notice of documents that were not considered by the trial court].)

May 20, 2005. “A cause of action for breach of contract ordinarily accrues at the time of breach, and the statute begins to run at that time regardless whether any damage is apparent or whether the injured party is aware of his or her right to sue.” (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, p. 664.) Chang’s own allegations demonstrate that his July 7, 2009 filing was late. The trial court, therefore, did not err in ruling that Chang’s cause of action for breach of contract was time-barred.

Chang contends, however, that the court’s reading of the phrase “ ‘at the end of the spring 2005 semester’ ” was too narrow, because, as he argued in his opposition below, the evidence would show he was actually dismissed “more than one month after the end of the spring semester.” Chang also contends, and contended in his late opposition, that the breach of contract occurred only after Chang’s “appeal” of the dismissal was finally denied, on some date after July 7, 2005. Neither of these contentions, however, were before the trial court because, as we have noted, the opposition was not filed until the date set for the hearing on the demurrer. We cannot consider arguments made for the first time on appeal. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131.) Because matters in the late-filed opposition were not before the trial court, they cannot properly be heard here. (*Knapp v. City of Newport Beach* (1960) 186 Cal.App.2d 669, 679.)

In any event, the factual proffer in the opposition to the demurrer does not resolve the statute of limitations issue because, while Chang claims he was dismissed “more than one month” after the end of the spring semester, i.e., on some date after June 20, 2005, he does not claim he was dismissed on a date that was less than four years before July 7, 2009. Thus, he has not proposed any amendments that would cure the complaint’s fatal defect. Additionally, the only evidence proffered by Chang with respect to his “appeal” shows that the administrative proceedings were not an appeal of the dismissal, but a petition for reinstatement; that is, the document shows defendants were not making an adjudicatory determination as to the propriety of the dismissal but were making a discretionary determination as to whether he should be readmitted as a student. Accordingly, plaintiff has not presented any ground for reversing the trial court’s denial

of leave to amend. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091 [plaintiff has burden to demonstrate he can cure pleading defect by amendment].)

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.