

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHRISTINA MARIE FASSETT,

Plaintiff and Appellant,

v.

MICROSOFT CORPORATION et al.,

Defendants and Respondents.

B234611

(Los Angeles County
Super. Ct. No. PC048855)

APPEAL from an order of the Superior Court of Los Angeles County.

Randy Rhodes, Judge. Affirmed.

Christina Marie Fasset, in pro. per., for Plaintiff and Appellant.

Wilson Turner Kosmo, Frederick W. Kosmo, Jr. and Christian S. Scott for
Defendant and Respondent Microsoft Corporation.

K&L Gates, Jon Michaelson and Michele D. Floyd; and Nancy Chang for
Defendant and Respondent Yahoo! Inc.

The trial court dismissed an action for damages on the ground the plaintiff failed to file an amended pleading after being granted leave upon an order sustaining demurrers to plaintiff's original complaint. We affirm.

FACTS

*The Events Giving Rise to the Litigation*¹

In April 2010, defendant John Doe gained unauthorized access into plaintiff and appellant Christina Fassett's computers, network and email services. Doe hacked Fassett's computers intending to spy on and disrupt her business operations and personal affairs. Doe hacked Fassett's computers using email service platforms developed and placed into the marketplace by Yahoo! Inc. and the Microsoft Corporation. Yahoo and Microsoft did not prevent Doe's wrongful conduct.

The Litigation

In August 2010, Fassett, in pro. per., filed a complaint for damages against Doe, Microsoft, and Yahoo. The complaint alleged causes of action as follows: (1st) violation of the Anti-Phishing Act (Bus. & Prof. Code, § 22948) against Doe only; (2d) trespass against all defendants; (3d) conversion against all defendants; (4th) intentional infliction of emotional distress against all defendants (IIED); and (5th) negligent infliction of emotional distress against all defendants.

In October 2010, Yahoo and Microsoft filed separate demurrers to the complaint.² The demurrers were set on the trial court's calendar for hearing in mid-March 2011. In February 2011, Fassett dismissed John Doe from her action. On March 1, 2011, Fassett dismissed her causes of action for trespass, conversion, and IIED against Yahoo and Microsoft, leaving only her negligence-based cause of action against the companies.

¹ As always in the context of a demurrer, we consider the facts that are pleaded in the complaint to be true. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The record designated by Fassett for this appeal does not include a copy of her complaint; on our own motion we have augmented the record on appeal to include a copy of her complaint, obtained from the trial court.

² The record designated by Fassett for this appeal does not include copies of the demurrers.

On March 16, 2011, the trial court sustained the demurrers to Fassett's complaint, with 30 days leave to file an amended complaint.³ There is nothing in the record before us on this appeal to show that Fassett ever filed an amended complaint. On April 12, 2011, Fassett filed a document entitled: "Motion for Leave to Amend to Add Microsoft Corporation and Yahoo! Incorporated To First Cause of Action As Order on March 16, 2011, Violation of the Anti-phishing Act of 2005 Business and Professions Code § 22948 et seq., Negligent Infliction of Emotional Distress." At a case management conference held on May 10, 2011, the trial court denied Fassett's "motion to amend" on the grounds that it had not been properly served on the defendants, and did not comply with court rules. During the hearing, the trial court repeatedly stated to Fassett that it could not take sides by giving her legal advice, and that she needed to read the court's rulings as a "road map" for how to proceed with her case.

On May 20, 2011, Microsoft and Yahoo filed separate ex parte applications to dismiss Fassett's complaint with prejudice pursuant to Code of Civil Procedure section 581, subdivision (f)(2),⁴ and California Rules of Court, rule 3.1320(h).⁵ In their applications, Microsoft and Yahoo pointed out to the trial court that Fassett had not filed an amended complaint within the 30-day time limit specified in the court's ruling of March 16, 2011, sustaining Microsoft's and Yahoo's demurrers. Fassett appeared at the ex parte hearing, and the trial court permitted her to argue at length against the ex parte applications. At the conclusion of the hearing, the trial court granted the applications to dismiss Fassett's complaint as to both Microsoft and Yahoo.

³ The record designated by Fassett for this appeal does not include a copy of the trial court's minute order on the demurrers. We do not know the grounds on which the court sustained the demurrers. We do not know whether the trial court directed any party to give notice of the ruling on the demurrers.

⁴ Hereafter section 581(f)(2).

⁵ Hereafter rule 3.1320(h).

On June 24, 2011, the trial court signed and entered a written order dismissing Fassett's complaint with prejudice. The court's order tracks the language of section 581(f)(2) providing that a court "may dismiss a complaint" when a plaintiff fails to file an amended complaint within the time allotted by the court upon a ruling on a demurrer. (Emphasis added.)

Fassett filed a timely notice of appeal.

DISCUSSION

Fassett, in pro. per., argues the order dismissing her complaint must be reversed because the trial court did not understand that it had discretion under section 581(f)(2) and rule 3.1320(h) not to dismiss her complaint. Fassett argues the trial court wrongly understood that dismissal of her action was mandatory upon her failure to file a timely amended complaint. Fassett argues a court's ruling based on a mistaken understanding of its discretion shows an abuse of discretion. We find no error.

Section 581(f)(2) provides that the trial court "may dismiss the complaint" when, "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." Rule 3.1320(h) provides: "A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under . . . section 581(f)(2)." The parties agree, and so do we, that the use of the word "may" in section 581(f)(2) means the trial court had discretion whether or not to dismiss Fassett's complaint on the ex parte applications presented by Yahoo and Microsoft. (See, e.g., *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 Cal.App.3d 596, 606 [it is a well established rule of statutory construction that the word "shall" connotes mandatory action whereas "may" connotes discretionary action].) As always on appeal, we presume that the trial court was aware of and followed the law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913, citing Evid. Code, § 664.)

To overcome this presumption, Fassett points us to the trial court's comments at the time it ruled on the ex parte applications presented by Microsoft and Yahoo. These are the court's comments as shown in the reporter's transcript:

“Well, here's the issue. [The case] is here today for ex parte application which is appropriate under [rule 3.120(h)], as well as [section 581(f)(2)], for the relief [sought], i.e., dismissal based on the failure to amend within 30 days. *I'm without option*. It's granted [as to both defendants].” (Italics added.)

Though Fassett's argument gives us pause, in the end it does not persuade us that we must reverse the order dismissing her complaint with prejudice. We agree with Fassett that the trial court's use of language “without option” may suggest the court was acting with the misunderstanding that dismissal is mandatory when a plaintiff does not file a timely amended pleading. The problem we have with reversing is that the record, when taken as a whole and not as to an isolated comment, does not persuade us that the court misunderstood the law. The ex parte applications filed by Yahoo and Microsoft both used the discretionary “may dismiss” language in invoking section 581(f)(2), and the court's written order uses similar “may dismiss” language. The court's orally stated “without option” language at the ex parte hearing, in our view, must be read in context. It came at the end of the hearing, after Fassett made a lengthy statement, largely filled with legally irrelevant comments, objecting to the proceeding. We read the court's “without option” language to be an expression of the court's conclusion that Fassett had given the court no option but to dismiss her complaint because she had not shown the court any reason for not filing a timely amended pleading, and for not dismissing.

We agree with Microsoft and Yahoo that the trial court acted within its discretion in dismissing Fassett's complaint. The trial court dismissed Fassett's complaint after she failed to amend her pleading despite being given ample time to do so, and after she had failed to follow procedural rules despite being directed to them (see, e.g., *Kobayashi v.*

Superior Court (2009) 175 Cal.App.4th 535, 543 [pro. per. litigant's are held to the same standards as attorneys]). When given the opportunity to speak at the ex parte hearing, Fassett did little more than launch into a vague objection based on a plea that she was just "trying to exercise [her] rights as an American."

Fassett's reliance on *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176 (*Richards*) for a different result is misplaced. In *Richards*, an issue arose in the trial court whether a Business & Professions Code section required mandatory dismissal of an action or vested the court with discretion. (*Id.* at p. 1178.) The trial court interpreted the section to require mandatory dismissal. Division Five of our court interpreted the section differently, and remanded the cause to the trial court for reconsideration of the dismissal issue under the correct, discretionary standard. Here, there is no indication that the trial court made an error of interpretation regarding section 581(f)(2) or rule 3.1320(h).

DISPOSITION

The order dismissing the complaint is affirmed. Each party to bear its own costs on appeal.

BIGELOW, J.*

We concur:

PERLUSS, P. J.

JACKSON, J.

* Presiding Justice, Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.