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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DIANE DELLAMARGGIO,
Plaintiff and Appellant,

v.

WINCO FOODS, INC.,
Defendant and Respondent.

A148483

(Solano County
Super. Ct. No. FSC045883)

Appellant Diane Dellamarggio (Dellamarggio) filed a complaint against her now-estranged husband’s employer, respondent WinCo Foods, Inc. (WinCo), for damages she suffered as a result of an extramarital affair her husband had with another WinCo employee. The trial court sustained WinCo’s demurrer to the complaint without leave to amend on the ground that the action was barred by California’s “anti-heart-balm statute,” Civil Code, section 43.5. Dellamarggio, *in propria persona*, contends the statute does not apply to her case and that alternatively, she should be given the opportunity to amend her complaint. For the reasons set forth below, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

On August 28, 2015, Dellamarggio filed a complaint against WinCo alleging two causes of action: (1) professional negligence; and (2) breach of non-fiduciary duty under aiding and abetting.

Dellamarggio's husband,² an employee of WinCo, transferred from its store in Eugene, Oregon, to its store in Vacaville, California, in October 2010. He introduced Dellamarggio to the store manager and told him that "the reason he transferred from Oregon was to be with this beautiful woman, [Dellamarggio,] the love of his life." Dellamarggio and her husband were married on November 8, 2011. It was common knowledge among WinCo management and store employees that Dellamarggio and her husband were married.

In August 2014, Dellamarggio received a letter at home from an anonymous WinCo employee informing her that her husband had been having a sexual affair with another married WinCo employee "for quite some time." Dellamarggio confronted her husband, who denied knowing the married employee.

The next day, Dellamarggio's husband told her "not to bother giving his boss [the store manager] a copy of the anonymous letter" because the store manager had also received a letter and knew of the affair. According to the husband, the store manager threw away the letter after reading it, and told the husband, "his affair was none of his [the store manager's] business and he didn't care as long as it remained professional at work." Dellamarggio learned that the store manager was also having an extramarital

¹Because this appeal is from a ruling sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 814), and accept as true all facts that may be implied or inferred from those expressly alleged (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

²The husband's name is not provided in the complaint; we will refer to him as the husband or her husband in this opinion.

affair with a young female cashier, and that he was giving preferential treatment to an employee who was the cashier's close friend.

WinCo had a "prohibited supervisor/subordinate relationships" policy that precluded its employees from "having romantic relationships, relations, affairs or sexual relationships with employees under their direct or indirect supervision." The policy stated, "Violation of this policy will be subject to immediate discharge." The married female employee with whom Dellamarggio's husband had an affair had signed an acknowledgment of receipt of this policy on September 30, 2010. Despite this, WinCo did not terminate this employee, and "only demoted" her from bakery manager to cashier.

In her first cause of action for professional negligence, Dellamarggio alleged she "suffered loss of her spouse, economic present and future loss of her husband's financial securities from pension and retirement, risk of contracting AID's [sic] and STD's [sic], and loss of medical coverage until retirement age," as a proximate result of WinCo's act of violating its own "subordinate policy by allowing employees to breach the terms of their agreement." In her second cause of action for breach of non-fiduciary duty under aiding and abetting, Dellamarggio alleged that WinCo had "a duty of care to [her] in a non-fiduciary manner," and that it "contributed" to her "humiliation, embarrassment, emotional distress, and mental anguish" and caused her to "suffer[] from the risk of exposure to AID's [sic] and STD's [sic]" by violating its own policy. She sought "damages for breach of contract . . . including lost benefits and income, past and future," "compensatory damages . . . including lost future earnings, financial securities, medical benefits, and damages for emotional distress, humiliation and mental anguish," costs of suit, and pre-judgment and post-judgment interest.

WinCo demurred to the complaint on the ground the entire action was barred by California's "anti-heart-balm statute," Civil Code, section 43.5. Dellamarggio opposed the demurrer. The trial court sustained the demurrer without leave to amend, stating: "All of Plaintiff's causes of action are based on damages she claims to have suffered

from the adultery of her husband with a coworker . . . Claims arising out of criminal conversation, or sexual intercourse of an outsider with a husband or wife, are barred by California's Anti-Heart-Balm Statute. (Civ. Code, § 43.5(b); *Jacks v. Jacks* (1956) 140 Cal.App.2d 852, 853; *Hirschy v. Coodley* (1953) 116 Cal.App.2d 102, 103.) Notwithstanding Plaintiff's labeling of her causes of action as sounding in 'professional negligence' and 'aiding and abetting,' the 'anti-heart-balm statute' precludes 'the mere recharacterization of the abolished amatory cause of action as a form of negligence of some other acknowledged tort.' ” (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 267.)

DISCUSSION

“In reviewing the sufficiency of a complaint against a general demurrer, we . . . ‘treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . We also consider matters which may be judicially noticed.’ . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “[I]n ruling on a demurrer, the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief.” (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.) The task of the reviewing court, therefore, “is to determine whether the pleaded facts state a cause of action on any available legal theory.” (*Ibid.*)

The “anti-heart-balm statute,” Civil Code, section 43.5 (section 43.5), on which the trial court relied in sustaining the demurrer, provides: “No cause of action arises for: [¶] (a) Alienation of affection. [¶] (b) Criminal conversation. [¶] (c) Seduction of a person over the age of legal consent. [¶] (d) Breach of promise of marriage.” The statute “creates a blanket immunization from liability for the conduct it protects unless such

conduct ‘breaches a duty of care *independent* of the causes of action barred therein.’ ”
(*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 267.)

In *Richelle L. v. Roman Catholic Archbishop*, *supra*, 106 Cal.App.4th at page 263, an adult member of the Church of Our Lady of Mount Carmel brought an action against a church priest and his employer, the Roman Catholic Archdiocese, for damages she suffered as a result of a sexual relationship initiated by the priest who used his position of power to seduce her. The complaint stated causes of action for breach of fiduciary duty and general negligence against both the priest and the Archdiocese, fraud and deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress only against the priest, and negligent supervision/retention and negligent hiring only against the Archdiocese. (*Ibid.*) The trial court sustained the defendants’ demurrers without leave to amend and the Court of Appeal affirmed, stating, “section 43.5 means it is no longer possible for two consenting adults in the state of California to engage in ‘illicit intercourse,’ ” and that the statute precludes “the mere recharacterization of the abolished amatory cause of action as a form of negligence or some other acknowledged tort.” (*Id.* at p. 267.)

In *Haldane v. Bogy* (1962) 208 Cal.App.2d 302, 303, the plaintiff brought suit against his ex-wife’s friend and two attorneys, alleging they were responsible for the divorce action his wife had filed. The Court of Appeal affirmed the trial court’s order sustaining the defendants’ demurrer, holding that “[t]he only cause of action . . . appellants complaint even remotely approaches is one for alienation of affections, and actions on that ground have been abolished in California by section 43.5 . . .” (*Ibid.*)

Similarly, here, Dellamarggio’s action is barred by section 43.5 because she attempts to hold a third party—WinCo—responsible for damages she suffered as a result of her husband’s act of engaging in an extramarital affair with a co-worker. Both of her causes of action are based entirely on her husband’s affair, e.g., that WinCo enabled her

husband to have the affair and caused her to suffer, among other things, the “loss of her spouse” and “humiliation.” Dellamarggio asserts on appeal that section 43.5 does not apply to her case because the statute was “abolished in 1939.” She cites no authority for this position. In fact, 1939 is the year the Legislature added the statute to the Civil Code. (Stats. 1939, ch. 128, § 2, p. 1245.)

Moreover, we conclude the trial court’s ruling was proper for the additional reason that under no set of facts could Dellamarggio establish either of her causes of action. Her first cause of action for professional negligence is a variant of a negligence claim.

(Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 998.)

Her second cause of action entitled “breach of non-fiduciary duty under aiding and abetting” does not exist, but read liberally, appears to be a cause of action also based in negligence. To establish a cause of action for negligence, Dellamarggio must show that WinCo owed her a legal duty of care, breached that duty, and proximately caused the resulting injury. *(Ladd v. County of San Mateo (1996) 12 Cal.4th 913, 917.)*

Dellamarggio does not articulate what duty WinCo owed her and cites no authority to support the position that it owed her a duty to prevent her husband’s affair. *(See e.g., Richards v. Stanley (1954) 43 Cal.2d 60, 65 [“[I]n the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another”].)* Dellmarggio did not—and cannot—allege facts necessary to establish that WinCo owed her a duty to prevent the affair.

Finally, we conclude the trial court did not abuse its discretion in denying Dellamarggio’s request for leave to amend her complaint. “When a demurrer is sustained without leave to amend, ‘we decide 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. . . . The burden of proving such reasonable possibility is squarely on the plaintiff.’ ” *(Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 992.)* “To show abuse of discretion, plaintiff

must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action.” (*Ibid.*) Here, Dellamarggio asserts only that she “was not afforded an opportunity to amend the complaint or to present any evidence to the court to overcome or oppose the dismissal of her complaint.” She has not explained how she can amend her complaint to state a valid cause of action.

DISPOSITION

The judgment is affirmed. Respondent WinCo Foods, Inc., shall recover its costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

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