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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

PELISI FOKET FONUA,

Plaintiff and Appellant,

v.

JERRY D. CRUM et al.,

Defendants and Respondents.

C066480

(Super. Ct. No. 48630)

Plaintiff Pelisi Foket Fonua brings this pro se appeal from the trial court's order granting defendants' motion to strike his third amended complaint, and dismissing the action in its entirety.¹

He contends on appeal the trial court erred in dismissing the action, and erred in denying his months-earlier motions to withdraw the second amended complaint, stay the action, and

¹ Plaintiff purports to appeal from a judgment. As no judgment appears to have been filed in this action, we construe his October 25, 2010, notice of appeal as an attempt to appeal from the court's September 30, 2010, order striking his third amended complaint and dismissing the action.

request an extension of time to file a new second amended complaint.

We find no error and affirm the order of dismissal.

BACKGROUND

Plaintiff, a prison inmate, filed this action in propria persona against Dr. Jerry D. Crum, Banner Lassen Medical Center, and Eagle Summit Orthopedic & Sports Medical Clinic in April 2009, alleging causes of action for medical malpractice, assault/battery, intentional tort, breach of contract, and civil rights violations.

The trial court sustained, with leave to amend, defendants' demurrers to the original complaint on the grounds it was uncertain and unintelligible. Plaintiff filed a first amended complaint, to which the trial court sustained defendants' demurrers (on the same grounds) with leave to amend. He then filed a second amended complaint, and defendants again demurred.

While defendants' demurrers to the second amended complaint were pending, plaintiff filed motions seeking (among other things) to withdraw the second amended complaint, stay the action, and extend the time to file a new second amended complaint.

Before plaintiff's motions could be heard, the trial court conducted the regularly scheduled hearing on defendants' demurrers to the second amended complaint, and sustained the demurrers with leave to amend. The last possible date for plaintiff to file a third amended complaint was then May 18, 2010.

The trial court thereafter denied plaintiff's motions to withdraw the second amended complaint, stay the action, and request an extension of time to file a new second amended complaint, finding the motions had been rendered moot by sustaining defendants' demurrers to the second amended complaint. The record on appeal does not show that notices of the court's denial of plaintiff's motions were served on plaintiff.

On May 27, 2010, plaintiff made an ex parte request to extend the time for filing a third amended complaint to June 20, 2010. Plaintiff also sought to continue the case management conference. Both requests were granted, and the case management conference was continued to July 15.

Plaintiff filed his third amended complaint on July 9, 2010.

Defendants then brought the instant motion to strike plaintiff's third amended complaint as untimely and to dismiss the case. The trial court granted their requests.

DISCUSSION

Plaintiff contends the trial court erred when it dismissed the action without giving him notice that the case might be dismissed. He also contends the court erred when it denied his earlier motions to withdraw his second amended complaint, to stay the action, and to request an extension of time to file a new second amended complaint, and then failed to give him timely notice those motions had been denied.

Each of these contentions lacks merit.

Applicable Rules Governing Appeals

On appeal, we must presume the trial court's judgment or order is correct. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In service of that rule, we adopt all intendments and inferences to affirm the judgment or order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.)

We also apply the general rules of appellate practice set forth in the California Rules of Court² including those requiring the appellant to show exactly how the claimed error caused a miscarriage of justice (rule 8.204(a)(2)(A); Cal. Const., art. VI, § 13). If the appellant fails to comply with any of these rules, the contentions are forfeited. (Rule 8.204(a)(1)(B); *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240.)

Plaintiff is not exempt from the rules governing appeals because he is representing himself in propria persona. A party representing himself is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants having attorneys. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; see *Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121 [self-

² Undesignated references to rules are to the California Rules of Court.

represented parties are held to "the same 'restrictive procedural rules as an attorney'"].)

II

Dismissal of the Action

Code of Civil Procedure section 436³ gives the trial court the authority to strike out any pleading, in whole or in part, that fails to conform to the laws of this state, a court rule, or the court's prior rulings, "at any time in its discretion, and upon terms it deems proper." An order striking a pleading is reviewed for abuse of discretion, and the burden is on the plaintiff to establish such abuse. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

We see no abuse of discretion in the trial court's striking plaintiff's third amended complaint. The court granted plaintiff's request for an extension of time to file a third amended complaint until June 20, 2010. The third amended complaint, filed July 9, 2010, was untimely.⁴ After the expiration of time allowed for leave to amend, a plaintiff must make a noticed motion for permission to file the amended pleading. (*Leader v. Health Industries of America, Inc., supra*, 89 Cal.App.4th at pp. 612-613.) No such motion was made.

³ Undesignated section references are to the Code of Civil Procedure.

⁴ Plaintiff appears to believe the time to file a third amended complaint was extended to July 15, 2010, it was not.

Plaintiff's contention on appeal that the trial court erred in ordering the third amended complaint stricken and the action dismissed rests on his assertion that a motion to dismiss "required notice to the plaintiff of a motion of intent to dismiss and an opportunity for [him] to be heard" and plaintiff "was not given notice that the case would [be] dismissed."

To the contrary, plaintiff received adequate notice that defendants sought dismissal of the action. Defendants' motion was entitled, "Motion to Strike Plaintiff's Purported Third Amended Complaint and Dismiss Case." The notice portion of the motion expressly declared that it sought to "dismiss the action in its entirety for failure to timely amend the complaint." Elsewhere in the memorandum of points and authorities, defendants urge that "the case should be dismissed in its entirety" and, under the heading "Conclusion," they "request[ed] that the Court issue an Order of Dismissal, as a result of Plaintiff's failure to timely amend."

Under these circumstances, plaintiff cannot show the trial court abused its discretion in granting the motion to dismiss the action.

III

*Denial of Motions to Withdraw the Second Amended Complaint,
Stay the Action, and Request an Extension of Time
to File a New Second Amended Complaint*

A plaintiff has the right to amend his complaint once without leave of court, before the defendant demurs or answers. (§ 472; see *Woo v. Superior Court* (1999) 75 Cal.App.4th 169,

175.) Thereafter, section 473 states the governing rule regarding amendment of pleadings: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding." (*Id.* subd. (a)(1); see also § 576.) Leave to amend a complaint is thus entrusted to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

Plaintiff contends his motions "effectively acted as [an] extension to file" the amended complaint⁵ because they "placed the court, and parties on notice that his [second] Amended Complaint would not be filed 30 days from" the order granting leave to amend. He is incorrect. A motion is an "application for an order" (§ 1003), i.e., a request directed by a party to the trial court, seeking an order granting the party specified relief. (*Id.*; rule 3.1110(a).) Thus, the mere request for an extension does not "effectively act[] as" an extension; it is not self-executing. A party obtains the asked-for relief only if the court enters an order granting his or her motion.

Finally, plaintiff asserts he "was entitled to receive notice from the [s]uperior court" in March 2010 that his motions

⁵ Plaintiff mistakenly asserts in his brief on appeal the motion sought to extend the time within which to file the *third* amended complaint. In fact, he sought to withdraw the *second* amended complaint and extend the time to file a new *second* amended complaint.

to withdraw the second amended complaint, stay the action, and request an extension of time to file a new second amended complaint had been denied. Generally speaking, he is correct. Absent special circumstances, the prevailing party prepares a proposed order, serves it on all parties for review (rule 3.1312(a)), and submits it to the court to be signed by the judge (rule 3.1312(b)), so that other parties may be informed of the order.

Even assuming a challenge arising from the trial court's denial of these motions were timely and properly raised, plaintiff does not attempt to show how he was prejudiced by not receiving prompt notice that the trial court had denied his motions. (Rule 8.204(a)(2)(A); Cal. Const., art. VI, § 13.) That failure forfeits his claim of error. (Rule 8.204(a)(1)(B).) In any event, we cannot see how plaintiff was prejudiced by a delay in learning that the motions had been denied. By the date plaintiff set for the hearing on his motions, he had received notice that the trial court had sustained with leave to amend defendants' demurrers to the second amended complaint. A few weeks later, he made the first of his successful ex parte requests to extend the time for filing a third amended complaint. He then received notice of a failure to comply with the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.), and again successfully obtained an ex parte order from the court granting his request to extend the time to file his third amended complaint to June 20, 2010. There was no error.

DISPOSITION

The order of dismissal is affirmed. Each side will bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

HOCH, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.