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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

JEFFREY R. GOLIN et al.,
Plaintiffs and Appellants,
v.
CLIFFORD B. ALLENBY et al.,
Defendants and Respondents.

A140652

(San Mateo County
Super. Ct. No. CIV507159)

Jeffrey R. Golin and Elsie Y. Golin filed this action after the California Department of Developmental Services (DDS) initiated conservatorship proceedings for their developmentally disabled adult daughter, Nancy Golin.^{1,2} Plaintiffs assert Clifford B. Allenby and Therese Delgadillo, former directors of DDS, and H. Dean Stiles, a DDS attorney,³ committed civil rights violations actionable under title 42 United States Code section 1983 (section 1983). The trial court sustained defendants' demurrer to the section 1983 claims in plaintiffs' second amended complaint (SAC) without leave to amend. The court reasoned that since plaintiffs sued defendants, state officials, in their official capacities rather than as individuals, they are not subject to suit under

¹ Because Jeffrey, Elsie and Nancy share the same last name, we refer to them by their first names. We mean no disrespect in doing so.

² The suit was also filed by Nancy's guardian ad litem, Nancy Delaney. We refer to Jeffrey, Elsie, and Delaney, collectively, as plaintiffs.

³ For the sake of clarity, we refer to Allenby, Delgadillo, and Stiles, collectively, as defendants, though we recognize plaintiffs have sued about 20 other parties in this action.

section 1983. The court also found plaintiffs failed to plead sufficient facts as to Stiles, and that Stiles was immune from suit. Plaintiffs now appeal, arguing the trial court should have granted them leave to amend and Stiles is not entitled to immunity. We affirm.

I. BACKGROUND

A. Factual Background

Nancy Golin is an autistic adult, developmentally disabled since birth. Nancy suffers from profound mental retardation and a seizure disorder. In November 2001, Nancy wandered away from her parents, Jeffrey and Elsie, at their workshop in Palo Alto. Elsie called the police for help and searched for Nancy without success. The following morning, Nancy returned to the workshop unharmed.

Upon her return, the police seized Nancy and took her to Stanford Hospital for a physical examination. Nancy was initially held at Stanford for 72 hours as gravely disabled under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.; LPS Act). Nancy's commitment was later extended another 14 days for intensive treatment. The Santa Clara County Superior Court eventually ruled Nancy was not subject to the LPS Act and ordered her release. At the behest of Adult Protective Services, Stanford Hospital transferred Nancy to Embee Manor, a residential care facility retained by San Andreas Regional Center, Inc. (SARC), a private nonprofit corporation which provides state-funded services to developmentally disabled clients. Plaintiffs claim Nancy was neglected and physically and emotionally abused at Embee Manor, and that caregivers there administered psychotropic drugs in order to control her.

Meanwhile, Jeffrey and Elsie were arrested on charges of felony dependent adult abuse. Plaintiffs allege the charges were false, and various parties, including Stiles, conspired to have Jeffrey and Elsie arrested so that no one who cares for Nancy would be available to protect her. Jeffrey eventually pled no contest to one count of violating Penal Code section 368, which prohibits crimes against dependent adults. At a September 28, 2012 hearing, plaintiffs' counsel asserted Jeffrey later "went back to the criminal court

and had that conviction . . . overturned, dismissed and the judge actually used the word exonerated him on the charges [*sic*].”

In April 2002, Stiles, on behalf of DDS, initiated conservatorship proceedings for Nancy in Santa Clara Superior Court. In February 2003, the court appointed Allenby, as the director of DDS, as Nancy’s limited conservator. A three-week trial was held in September and October 2003, at which Stiles represented DDS, Jeffrey and Elsie appeared in pro. per., and Nancy was represented by a public defender.

In its statement of decision, filed October 22, 2013, the court found by clear and convincing evidence that Jeffrey and Elsie were unable to provide for the best interests of their daughter. The court concluded Jeffrey’s and Elsie’s “difficult personalities” and “mistaken overconfidence in their limited medical knowledge” had exposed Nancy to “dangerous non-compliance with physicians’ directions as to medication and care for [Nancy’s] very serious seizure disorder and other medical problems.” The court was also concerned with Jeffrey and Elsie’s history of marital strife, as well as their past abuse and neglect of Nancy.⁴ Based on these findings, the court appointed DDS as Nancy’s permanent limited conservator. The court also stated there were legitimate concerns about Nancy’s care in the custody of DDS and SARC residential facilities, and it ordered consideration of reasonable requests for second medical opinions and better documentation of any injuries to Nancy. Jeffrey and Elsie were granted reasonable visitation with their daughter, so long as they abided by all visitation rules.

B. *Procedural History*

The same day the court issued its statement of decision, Jeffrey and Elsie filed a lawsuit in federal court challenging the conservatorship proceedings. They asserted 12 separate causes of action, including malicious prosecution under section 1983, fraud,

⁴ For example, in the mid 1980’s, Nancy burned herself with a lighter discarded by Elsie and was hospitalized for several weeks. Less than 10 years later, Nancy got too close to a barbeque at Jeffrey’s workplace and sustained second and third degree burns over 50 percent of her body. In another incident, the police were called after Jeffrey locked Nancy in a bedroom with a pot for a toilet and a bowl of dried banana slices.

slander, wrongful imprisonment, negligent and intentional infliction of emotional distress, and denial of Nancy's constitutional right to liberty and freedom of association. The court dismissed the action, holding Jeffrey and Nancy lacked standing to assert claims on behalf of Nancy, and federal abstention doctrines barred consideration of claims arising out of the conservatorship proceedings. The court also found the malicious prosecution claims failed because Jeffrey and Elsie could not show a lack of probable cause or that the case was resolved on the merits in their favor. Finally, the court declined to exercise supplemental jurisdiction over Jeffrey and Elsie's state law claims.

In April 2006, plaintiffs filed this action in Sacramento County Superior Court. Twenty-four parties were named as defendants, including Allenby, Delgadillo, Stiles, the County of Santa Clara, SARC, the City of Palo Alto, and Stanford Hospital and Clinics. Defendants moved to transfer venue to Santa Clara County, and the motion was granted in October 2006. After the case was transferred, plaintiffs challenged the appointment of every judicial officer assigned to their case, and after one of the defendants was appointed as a judge to the Santa Clara County Superior Court, the entire bench of Santa Clara County recused.

Later, the City of Palo Alto moved to have Jeffrey and Elsie declared vexatious litigants. The trial court granted the motion and required plaintiffs to post a \$500,000 security to continue the litigation. Jeffrey and Elsie failed to post the bond, and the action was dismissed in its entirety. On appeal, our colleagues in the Sixth Appellate District found the trial court did not abuse its discretion in finding Jeffrey and Elsie vexatious litigants because of their "persistent and obsessive use of judicial challenges in this action." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 639.) However, the court also held security should not have been required because the defendants had failed to demonstrate there was no reasonable probability the plaintiffs would prevail in the action. (*Id.* at pp. 640–641)

On remand, the case was transferred to the San Mateo Superior Court, though the basis for the transfer is unclear from the record before us. Thereafter, plaintiffs filed their SAC. Like the first amended complaint, the SAC names over 20 parties as defendants,

including Allenby, Delgadillo, and Stiles. Plaintiffs allege a vast conspiracy to maliciously prosecute Jeffrey and Elsie, and to conserve Nancy and keep her away from her parents. Plaintiffs also allege Nancy has suffered abuse, neglect, and improper medical treatment under SARC's continuing care. According to the SAC, Allenby and Delgadillo have served as Nancy's conservators in their official capacities as director of DDS, though it is unclear what specific actions they have taken in furtherance of this alleged conspiracy. Stiles is alleged to have represented DDS in Nancy's conservatorship proceedings. The SAC asserts 11 causes of action, four of which are brought under section 1983. The section 1983 claims assert violations of various constitutional rights, malicious prosecution, and conspiracy.

Defendants demurred to the SAC. The court sustained Allenby and Delgadillo's demurrer as to the section 1983 claims without leave to amend on the grounds Allenby and Delgadillo are not "persons" under section 1983 because they were sued in their official capacities, and plaintiffs made no showing of facts they might allege demonstrating individual liability in a nonofficial capacity. The court also sustained Stiles's demurrer as to all causes of action alleged against him, including three of the section 1983 claims, since (1) plaintiffs failed to state facts sufficient to constitute a cause of action against Stiles, (2) Stiles is immune from suit, and (3) Stiles is not a person under section 1983 because he was sued in his official capacity. Plaintiffs subsequently filed a motion for reconsideration, which the trial court denied.

Plaintiffs were granted leave to amend as to a number of their other claims, and on February 1, 2013, they filed a third amended complaint (TAC). The TAC contains some additional allegations as to defendants. Allenby and Delgadillo demurred to the remaining state law claims asserted against them in the TAC. At the hearing on the demurrer, plaintiffs voluntarily dismissed without prejudice a number of these claims. The court sustained the demurrer as to the remaining claims and dismissed those claims without leave to amend.

II. DISCUSSION

On appeal, plaintiffs challenge the trial court's order sustaining defendants' demurrer to the section 1983 claims in the SAC without leave to amend. Plaintiffs argue they should have been granted leave to amend to sue defendants in their individual capacities. They also argue the trial court erred in finding Stiles was immune from suit. We agree with the trial court that the SAC fails to state a claim against defendants and granting leave to amend would be futile.

A. *Standard of Review*

We apply federal law to determine whether a complaint pleads a cause of action under section 1983 in a manner sufficient to survive a general demurrer. (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 563.) Under the federal rules, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." (Fed. Rules Civ. Proc., rule 8(a)(2), 28 U.S.C.) "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." (*Balistreri v. Pacifica Police Dept.* (9th Cir. 1988) 901 F.2d 696, 699.) "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 679.) However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (*Id.* at p. 678.) Where a plaintiff cannot "nudge" a claim "across the line from conceivable to plausible," that claim must be dismissed. (*Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 570.) We review a decision to sustain a demurrer de novo. (*Balikov v. Southern Cal. Gas Co.* (2001) 94 Cal.App.4th 816, 819.)

Where a demurrer is sustained, the grant of leave to amend involves the exercise of discretion by the trial court. (*Balikov v. Southern Cal. Gas Co.*, *supra*, 94 Cal.App.4th at p. 819.) A trial court abuses its discretion if it sustains a demurrer without leave to amend when there is a reasonable possibility the plaintiff can cure a pleading defect by

amendment. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) In such case, the judgment must be reversed to allow a plaintiff an opportunity to amend. (*Ibid.*) The burden is generally on the plaintiff to demonstrate a reasonable possibility to cure. (*Ibid.*) “To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citation.] . . . [¶] . . . Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43–44.)

B. *Allenby and Delgadillo*

The trial court dismissed the section 1983 claims against Allenby and Delgadillo on the ground they are not “persons” for the purposes of the statute because they had been sued in their official capacities. This was the correct decision. Allenby and Delgadillo are literally persons, “But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. [Citation.] As such, it is no different from a suit against the State itself.” (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71.) Thus, “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” (*Ibid.*)

Plaintiffs now argue they should have been permitted to amend the SAC to sue Allenby and Delgadillo in their individual capacities. We agree this defect could have been cured through amendment. Plaintiffs need not have even pleaded new facts. In both personal and official-capacity suits brought under section 1983, a plaintiff must allege a violation of a federal right. (*Kentucky v. Graham* (1985) 473 U.S. 159, 166.) In

an official-capacity suit, the plaintiff must show a governmental entity's policy or custom played a part in the deprivation of the right, while in a personal-capacity suit, "it is enough to show that the official, acting under color of state law, caused the deprivation" (*Ibid.*) In this case, the facts pleaded in the SAC indicate Allenby and Delgadillo were acting under color of state law, i.e., they were acting as directors of DDS, when they engaged in the alleged violations of constitutional rights. Thus, there was more than a reasonable possibility plaintiffs could have cured the defect through amendment. A short statement that Allenby and Delgadillo were being sued in their personal capacities would have sufficed.

Defendants argue Allenby and Delgadillo's demurrer should have been sustained without leave to amend on the additional ground that plaintiffs' section 1983 claims are inadequately pleaded. We agree plaintiffs' allegations against Allenby and Delgadillo fall far short of the federal pleading standards. The only specific allegations as to Allenby and Delgadillo in the SAC are that they served as directors of DDS. To state a claim, plaintiffs must, at the very least, allege facts showing misconduct or bad acts on the part Allenby or Delgadillo. Yet it is entirely unclear from the SAC how these defendants acted to deprive Jeffrey, Elsie, or Nancy of their constitutional rights. To the extent plaintiffs are asserting Allenby and Delgadillo should be held liable for failure to supervise, their pleading also falls short. In order to establish supervisory liability in the section 1983 context, a plaintiff must allege: "(1) the supervisor had actual or constructive knowledge of [the] wrongful conduct; (2) the supervisor's response ' "was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices' " ' ; and (3) the existence of ' "an affirmative causal link" ' ' between the supervisor's inaction and [the plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280.) No such allegations appear in the SAC.

The burden is on the appellant to show how his or her pleading can be amended and how that amendment will change the legal effect of the pleading. (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at p. 43.) In this case, plaintiffs have failed to set forth any new factual allegations in their briefing on appeal. Plaintiffs

argue defendants' demurrer was sustained on the sole ground that Allenby and Delgadillo are not persons under section 1983, and they should not be faulted for declining to address deficiencies not identified by the trial court. They assert the matter should be remanded to the trial court for consideration of whether leave to amend should be granted as to these other deficiencies. But when asked at oral argument what specific facts plaintiffs could possibly plead so as to state a plausible claim against Allenby and Delgadillo, plaintiffs' counsel could not provide a response other than to repeat the SAC's vague allegations that Allenby and Delgadillo were part of a conspiracy. Accordingly, we find granting leave to amend would be futile and a remand would be a waste of judicial resources.

C. Stiles

The trial court sustained Stiles' demurrer to plaintiffs' section 1983 claims on three grounds: (1) because Stiles was sued in his official capacity, he is not a person within the meaning of section 1983; (2) Stiles is immune from suit; and (3) plaintiffs failed to plead facts sufficient to state a cause of action against Stiles. For the reasons set forth above, we find it reasonably probable plaintiffs could cure the first defect if given the chance to amend. However, the other two grounds for dismissal are more problematic, especially since plaintiffs have failed to describe how they would cure the deficiencies. Accordingly, we affirm the trial court's decision to sustain Stiles' demurrer without leave to amend.

Three of the four section 1983 claims set forth in the SAC are directed at Stiles. Those three claims assert (1) Stiles violated Jeffrey's and Elsie's First, Fourth, and Fourteenth Amendment rights; (2) Stiles engaged in malicious prosecution by causing false criminal charges to be brought against Jeffrey and Elsie; and (3) Stiles, along with almost every other defendant, engaged in a conspiracy to, among other things, remove Nancy from her parents' care on spurious allegations of abuse and neglect, falsely arrest and imprison Jeffrey and Elsie, secretly apply for conservatorship for Nancy, and forge documents to create the appearance Nancy's false imprisonment was voluntary. The only factual allegations in the SAC specifically related to Stiles are that he, along with SARC,

filed a false capacity declaration in the probate court, and entered an appearance in the criminal proceedings to request a stay away order.

We agree with the trial court that, based on the facts pleaded, Stiles is immune from suit. Section 1983 immunities are “predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.” (*Imbler v. Pachtman* (1976) 424 U.S. 409, 421.) Thus, “in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.” (*Id.* at p. 431, fn. omitted.) However, “a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman’s.” (*Id.* at p. 430, fn. omitted.) The same rules apply to an agency attorney, such as Stiles, who arranges for the presentation of evidence on the record in the course of an adjudication. (*Butz v. Economou* (1978) 438 U.S. 478, 516.) Stiles is therefore immune from any and all claims arising from his role as DDS’s advocate in the conservatorship and criminal proceedings.

Plaintiffs argue Stiles could have functioned as an investigator or legal advisor and committed acts outside the courtroom not subject to absolute immunity. They do not suggest what those acts might have been, except to argue Stiles fabricated evidence and was part of a conspiracy to obtain a false arrest. But the SAC does not contain allegations that Stiles fabricated evidence. Instead, plaintiffs vaguely alleged Stiles and SARC filed a false capacity declaration that was purportedly signed by a James D. Morgan, M.D., and Dr. Morgan later testified he did not sign the declaration. It is unclear from the SAC whether Stiles was aware of the declaration’s alleged falsity or had any a role in the purported forgery.

As to the malicious prosecution claim, plaintiffs’ allegations are far too vague to state a claim for relief against Stiles. “Ordinarily, the decision to file a criminal complaint is presumed to result from an independent determination on the part of the prosecutor.” (*Awabdy v. City of Adelanto* (9th Cir. 2004) 368 F.3d 1062, 1067.) A plaintiff may refute the presumption of prosecutorial independence by alleging a

defendant named in a civil suit “improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings.” (*Ibid.*) Once again, it is unclear from the SAC what role, if any, Stiles played in the decision to bring charges against Jeffrey and Elsie. The only specific allegation as to Stiles’s role in the criminal proceedings is that he requested a stay away order, an act for which he is immune from suit.

Moreover, plaintiffs are not excused from pleading facts specific to Stiles merely because they have asserted a claim for conspiracy. “In order to allege a conspiracy under § 1983, a plaintiff must show ‘an agreement or “meeting of the minds” to violate constitutional rights.’ [Citation.] ‘To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.’ ” (*Steel v. City of San Diego* (S.D. Cal. 2010) 726 F.Supp.2d 1172, 1179 [finding conspiracy sufficiently pleaded where plaintiff alleged telephone conversations and other communications between defendants and identified testimony by defendants regarding the communications].) “[A]llegations of conspiracy must be supported by material facts, not merely conclusory statements.” (*Woodrum v. Woodward County, Okl.* (9th Cir. 1989) 866 F.2d 1121, 1126.) Further, “A plaintiff must allege with particularity facts in the form of specific overt acts.” (*Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 673.) In this case, plaintiffs’ conclusory allegations that Stiles and almost every other defendant named in the action somehow conspired to bring criminal charges against Jeffrey and Elsie do not support a section 1983 claim. Plaintiffs have not alleged specific facts showing meetings, communications, or correspondence between Stiles and the prosecutor. Nor is there or any indicia that Stiles exerted pressure on the prosecutor to bring criminal charges.

For these reasons, we affirm the trial court’s decision to sustain Stiles’s demurrer as to the section 1983 claims. We also affirm its decision to deny leave to amend. Although plaintiffs were well aware their claims were dismissed on immunity grounds, they have yet to explain how they would plead around this deficiency in an amended

complaint. Accordingly, it appears amendment would be futile.⁵ Plaintiffs argue other facts, which may be brought out at trial or summary judgment, may show Stiles engaged in misconduct while carrying out investigative activities for which he is not immune from suit. But the federal pleading standards do not give plaintiffs a free license to engage in unfounded fishing expeditions. (See *Ashcroft v. Iqbal*, *supra*, 556 U.S. at p. 678.) Although this case has been pending since 2006, plaintiffs have amended their pleading several times already, and plaintiffs filed a similar case in 2003, they have yet to point to any facts that would suggest Stiles stepped outside his role as a legal advocate. The trial court had ample reason to deny leave to amend, and certainly did not abuse its discretion in doing so.

III. DISPOSITION

The trial court's order sustaining defendants' demurrer to the section 1983 claims without leave to amend is affirmed. Defendants are entitled to recover their costs on appeal.

⁵ The additional allegations concerning Stiles in the TAC do not cure the deficiencies identified above. The conduct attributed to Stiles in the TAC relates to his representation of DDS in the conservatorship proceedings, conduct for which he is immune from suit.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.

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