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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JACQUELINE BAZIKIAN,

Plaintiff and Appellant,

v.

NASSER GHOLIAN MOGHADAM,

Defendant and Respondent.

B243301

(Los Angeles County
Super. Ct. No. LC095354)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Frank Johnson, Judge. Affirmed.

Jacqueline Bazikian, in pro. per.; and Motaz M. Gerges for Plaintiff and Appellant.

Law Offices of Farrah Mirabel, and Farrah Mirabel for Defendant and Respondent.

Plaintiff and appellant Jacqueline Bazikian sued defendant and respondent, Nasser Gholian Moghadam, M.D., an anesthesiologist, following a “failed” liposuction procedure. The trial court sustained without leave to amend separate demurrers to causes of action for medical battery and fraud by intentional misrepresentation and concealment of fact. We affirm.

FACTS

As always in the context of reviewing a demurrer we consider the facts alleged in the operative pleading to be true. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We may also consider matters that are judicially noticed. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Examined in the light of these rules, these are the facts in this case.

In July 2005, Bazikian underwent a liposuction procedure at the Sunrise Surgical Center by Parvin Mirabadi, M.D., who is not a party the current action or appeal. On the day of the procedure, Bazikian spoke to a person who “used” Dr. Moghadam’s name and who represented that he was a board certified anesthesiologist and would be administering anesthesia. The liposuction procedure by Dr. Mirabadi “failed.”¹ On a date not alleged, Bazikian initiated an investigation against Dr. Mirabadi with the California Medical Board. In June 2008, Bazikian was represented by counsel and sued Dr. Mirabadi and Sunrise Surgical Center for medical malpractice.

In September 2011, Bazikian “was trying to conclude her investigation against Dr. Mirabadi with the Medical Board, and came across Nasser Golian Moghadam’s photo in Facebook.” Bazikian “had a very sick feeling when she first saw Nasser Moghadam’s photo because he was not the same anesthesiologist she saw on the day of her surgery.” Bazikian contacted Dr. Moghadam and requested a copy of her medical records. Dr. Moghadam did not respond.

¹ In her original pleading, Bazikian alleged she suffers from “Reflex Sympathetic Dystrophy,” a nerve disorder characterized by chronic pain which usually develops at the site of an injury. In her first amended complaint, Bazikian does not allege the nature of the liposuction failure.

In November 2011, Bazikian filed a complaint against Dr. Moghadam and Does 1 through 100. As relevant to the current appeal, Bazikian's original complaint alleged a cause of action for fraud and a cause of action for medical battery.

Dr. Moghadam filed a demurrer in which he argued, among other legal defenses, that Bazikian's cause of action for medical battery was barred by the two-year statute of limitations under Code of Civil Procedure section 335.1. Specifically, Dr. Moghadam argued that Bazikian's cause of action showed on its face that the alleged battery had occurred in July 2005, and that Bazikian did not file her complaint until more than six years later. On February 27, 2012, the trial court entered an order sustaining Dr. Moghadam's demurrer to Bazikian's cause of action for medical battery, without leave to amend.

In March 2012, Bazikian filed a first amended complaint alleging a single cause of action for fraud by intentional misrepresentation and concealment of fact. This pleading alleged that Bazikian had met and talked with "Doe #1" — an "unknown" person — on the day of her liposuction procedure at the Sunrise Surgical Center and that Doe #1 had misrepresented that he was Dr. Moghadam and that he was an expert in anesthesia. Bazikian alleged that Doe #1 had "used both local and general anesthesia in quantities too high and not according to [her] weight . . ." during her liposuction surgery.

As to Dr. Moghadam, the pleading alleged that he "knew or should have known that Doe #1, Dr. Mirabadi, and others at Sunrise Surgical Center [were] . . . using his name and forging medical records and deceiving patients that they [were] being treated by [Dr. Moghadam] when in fact, Doe #1 and/or others were using [Dr. Moghadam's] name, license, and likeness to deceive and administer anesthesia . . ." Bazikian also alleged that Dr. Moghadam "allowed Doe #1, Dr. Mirabadi, Sunrise Surgical Center and others working at Sunrise Surgical Center to use his name [and] identity, sign medical records, and perform anesthesia services under his name . . ." ² Bazikian alleged she

² Bazikian's first amended complaint alleged: "Plaintiff believes and therefore, alleges, that Dr. Moghadam may be related by marriage to Dr. Mirabadi's husband, Mehdi Amin Moghadam, M.D., [a] pediatrician."

justifiably relied on the defendants' conduct, and "was induced to undergo [] liposuction surgeries at the Sunrise Surgical Center believing that she was [being] treated by competent board certified anesthesiologist where in fact, she was not." She further alleged: "Because of Plaintiff's reliance upon defendants' conduct, Plaintiff has been damaged as follows: Plaintiff has suffered severe emotional distress, physical and emotional pain, underwent years of treatment and is still suffering."

Dr. Moghadam filed a demurrer in which he argued, among other defenses, that Bazikian's first amended complaint failed to allege specific facts showing any "nexus" or "privity" between Dr. Moghadam and Doe #1 which would hold the former liable for the latter's misrepresentations. Dr. Moghadam also argued that Bazikian's action was barred by the statute of limitations as she failed to allege facts showing why she took more than six years to learn that the imposter "Dr. Moghadam" who she saw on the day of her liposuction surgery was not the real Dr. Moghadam. Dr. Moghadam requested judicial notice that Bazikian, represented by counsel at the time, had filed a medical malpractice action against Dr. Marabadi and Sunrise Surgical Center in June 2008.

On June 6, 2012, the parties argued the merits of Dr. Maghadam's demurrer to the trial court. An attorney, Motaz Gerges, appeared at the hearing on behalf of Bazikian. He indicated he had just been retained and requested that the court grant leave to file a second amended complaint. The court sustained Dr. Maghadam's demurrer without leave to amend, and dismissed the action with prejudice.

Bazikian filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

The allegations of a complaint must be liberally construed in favor of the pleader. (Code Civ. Proc., § 452.) A demurrer tests only the legal sufficiency of a complaint, not the truth of the alleged facts. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) A plaintiff need only plead those facts showing that he or she is entitled to some form of relief from the defendant. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) Whether the plaintiff has alleged facts showing he or she is entitled to relief

against the defendant is “a pure question of law.” (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1530.)

When a trial court sustains a demurrer, the decision whether to grant leave to file an amended pleading is a matter within the trial court’s discretion. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, a demurrer should not be sustained without leave to amend where it appears reasonably possible that the plaintiff can cure a defective complaint to state a cause of action. (*Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 296-297; *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118.) A trial court abuses its discretion by sustaining a demurrer without leave to amend where it appears from the complaint that under applicable substantive law there is a reasonable possibility that an amendment could cure the complaint’s defect. (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486.) The burden is on the plaintiff to demonstrate in what manner he or she can amend the complaint and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy, supra*, 18 Cal.3d at p. 349.)

II. Leave to Amend

Bazikian’s first contention is that trial court should have granted her leave to file a second amended complaint after she hired an attorney. We disagree.

As noted above, the burden is on Bazikian to demonstrate in what manner she can amend the complaint and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy, supra*, 18 Cal.3d at p. 349.) At the hearing on Dr. Modhadam’s demurrers, Bazikian did not proffer any amendments or an amended pleading to show how she could cure any defects in her pleading. She has not done so on appeal either. Accordingly, we will not find the trial court abused its discretion in declining to grant leave to file a second amended complaint.

III. Statute of Limitations — Medical Battery

The trial court sustained Dr. Moghadam’s demurrer to Bazikian’s cause of action for medical battery on the ground that her original pleading showed on its face that the cause of action was barred by the statute of limitations. On appeal, Bazikian contends that she stated a cause of action for medical battery because she alleged that she never

consented to be treated by Doe #1 — the Dr. Moghadam imposter. She contends that whatever consent she gave, it was obtained by fraud and is therefore invalid. Further, she argues that, under the discovery rule, a cause of action does not accrue until the plaintiff has reason to discover the cause of action or has reason to suspect a factual basis for one or more of its elements. (Generally citing *Grisham v. Phillip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623.) In attempting to invoke the delayed discovery rule, Bazikian argues: “The discovery of the fraud and medical battery were not until September 2011”

We find no error in the trial court’s ruling on the demurrer as to the cause of action for medical battery. Bazikian’s general discussion of the delayed discovery rule does not persuade us to find error. In order to invoke the discovery rule, a plaintiff must “plead facts showing an excuse for late discovery of the facts underlying his [or her] cause of action.” (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1247.) The plaintiff must allege facts showing that he or she ““was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him [or her] on inquiry. [Citations.]”” (*Ibid.*) Here, Bazikian’s pleadings alleged no more than that she saw Dr. Moghadam’s photo on Facebook in September 2011. She did not allege any facts concerning what she did to inquire about possible anesthesia problems between 2005, when she underwent her failed liposuction procedure, and 2011, when she first filed an action against Dr. Moghadam.

IV. Fraud

Bazikian next contends she alleged sufficient facts to plead a civil conspiracy to commit fraud involving Dr. Moghadam. We disagree.

Bazikian argues that, assuming the truth of the allegations in her complaint and first amended complaint, “[i]t is clear . . . that [she] was defrauded by an imposter who called himself [Dr.] Moghadam.” We agree. The problem for Bazikian, however, is that she has not alleged any fraudulent act on the part of Dr. Moghadam. The issue is not whether Bazikian alleged a fraud — plainly she did as to the “imposter;” the issue is whether Bazikian alleged facts stating a cause of action for fraud on the part of Dr. Moghadam.

Bazikian did not allege fraud with the required specificity. Fraud must be pleaded with more detail than other causes of action. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 240.) A cause of action for fraud, both in the nature of an affirmative misrepresentation or a concealment of fact, must be pleaded with specificity. (See. e.g., *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72-73; *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248; *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.) A plaintiff is required to plead facts ““which show how, when, where, to whom, and by what means”” the fraud was committed. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) The heightened pleading requirement for fraud allegations serves not only to give notice to a defendant of the specific fraudulent conduct against which he or she must defend, but also to deter the filing of complaints as a pretext for discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis. (*State of California ex rel. McCann v. Bank of America, N.A.* (2011) 191 Cal.App.4th 897, 909.)

A complaint alleging liability based on a civil conspiracy may generally allege the formation and operation of the conspiracy, but must specifically allege the wrongful act or acts done pursuant to it, as well as the damage resulting from the act or acts. Also, in alleging liability based on a conspiracy, bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 649.) Because a civil conspiracy renders each participating conspirator liable as a contributory tortfeasor whether or not he or she ultimately participate in the final injury causing wrongful act (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 566), the purpose of requiring the pleading of facts showing a conspirator’s acts pursuant to the conspiracy is to prevent a person from being drawn into litigation based on the bare allegation of being in a conspiracy.

Here, Bazikian alleged only generally that Dr. Moghadam knew or should have known that his name was being used by others, and allowed others to use his name. We agree with Dr. Moghadam that the general allegations in Bazikian's pleadings were not sufficient to state a claim for fraud, particularly where liability is largely based on being a civil conspirator in a fraud.

Having concluded that Bazikian failed to allege her cause of action for fraud with the required specificity, we do not address the further issues whether her cause of action was barred by the statute of limitations or by the doctrine of res judicata based upon her prior lawsuit against Dr. Mirabadi and Sunrise Surgical Center.

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.