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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ARTHUR J. BREWSTER,

Plaintiff and Appellant,

v.

MARY BLACKSHEAR et al.,

Defendants and Respondents.

B238325

(Los Angeles County Super. Ct.  
No. BC450894)

APPEAL from the judgments of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Arthur J. Brewster, in pro. per., for Plaintiff and Appellant.

The Law Office of Linda Rose Fessler and Linda Rose Fessler for Defendants and Respondents The Law Office of Linda Rose Fessler and Linda Rose Fessler.

No appearance for Defendant and Respondent Mary Blackshear.

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Plaintiff and appellant Arthur J. Brewster appeals from two judgments of dismissal following orders granting the demurrers of defendants Mary Blackshear, her attorney Linda Rose Fessler, and The Law Offices of Linda Rose Fessler in this action to set aside a judgment.<sup>1</sup> Brewster contends: 1) the hearing date for Blackshear's demurrer was untimely; and 2) the doctrine of res judicata does not apply because the complaint alleged extrinsic fraud. We conclude Brewster has failed to show the hearing date was untimely and the allegations of the complaint do not allege extrinsic fraud, and therefore, we affirm.

### **FACTS AND PROCEDURAL BACKGROUND**

In January 2009, Blackshear, through Fessler, filed a breach of contract action against several defendants, including Brewster. Brewster claimed to have been the victim of identity theft. On the day of trial, Blackshear dismissed Brewster without prejudice.

On September 21, 2009, Brewster filed an action against Blackshear and Fessler for malicious prosecution. Blackshear and Fessler filed a special motion to strike under Code of Civil Procedure section 425.16 (an anti-SLAPP motion),<sup>2</sup> which the trial court granted. The court found that Brewster had failed to show Blackshear and Fessler lacked probable cause to prosecute the action against Brewster and failed to even attempt to establish malice. The court struck the complaint and awarded attorney fees and costs to Blackshear. Brewster appealed the order granting the anti-SLAPP motion. On September 23, 2010, Division Four of this District affirmed the trial court's order. Brewster's petition to the California Supreme Court for review was denied.

On December 9, 2010, Brewster filed the instant action to set aside the order striking the malicious prosecution complaint. Brewster alleged the evidence submitted in

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<sup>1</sup> Blackshear has not filed a respondent's brief on appeal.

<sup>2</sup> SLAPP stands for strategic lawsuits against public participation. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn.1.)

support of the anti-SLAPP motion was fraudulent as follows. Blackshear's declaration in support of the anti-SLAPP motion was forged and perjured, because Fessler admitted that she used electronic copies of Blackshear's signature on several documents filed with the court. In addition, Blackshear's and Fessler's declarations were intentionally false and misleading. As a result, Brewster was prevented from a fair hearing.

In February 2011, Fessler and her firm filed a demurrer based on principles of res judicata and the finality of the ruling in the malicious prosecution matter. Brewster opposed the demurrer by arguing that a judgment procured by extrinsic fraud may be attacked in an independent action.

On March 8, 2011, Blackshear filed a demurrer based on res judicata and failure to allege facts sufficient to constitute a cause of action. On March 15, 2011, Blackshear provided notice changing the hearing date to Monday, April 18, 2011. The hearing date was 41 days after the date that the demurrer was filed. Brewster opposed Blackshear's demurrer on several grounds, including that the demurrer was filed more than 30 days after service of the complaint in violation of Code of Civil Procedure section 430.40, subdivision (a), and the hearing date was not within 35 days of the filing of the demurrer in violation of California Rules of Court, rule 3.1320(d).

A hearing was held on the demurrer brought by Fessler and her firm on July 19, 2011. The trial court explained that although a judgment obtained through extrinsic fraud may be set aside, Brewster had not alleged extrinsic fraud. The court sustained the demurrer of Fessler and her firm.

A hearing was held on Blackshear's demurrer on September 1, 2011. The trial court noted that the demurrer was untimely because it was filed more than 30 days after service of the complaint. However, the court stated that it had discretion to consider a late filed demurrer and was exercising its discretion to do so. The court sustained Blackshear's demurrer. On December 1, 2011, the court entered judgments of dismissal as to Blackshear, Fessler, and her firm.

On January 6, 2012, Brewster filed a notice of appeal purporting to appeal from the orders sustaining the demurrers. In the interest of justice, we deem Brewster's appeal

to be from the December 1, 2011 judgments following the orders sustaining the demurrers.

## DISCUSSION

### **Standard of Review**

“A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]’ [Citation.] Thus, the standard of review on appeal is de novo. [Citation.] ‘In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “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.” [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]’ [Citations.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

“On appeal, we will affirm a ‘trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]’ [Citation.] Accordingly, ‘we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]’ [Citation.]” (*Berg & Berg Enterprises, LLC v. Boyle, supra*, 178 Cal.App.4th at pp.1034-1035.)

### **Timeliness of Hearing**

Brewster contends the date set for the hearing on Blackshear’s demurrer was untimely under California Rules of Court, rule 3.1320(d). We find that he has failed to show the hearing was untimely.

California Rules of Court, rule 3.1320(d) provides: “Demurrers must be set for hearing not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter. For good cause shown, the court may order the hearing held on an earlier or later day on notice prescribed by the court.”

Brewster did not show in the trial court or on appeal that the hearing was not set on the first date available to the court. “It is the appellant’s burden to demonstrate the existence of reversible error. [Citation.]” (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 766.) “A ““judgment or order of the lower court is *presumed correct* [, and a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.]” (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499.)

In addition, Brewster has not shown that he suffered any prejudice as a result of the hearing date being set 41 days after the demurrer was filed. (Cal. Const., art VI, § 13; Code Civ. Proc., § 475.)

### **Extrinsic Fraud**

Brewster contends the complaint alleged a cause of action to set aside the judgment in the malicious prosecution action based on extrinsic fraud; namely, Blackshear’s signature on documents was forged and the declarations in support of the anti-SLAPP motion contained false statements. We agree with the trial court that the complaint fails to allege extrinsic fraud to induce a court in equity to set aside the judgments.

“‘A court of equity under proper circumstances will set aside a judgment obtained by fraud.’ [Citation.] The fraud must be extrinsic and collateral. [Citation.]” (*Estate of Standing* (1950) 99 Cal.App.2d 668, 673.) Extrinsic fraud is “‘fraud *practiced directly upon the party seeking relief* against the judgment or decree [such] that [the] party has been prevented from presenting *all* of his case to the court.”” (*Caldwell v. Taylor* (1933) 218 Cal. 471, 475-477.) “Extrinsic fraud occurs when a party is deprived of the

opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. [Citation.]” (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.) Examples of extrinsic fraud warranting setting aside a judgment include: conduct that convinces a party not to appear or participate in the proceeding, failure to provide notice of the proceeding to the other party, a false affidavit of service, or preventing the testimony of material witnesses. (*Estate of Standing, supra*, at pp. 673-674.) “The essence of extrinsic fraud is one party’s preventing the other from having his day in court.” (*City and County of San Francisco v. Cartagena, supra*, at p. 1067.)

“‘[Extrinsic] fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. [Citations.] Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief . . . .’ [Citations.]” (*Estate of Standing, supra*, 99 Cal.App.2d at pp. 673-674.) “‘Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself but relates to the manner in which it was procured.’ [Citation.]” (*Id.* at p. 674.)

“By contrast, fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so. [Citation.] Such a claim of fraud goes to the merits of the prior proceeding which the moving party should have guarded against at the time. Where the defrauded party has failed to take advantage of liberal discovery policies to fully investigate his claim, any fraud is intrinsic fraud. [Citation.]” (*City and County of San Francisco v. Cartagena, supra*, 35 Cal.App.4th at pp. 1067-1068.) Allegations that a will was forged is an example of intrinsic fraud. (*Granzella v. Jargoyhen* (1974) 43 Cal.App.3d 551, 556.)

In this case, Brewster has not alleged extrinsic fraud permitting the judgments to be set aside. Brewster fully participated in the anti-SLAPP proceedings. The allegedly forged signatures and false statements in the declarations of opposing parties did not prevent Brewster from presenting his claims to the court. He does not have standing to raise the issue of whether Blackshear was deprived of her day in court as a result of her signature being forged on documents submitted on her behalf. False statements in the declarations of opposing parties as to the facts of the underlying breach of contract action did not deprive Brewster of an opportunity to present his claim or defense to the court. The trial court properly sustained the demurrers on the ground that Brewster failed to allege any extrinsic fraud which would justify setting aside the judgments against him.

### **DISPOSITION**

The judgments are affirmed. Respondents Linda Rose Fessler and The Law Offices of Linda Rose Fessler are awarded their costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.