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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAREY McCALLUM,

Plaintiff and Appellant,

v.

ESCONDIDO UNION HIGH SCHOOL
DISTRICT,

Defendant and Respondent.

D058530

(Super. Ct. No. 37-2010-00050825-
CU-OE-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dalquist, Judge. Affirmed as modified.

In 2009, Carey McCallum sued the Escondido Union High School District (District) alleging he was not hired for a job because of the District's unconstitutional affirmative action policies and the District committed fraud by concealing these policies. The court sustained the District's demurrer without leave to amend. On appeal, we affirmed the judgment, except that we vacated the attorney fees award. (*McCallum v. Escondido Union High School District* (Nov. 15, 2011, D058270) (*McCallum I*.)

After the court sustained the demurrer in his first lawsuit, McCallum filed a second lawsuit similarly alleging the District violated the California Constitution by engaging in affirmative action and committed fraud by concealing this policy and telling job seekers that the District is an equal opportunity employer. McCallum sought damages for each cause of action. The court sustained the District's demurrer to McCallum's first amended complaint without leave to amend and granted the District attorneys fees of \$3,854. McCallum now appeals from this second judgment. We affirm, except that we vacate the attorney fees order.

FACTUAL AND PROCEDURAL SUMMARY

In April 2009, McCallum filed a complaint alleging that he applied for a job with the District in March 2007 and scored well on a screening examination, but the District did not interview him for the position. In the first cause of action, McCallum claimed the District discriminated against him based on his gender and "achieved its unconstitutional goal of affirmative action by hiring a female applicant for the position." In the second cause of action, McCallum alleged the District defrauded him by concealing its "unconstitutional policy of affirmative action." This lawsuit will be referred to as the First Action.

On January 29, 2010, the trial court sustained the District's unopposed demurrer to the complaint in the First Action. (*McCallum I, supra.*) The trial court awarded the District attorney fees of \$4,905.40 under Code of Civil Procedure section 1038 (section 1038).

On the same day that the court sustained the District's demurrer in the First Action, McCallum filed a new action against the District (the Second Action), alleging two causes of action: (1) unconstitutional discrimination under article I, section 31 of the California Constitution (section 31), which prohibits governmental entity employers from discrimination or preference "on the basis of race, sex, color, ethnicity, or national origin"; and (2) fraud.

In the section 31 cause of action, McCallum alleged that as a "white, male job seeker," he has "standing to pursue a claim of unlawful discrimination" against the District because the policy "negatively impacts plaintiff's search for work. [¶] . . . For example, in January 2007, after plaintiff's employment application was accepted and he achieved a superior score on a comprehensive written examination, the defendant didn't even grant the plaintiff an interview! A woman was eventually hire[d] for the position in line with the defendant's policy of affirmative action."

In the fraud cause of action, McCallum alleged that the District is "committing fraud by claiming to job seekers it is an equal opportunity employer when in fact it is an affirmative action employer" McCallum alleged that "[t]o this day, the defendant continues its illegal policy of affirmative action."

Four months later, in May 2010, McCallum filed an amended complaint in the Second Action. In the amended complaint, McCallum alleged that his Second Action was necessary because the trial judge in the First Action was biased and "refused . . . to recuse herself," and "strictly enforced the statute of limitations." McCallum also added that the doctrines of "res judicata, collateral estoppel and the statute of limitations do not

apply" because the "discrimination the plaintiff suffered in January, 2007" is merely "an example of the [District's continuing] illegal policy of affirmative action . . ." and that as "an unemployed white male," he is in a class of persons "whose employment prospects are traditionally negatively impacted by affirmative action [policies] . . ." On his fraud claim, McCallum added: "This complaint, unlike the previous one, i[s] not based on the Fair Employment and Housing Act. Rather, it is based on the defendant's current misconduct. Before filing this complaint plaintiff sent defendant a demand letter Defendant has not responded to plaintiff's demand letter." McCallum requested \$10,000 in compensatory damages for each cause of action and \$10,000 in punitive damages.

McCallum attached to his amended complaint copies of two District job announcements, one dated February 20, 2007 and one dated December 9, 2009. At the bottom of each announcement, it states: "AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER." McCallum also attached his letter dated December 11, 2009 addressed to the District's assistant superintendent, stating: "I, Carey McCallum, a white, male job seeker, demand that Escondido Union High School District, an affirmative action employer, pay to me \$20,000.00."

The District demurred to the complaint on several grounds, including that the complaint was barred under res judicata principles, McCallum failed to allege compliance with the Government Claims Act, and the District's employment policies were permissible under applicable constitutional and statutory provisions. The District requested the court to take judicial notice of the complaint and demurrer in the First Action. In an untimely opposition, McCallum argued that his claims were based on the

District's "ongoing" affirmative action policies rather than on a "specific incident," and therefore his claims were not barred by the statute of limitations or res judicata doctrines. He also argued that his claims were supported by California law.

On August 27, 2010, the court held oral argument. During the hearing, McCallum left the courtroom. At the conclusion of the hearing, the court sustained the demurrer without leave to amend and later granted the District's motion for \$3,854 in attorney fees under section 1038. The court found the amended complaint was barred by res judicata because it was based on the same facts as the complaint in the First Action and that McCallum did not allege compliance with the Government Claims Act.

In September 2010, McCallum filed an appeal from the judgment in the First Action. Several months later, McCallum filed an appeal from the judgment in the Second Action.

About one year later, in November 2011, this court affirmed the judgment in the First Action, except that we reversed the attorney fees award. (*McCallum I, supra.*) We held that section 1038 does not authorize attorney fees awards for prevailing parties on a demurrer.

McCallum now appeals from the judgment in the Second Action.

DISCUSSION

I. *Standard of Review*

In reviewing a judgment after a demurrer is sustained without leave to amend, a reviewing court must determine whether the complaint alleged facts sufficient to state a cause of action under any legal theory. (*Koszdin v. State Comp. Ins. Fund* (2010) 186

Cal.App.4th 480, 487.) In conducting this review, we assume the truth of the alleged facts and all facts that may be reasonably inferred from the allegations. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) However, we do not assume the truth of contentions, deductions or conclusions of fact or law. (*Ibid.*) We may consider documents subject to judicial notice and exhibits attached to the complaint. (See *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.) We exercise our own independent judgment as to whether a cause of action has been stated under any legal theory. Additionally, "it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 403.)

II. *The Res Judicata Doctrine Bars McCallum's Claims in the Second Action*

"Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action." (*Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 575.) The res judicata doctrine gives "conclusive effect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1247, italics omitted.) This doctrine bars all later claims that were, *or could have been*, brought in the prior litigation. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; *Villacres v. ABM Industries Inc., supra*, 189 Cal.App.4th at p. 576.)

To establish the res judicata bar, the moving party must satisfy three elements. (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162.) First, the later action must involve the same parties or their privies. (*Ibid.*) Second, the prior judgment must have been final and on the merits. (*Ibid.*) Third, the cause of action in the earlier and later suits must be identical. (*Ibid.*)

The District established each of these elements in this case.

First, the parties are the same in both actions (McCallum and the District). Second, the judgment in the First Action is final because this court affirmed the judgment on its merits (except for the attorney fees award), and the time has passed for a higher court to review this ruling. Third, the causes of action in the two actions are identical because each seeks to vindicate the exact same rights.

McCallum contends the causes of action in the two lawsuits are not identical because in the Second Action he is not specifically challenging the District's failure to hire him, and instead he is merely using his personal incident as an example of the District's ongoing unconstitutional affirmative action policies.

"In California, the primary right theory determines whether two separate actions concern a single cause of action. [Citation.]" (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1327; see *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 (*Mycogen*).) "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on which liability for that injury is premised: . . . The primary right must also be

distinguished from the remedy sought[.]'" [Citation.] "'[T]he harm suffered'" is "'the significant factor'" in defining a primary right." (*Alpha Mechanical*, at p. 1327.)

Under these principles, the First Action and Second Action allege the same causes of action because they seek to vindicate the same rights. (See *Mycogen*, *supra*, 28 Cal.4th at pp. 904-905.) In the First Action, McCallum challenged the constitutionality of the District's affirmative action program and alleged that the District committed fraud by failing to disclose its discriminatory policy. In asserting these claims, McCallum alleged he was personally harmed by the District's actions because he applied for a job and was not given the job based on the District's unconstitutional affirmative action policies. In the Second Action, McCallum does not center his legal claims on his own experience, but he similarly alleges that he is harmed by the District's policies because they "negatively impact[]" his search for work and he is a member of a class whose employment prospects are "negatively impacted" by the District's policies. These claims are barred by the res judicata doctrine because they allege an invasion of the same primary rights — the right to be free of discrimination based on the District's allegedly unconstitutional affirmative action policies and related fraudulent conduct (the District's announcement that it is an equal opportunity employer).

The fact that the District's affirmative action policies are "ongoing" does not affect this conclusion because McCallum does not claim the District policies have changed since 2007. Based on McCallum's allegations, the factual predicate of the claims is the same in the two actions; it is merely the manner in which he is challenging the claims that

has changed. This change in the nature of the legal challenge does not eliminate the applicability of the res judicata bar.

For similar reasons, we reject McCallum's argument that the res judicata doctrine is inapplicable because his specific legal theory in the First Action (violation of the Fair Employment and Housing Act) is different from the legal theory in the second action (violation of the California Constitution). Res judicata applies even if a different legal theory is alleged in the second action. (See *Mycogen, supra*, 28 Cal.4th at p. 897; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) A particular injury might be compensable under multiple legal theories and might entitle a party to several forms of relief; nevertheless, it will give rise to only one cause of action. (*Crowley v. Katleman, supra*, 8 Cal.4th at pp. 681-682.) Here, both complaints alleged the violation of a single primary right — the right to be free of employment discrimination on the basis of McCallum's status as a white male. Under the res judicata doctrine, "all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." (*Mycogen, supra*, 28 Cal.4th at p. 897.)

III. *McCallum's Failure To Allege Compliance with Claims Statutes*

We additionally conclude the court properly sustained the demurrer because McCallum did not allege compliance with the Government Claims Act.

In his first amended complaint in the Second Action, McCallum alleged two causes of action and sought personal money damages (\$10,000) for each claim.

McCallum made clear that his monetary damages claim was integral to his causes of

action, alleging that: "Only the imposition of monetary damages will stop the defendant from pursuing its unconstitutional activity."

The Government Claims Act requires that, before filing a complaint for money or damages against a public entity, the plaintiff must present the claim to the entity in a manner set forth in the statutes and within a statutory deadline. (See Gov. Code, §§ 910, 945.4.) Compliance with these provisions is an element of a lawsuit seeking monetary damages against a public entity. (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237, 1239-1245.) If the plaintiff does not properly allege compliance with these provisions, the suit is subject to dismissal on a demurrer. (*Id.* at p. 1241.)

McCallum contends that he satisfied the claims presentation requirement by attaching to his complaint the December 11, 2009 demand letter. The letter is addressed to a District assistant superintendent, and states: "I, Carey McCallum, a white, male job seeker, demand that Escondido Union High School District, an affirmative action employer, pay to me \$20,000.00."

This letter does not meet the statutory requirements for a claim presentation. Under the Government Claims Act, the claimant's notice must: (1) specify the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted"; (2) provide a "general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known"; and (3) identify "[t]he name or names of the public employee or employees causing the injury, damage, or loss, if known." (Gov. Code, § 910, subs. (c),(d),(e).)

McCallum's letter does not satisfy these requirements. First, the letter fails to point to any specific occurrences or actions on the part of the District that gave rise to the asserted liability. The letter does not state what the District allegedly did wrong. McCallum's reference to being a "white, male job seeker" did not put the District on notice regarding the specific claim asserted against it, or any specific circumstances or occurrences giving rise to the District's liability. McCallum's letter similarly fails to describe the "injury, damage or loss incurred." (Gov. Code, § 910, subd. (d).) McCallum stated only that the District must pay him \$20,000, and does not explain the indebtedness or obligation owed by the District or describe the nature of the injury suffered or loss incurred. McCallum additionally failed to identify any of the District's employees who committed the acts that caused McCallum's alleged injury, damage, or loss.

Because McCallum's demand letter fails to satisfy the statutory requirements, it did not substantially comply with the claims presentation requirements. Thus, the court properly sustained the demurrer to the first amended complaint. Moreover, McCallum does not suggest any factual grounds supporting an amendment that would establish timely compliance with the Government Claims Act. Accordingly, the trial court's sustaining of the demurrer without leave to amend was not an abuse of discretion.

III. *Attorney Fees*

The court granted the District's motion for \$3,854 in attorney fees under section 1038. The court found the award was appropriate because there was "no objective reasonable cause for the new lawsuit."

On appeal, the District concedes the court erred in granting attorney fees under this code section because section 1038 does not permit attorney fees based on the sustaining of a demurrer. We agree the District was not entitled to recover attorney fees under section 1038. (See *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 37 [section 1038 does not apply to the sustaining of a demurrer].)

The District nonetheless requests that this court award attorney fees under Code of Civil Procedure section 128.7, which permits monetary sanctions for pleadings that are "presented primarily for an improper purpose" and/or are unwarranted by the law or the facts. (See Code Civ. Proc., § 128.7, subd. (b)(1), (2), (3).) The District alternatively requests that we remand to permit the trial court to consider awarding fees based on Code of Civil Procedure section 128.7. The District seeks attorney fees incurred in the trial court proceedings and on appeal.

We decline the District's request that we grant attorney fees on this alternate statutory basis or remand the matter for further litigation on the fees issue. Because the District did not raise Code of Civil Procedure section 128.7 as an independent basis for awarding fees in the court below, the argument is waived. (See *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685 ["Contentions or theories raised for the first time on appeal are not entitled to consideration."].)

DISPOSITION

We strike the attorney fees award from the judgment. As so modified, the judgment is affirmed. The parties to bear their own costs.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.