Filed 1/24/13 Mack v. City of Oakland CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RONALD A. MACK, SR., Plaintiff and Appellant, v. CITY OF OAKLAND, Defendant and Respondent.	A135856 (Alameda County Super. Ct. No. RG11563787)

The trial court sustained the demurrer of respondent City of Oakland (city) to appellant Ronald A. Mack, Sr.'s (Mack) first amended complaint. The city's demurrer was sustained without leave to amend. A judgment dismissing that complaint soon issued. Mack appeals,[1] contending that the trial court erred by sustaining the demurrer. We affirm the judgment.

I. FACTS

On March 29, 2010, Mack's car was booted and later towed by B&B Towing. He learned that an electronic request from the city's parking division led to this action. On April 1, 2010, Mack met with city officials, who advised him that the towing company's action was proper because he had 10 outstanding parking tickets.[2] He asserted that of

[1] See part II., *post*.

[2] Before a vehicle may be booted, the owner must have at least five outstanding parking tickets. (Veh. Code, § 22651, subd. (i)(1).)

these 10 parking tickets, only four were then owed by him; the other six had been paid, were under administrative review,[3] or were not yet due.

According to Mack, city officials admitted at the April 1, 2010, meeting that their records were in error. He also asserts that they entered into a verbal agreement with him to correct their records and to release his car if he paid certain sums that he owed. In the next two weeks, Mack paid his remaining traffic tickets and he obtained a release from the city authorizing B&B Towing's return of his vehicle. When he went to reclaim his car, B&B Towing told Mack that while he had settled his parking fines with the city, he was required to pay them for storage fees before they would release his vehicle to him.

In March 2011, Mack sued the city,[4] claiming that it breached a verbal agreement that would have entitled him to his vehicle without having to pay any fees beyond the outstanding parking tickets. He alleged that city officials tricked him into believing that by paying the parking fees, he would obtain a release for his vehicle without being required to pay any additional sums to B&B Towing. He alleges that the city officials acted in a malicious manner, prompted by a desire to obtain city revenue. He also alleges that the city's breach caused him emotional distress and resulted in a lengthy hospitalization.[5]

On April 4, 2011, the city demurred to this complaint. On October 19, 2011, the trial court sustained that demurrer with leave to amend. The trial court found Mack's initial complaint to be vague and unclear about the specific material facts supporting each alleged claim. Mack was given until November 2, 2011, to file and serve an amended pleading. The city would then have two more weeks to respond.

Mack attempted to file his first amended complaint on October 28, 2011. Due to a clerical error, the first amended complaint was not filed, but was inadvertently attached to

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[3] The record contains no evidence of any administrative appeal of Mack's traffic tickets.

[4] Mack also sued two city employees, but their part of the case was later dismissed.

[5] Mack has not filed a copy of the original complaint with our court.

another document that Mack filed that day. The trial court's register of actions shows no proof of service of the first amended complaint on the city in October or November 2011. The city received a copy of the unfiled complaint in October 2011, but it took no action on this document.

In January 2012, the city moved to dismiss Mack's action on the ground that he failed to amend the complaint within the time allowed by the trial court. (Code Civ. Proc., § 581, subd. (f)(2).) A hearing on the motion was set for April 18, 2012.

Meanwhile, in February 2012, Mack's first amended complaint was actually filed. In it, Mack alleged two causes of action—fraud and breach of a verbal agreement. In both causes of action, he alleged that the city was liable because its employees acted with malice. He alleged that city officials knew that they had no authority to waive storage fees on behalf of B&B Towing and maliciously concealed this fact from him. He prayed that his vehicle would be released from B&B Towing, that the city would pay all fees owed for storage, and requested damages—including car registration fees—in order to make him whole. In all, Mack sought $215,000 in compensatory and punitive damages. Proof of service of the filed first amended complaint was filed the same day.

The city's motion to dismiss Mack's action for failure to amend the initial complaint was denied in April 2012. At the hearing, the city admitted that it had received the unfiled first amended complaint on October 28, 2011. The trial court ruled that Mack had attempted to comply with the November 2, 2011 deadline and was prevented from compliance because of a clerical error. Thus, it determined that the first amended complaint filed on February 2, 2012, remained operative.

The city was given until May 7, 2012, to respond to the first amended complaint. On May 7, 2012, the city demurred to the first amended complaint, on two grounds—because Mack failed to state facts sufficient to constitute a cause of action and because the pleading was so uncertain as to be ambiguous and unintelligible. (Code Civ. Proc., § 430.10, subds. (e), (f).)

Also, in May 2012, Mack objected to the trial court allowing the city additional time to respond to his first amended complaint, asserting that the city was in contempt for

failing to respond to his October 2011 attempt to file that complaint. He asked the trial court to grant him a default judgment against the city for $215,000. In June 2012, he formally moved for entry of a $215,000 default judgment against the city for failure to respond to his first amended complaint. The trial court rejected this request for default judgment, in part because Mack failed to file a proof of service showing valid service of the first amended complaint.[6]

On June 19, 2012, the trial court issued a tentative ruling sustaining the city's demurrer to Mack's first amended complaint without leave to amend. It found that the city was immune from liability for the alleged fraud and misrepresentation of the city employees. It also found that Mack failed to plead sufficient facts to support his claim that those employees entered into a valid verbal agreement with him on the city's behalf. The city was ordered to prepare a judgment of dismissal for the trial court's signature.

Mack contested this tentative ruling, arguing inter alia that the city's demurrer to his first amended complaint should be deemed void as a sanction for failing to respond to the unfiled version of it that the city admitted receiving in October 2011. On June 25, 2012, the trial court issued a minute order sustaining the city's demurrer without leave to amend on the basis asserted in its tentative ruling. Judgment dismissing Mack's action was entered on June 29, 2012.

II. TIMELY APPEAL FROM JUDGMENT

Our first task is to determine if we have jurisdiction to consider this appeal. In his June 27, 2012 notice of appeal, Mack purports to appeal from the June 25, 2012 minute order sustaining the city's demurrer. This is not an appealable order. An order sustaining a demurrer is not appealable. (See *Beazell v. Schrader* (1963) 59 Cal.2d 577, 579-580; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 154, pp. 230-231.) A minute order is not an appealable judgment, but is merely a basis on which a judgment may be rendered. (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1121, fn.

[6] We deem this to mean that Mack filed no proof of service of the first amended complaint he attempted to file in October 2011, which formed the basis of his motion for default.

3; see Code Civ. Proc., § 904.1, subd. (a)(1); see also 7 Witkin, Cal. Procedure, *supra*, Judgment, § 8, pp. 552-553.) We have no jurisdiction to consider the merits of an appeal from a nonappealable order. Typically, we must dismiss an appeal brought from a nonappealable order on jurisdictional grounds. (See, e.g., *Beazell v. Schrader*, *supra*, 59 Cal.2d at pp. 579-580; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 86, pp. 146-147.)

In this matter, Mack was required to appeal from the judgment of dismissal issued after the demurrer was sustained. (Code Civ. Proc., § 904.1, subd. (a)(1).) Mack—who represents himself in pro per—did not provide us with a copy of the June 29, 2012 judgment. However, we obtained a copy of this court record from the Clerk of the Superior Court of Alameda County on our own motion. We take judicial notice of it. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

We must liberally construe Mack's June 27, 2012 notice of appeal. (Cal. Rules of Court, rule 8.100(a)(2).) Applying this rule of liberal construction, we deem that he intended to appeal from the June 29, 2012 judgment rather than the cited order. As the June 27, 2012 notice of appeal was filed after the trial court announced its intended ruling on June 25, 2012, but before it rendered its June 29, 2012 judgment, we deem the notice of appeal to have been filed immediately after entry of judgment. (*Id*., rule 8.104(d)(2).) As thus construed, Mack filed a timely notice of appeal from the judgment of dismissal. (*Id*., rule 8.104(a).)

III. LACK OF RECORD

Our attempt to resolve the legal issue is hampered by Mack's decision to proceed on appeal without obtaining a reporter's transcript of the oral proceedings. On appeal, we begin with the presumption that the trial court's decision was correct. Mack, as the appellant, has an affirmative duty to demonstrate that it was incorrect. This is not simply a principle of appellate practice, but an ingredient of the constitutional doctrine of reversible error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Shepherd v. Greene* (1986) 185 Cal.App.3d 989, 994.) When, as here, the relevant record on appeal

consists solely of a clerk's transcript,[7] the normal presumption that the trial court's determination was correct takes on special significance. In such circumstances, we must *conclusively* presume that the evidence in the missing reporter's transcript would support the trial court's decision. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154; see *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 628, pp. 704-706.) Mack has not met his obligation to provide the necessary record on appeal to allow us to resolve the underlying issues in his favor.

IV. DEMURRER SUSTAINED

Despite this defect, we consider the issue that Mack appears to raise—that the trial court erred by sustaining the city's demurrer. He seems to argue that on the evidence before the trial court, it should have found in his favor on the merits of his cause of action. The case was not then ready for trial, but was at the preliminary demurrer stage to determine whether Mack's complaint was legally sufficient to warrant trial.

A demurrer tests the legal sufficiency of the complaint. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869 (*City of Morgan Hill*); *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497; see Code Civ. Proc., § 430.10, subd. (e).) On review from a judgment dismissing an action after sustaining a demurrer without leave to amend, we conduct an independent review of the complaint to determine if—as a matter of law—it stated facts sufficient to constitute a cause of action. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1264 (*Bardin*); *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) If we conclude that Mack stated a cause of action under any possible legal theory, the demurrer must be overruled. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870; see also *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870.) However, if we find that the facts alleged do not

[7] Mack did not file a clerk's transcript either, but we deem the exhibits he filed with his opening brief to constitute an appellant's appendix, albeit an incomplete substitute for one. (Cal. Rules of Court, rule 8.124(a)(1)(A).)

state a cause of action as a matter of law, then we must find that the trial court properly sustained the demurrer. (See *City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870; *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 55.)

A demurrer raises no *factual* issues, but assumes the facts alleged in the complaint to be true. On appeal, we interpret the complaint in a reasonable manner. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 319; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1252.) We deem the demurrer to admit all material facts that are properly pled. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 374-375; see *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638.) We accept as true those facts that may be implied or inferred from those expressly alleged. (*City of Morgan Hill, supra,* 118 Cal.App.4th at p. 869; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We may consider facts that are subject to judicial notice. (*Moore v. Conliffe, supra,* 7 Cal.4th at p. 638; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We do not assume the truth of any *legal* contentions, deductions or conclusions set out in the complaint. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967; *Bardin, supra,* 136 Cal.App.4th at p. 1263; *City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870.)

Mack purported to allege two causes of action against the city. On the cause of action alleging that its employees committed fraud and misrepresentation in a malicious manner, the city was immune from liability. A city is not liable for an injury caused by an employee's misrepresentation, even if that misrepresentation is intentionally made. (Gov. Code, § 818.8; *Harshbarger v. City of Colton* (1988) 197 Cal.App.3d 1335, 1339-1344.) Mack alleges in his pleading that the city is not immune, but this is a legal conclusion, not a factual allegation that binds on a demurrer. (See, e.g., *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967; *Bardin, supra,* 136 Cal.App.4th at p. 1263.)

On the second cause of action for breach of a verbal agreement, Mack did not plead any facts showing that the employees had the authority to enter into an enforceable contract on the city's behalf or that they actually entered into a valid agreement. Without the authority to enter into a binding verbal agreement with Mack, he cannot establish that

the action of the employees can be imputed to the city. (See, e.g., *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal.App.4th 427, 434 [no vicarious liability unless employee acting within scope of employment].)

V. LEAVE TO AMEND

Mack may also be deemed to contend that he should have been allowed leave to amend his amended complaint. Even if the demurrer was properly sustained, a trial court has discretion to grant or deny leave to amend. (*Montclair Parkowners Assn. v. City of Montclair, supra,* 76 Cal.App.4th at p. 790.) If there is a reasonable possibility that a defect in the pleading can be corrected by amendment, the trial court abuses its discretion if it denies leave to amend. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637.)

As the plaintiff, Mack must bear the burden of proving that another amended complaint could reasonably state facts sufficient to survive a demurrer. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) He has not done so. There is no evidence that he sought leave to amend in the trial court. On the record before us, we must conclusively assume that he did not so do. (See pt. III, *ante*.) More importantly, his briefs do not cite any additional facts that he could allege to overcome the defects in his amended complaint. Instead, he asserts that the facts in that complaint were sufficient to allow the trial court to find in his favor on the merits. Under these circumstances, we conclude that the trial court properly sustained the city's demurrer without leave to amend.

The judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.