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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEX LANGE, Plaintiff and Appellant, v. MIGNON HILTS et al., Defendants and Respondents.	D060698 (Super. Ct. No. 37-2010-00057161-CU-PN-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

INTRODUCTION

Alex Lange appeals from a judgment dismissing his amended complaint (complaint) for legal malpractice related claims after the trial court sustained general demurrers to it without leave to amend. Lange contends the trial court erred in determining the complaint failed to state a cause of action. We disagree and affirm the judgment.

BACKGROUND

Lange sued attorneys Mignon Hilts, William Matthews, and Joshua T. Hershon for malpractice, fraud and deceit, intentional infliction of emotional distress, deprivation of property, negligence, and malfeasance in office stemming from their representation of him in a criminal case and, more particularly, their unwillingness to challenge the trial court's subject matter jurisdiction on his behalf.[1] Lange's complaint generally alleged the trial court lacked subject matter jurisdiction over his criminal case because no witness appeared before a magistrate competent to issue oaths and testified to the underlying facts. The complaint further alleged a challenge to the trial court's subject matter jurisdiction on this basis would have prompted the prosecutor to summarily dismiss the charges against him, which would have prevented him from losing his property and experiencing ongoing emotional distress.

As to Hilts, the complaint specifically alleged she violated his federal constitutional right to assistance of counsel because she did not defend him from charges of which he was factually innocent and did not even know if he was presumed innocent. In addition, she did not take direction from him, did not look at a demand to abate the action for lack of subject matter jurisdiction (demand) he prepared, and did not explain

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[1] The complaint also named the San Diego County Office of the Public Defender as a defendant; however, the record does not show the office is actually a party to this litigation.

why filing the demand would have been frivolous.[2] She also did not exhibit any knowledge about his case and either did not have the time or did not care about researching possible defenses.[3]

A few days after Lange met with Hilts, he met with another public defender who simply confirmed Lange did not want to be represented by an attorney from the public defender's office.[4] Lange was then taken before the trial court where the public defender erroneously told the trial judge Lange wanted to represent himself. Lange asked the trial judge what the tort underlying his case was and the judge claimed not to understand the question. He then asked the judge, "Upon what individual do you rely for your authority in the event I am not found wanting in the righteousness of my activities that

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2 The demand argued for dismissal of the criminal action because it was not predicated on an oath or affirmation, there was no corpus delicti, and Lange did not have a meaningful arraignment.

3 According to an affidavit Lange included with his complaint, he first met with Hilts, a public defender, a few days after his arrest. She told him if he pleaded guilty, he could be out of jail that day and if he pleaded not guilty, he would be in jail for 30 days. He asked her if she presumed him to be innocent and she replied, " 'I don't know.' " She struck him "as being snotty, arrogant, and beneath her to even speak to a mere prisoner" and he fired her. After she informed the trial court he was not interested in her services, the trial court twice asked him if he wanted to represent himself and both times he replied, "How can I represent myself, I am myself ?" He also refused to enter a plea, stating he did not even know why he was there.

At a subsequent trial readiness conference, Hilts informed him that if he pleaded to trespassing, the vandalism charge would be dropped and he would be placed on informal probation for three years. He questioned whether it was possible to trespass on abandoned property and asked her if she was going to work on an affirmative defense on this basis. She said she was not. He asked her about jury nullification and she did not seem to understand the concept. He also asked her to file the demand, but she declined.

4 Lange did not name this public defender as a defendant in this case.

[whatsoever] shall be brought upon me shall be brought upon my accusers?" The judge did not seem to understand this question either.[5] Lange then asked if there was a verified complaint in his case. The judge said there was. Lange noticed the complaint was signed by a deputy district attorney, not the purportedly injured party. When Lange pointed out the complaint was hearsay, the judge told him that "that's the way they do things." The judge then entered a "not guilty" plea for Lange even though Lange had not asked the judge to do so.

A few days later, Lange met with Matthews. As to Matthews, the complaint similarly alleged Matthews did not defend him, take direction from him, or give him a direct explanation for why a jurisdictional challenge would not succeed. Rather, Matthews related a story of another client's jurisdictional challenge and told Lange he had never seen a jurisdictional challenge succeed. Afterwards, Lange was led to the trial court where the trial judge forced Hilts on him and then released him on his own recognizance.

Apparently at this same hearing, Lange asked the trial judge "for a finding of facts and conclusion of law as to why [the judge] was proceeding without a verified complaint signed by the injured party" and the judge replied "that proceeding without one was 'acceptable to [him].' " Lange alleged he was flabbergasted by the judge's reply and

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5 In the demand, Lange described the judge's response differently. He stated that after he had asked the judge "that very simple and eloquently phrased question, a look of embarrassment came over [the judge's] face. As if he understood, but dared not to answer."

clarified, " 'So anyway, you refuse to give me a finding of facts and conclusion of [the] law as to why you are proceeding in this case without a verified complaint from the injured party' " and the judge replied, " '[Y]es.' "

At some point, Hershon began representing Lange. As with Hilts and Matthews, Lange's complaint alleged Hershon did not take direction from Lange or spend sufficient time or effort to familiarize himself with the criminal action against Lange. As an example of the latter deficiency, Lange alleged Hershon informed him he could be charged with residential burglary if he did not plead guilty to a trespassing infraction, even though he had only been charged with vandalism and trespassing. Lange further alleged Hershon gave him conflicting information about whether the prosecution would be able to prove the vandalism charge and essentially indicated he was crazy if he did not accept the plea bargain. Lange also alleged Hershon did not make the slightest effort to inform him why there was no validity to "his demand to see evidence in the court record where any facts supporting the criminal accusation(s) have been brought into the controversy under the penalties of perjury pursuant to a[n] oath or affirmation administered by a judicial officer."[6]

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[6] As support for his allegations against Hershon, Lange included a letter from Hershon in his complaint. The letter advised Lange of a plea offer, expressed Hershon's belief Lange would have an uphill battle defending against the existing charges, advised Lange of a possible new charge of residential burglary if Lange did not accept the offer, and opined Lange would be making a bad choice if he did not accept the offer. The letter also advised Lange that a decision not to take the plea offer would raise a question about whether Lange was competent to assist in his defense and, if Lange was open to it, Hershon would like Lange to have a psychological evaluation done. Lange responded

Hilts, Matthews, and Hershon generally demurred to the complaint and the trial court heard oral argument on the matter.[7] The trial court sustained the demurrers without leave to amend and entered judgment in the attorneys' favor. The trial court found each of Lange's causes of action was based on the failure to raise a subject matter jurisdiction challenge in the criminal case. The trial court further found the allegations in the complaint showed Lange could not plead or prove he was damaged by this failure because he alleged he asserted the defense himself and the criminal trial judge rejected it. The trial court explained, "The fact that the argument was rejected by the judge indicates that it was not a successful argument and that [Lange] could not have been damaged by [the attorneys'] failure to assert it."

DISCUSSION

Lange contends the trial court erred in sustaining the general demurrers because he did not actually assert a defense in the criminal action and, even if he did, the trial judge did not actually rule on it. Assuming, without deciding, Lange did not formally raise and the trial court did not formally reject a subject matter jurisdiction claim, we nonetheless conclude Lange's complaint fails to state a cause of action.

"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

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with his own letter opposing each of Hershon's points and taking great offense at Hershon's suggestion he might be mentally incompetent.

[7] Lange did not include the parties' papers in the appellate record. He also did not include the reporter's transcript of the oral argument.

properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] 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.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

As the trial court recognized below, Lange premised all of his causes of action on his assertion that the defendants wrongfully failed to challenge the trial court's subject matter jurisdiction under the Fourth Amendment to the federal Constitution on the ground no witness appeared before a magistrate competent to issue oaths and testified to the facts underlying the criminal charges against him. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Among its protections, this amendment requires a prompt judicial determination of probable cause as a prerequisite to a significant pretrial restraint of liberty following a warrantless arrest, as apparently

occurred here. (*Gerstein v. Pugh* (1975) 420 U.S. 103, 114, 125 (*Gerstein*); *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 47, 52-53.)

In California, the probable cause determination is made at an arraignment before a magistrate, who must be presented with a verified complaint stating the charges. (Cal. Const., art. I, § 14; Pen. Code, §§ 806, 849, subd. (a).) The complaint may be verified on information and belief by a deputy district attorney. (*People v. Balthazar* (1961) 197 Cal.App.2d 227, 228; *People v. Currie* (1911) 16 Cal.App. 731, 733.) Contrary to Lange's assertions, California's procedure does not violate the Fourth Amendment because the Fourth Amendment does not require states to initiate criminal actions in any particular manner. (*Gerstein*, *supra*, 420 U.S. at p. 123 [state systems of criminal procedure vary widely and there is no single preferred pretrial procedure]; *County of Riverside v. McLaughlin*, *supra*, 500 U.S. at p. 53 ["the Constitution does not impose on the States a rigid procedural framework"].) In addition, the Fourth Amendment permits a probable cause determination to be made "in a nonadversary proceeding on hearsay and written testimony." (*Gerstein*, at p. 120.)

Consequently, the fact a prosecutor signed the complaint against Lange rather than someone personally knowledgeable of the underlying facts did not provide a federal constitutional basis for challenging the trial court's subject matter jurisdiction. Any such challenge by one of Lange's defense attorneys would have been futile and unprofessional. The federal constitution does not require appointed counsel " ' "to waste the court's time with futile or frivolous motions." ' " (*People v. Memro* (1995) 11 Cal.4th 786, 834; accord, *People v. Thompson* (2010) 49 Cal.4th 79, 122; see also *McCoy v. Court of*

Appeals, Dist. 1 (1988) 486 U.S. 429, 435 ["Ethical considerations and rules of court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments . . . ."].)

As the claims in Lange's complaint all rest on a faulty premise, the complaint does not state a cause of action and the record Lange provided does not show he can amend his complaint to do so. Accordingly, Lange has not established the trial court abused its discretion in sustaining the general demurrers to the complaint without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.