

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ANAND L. DANIELL,

Plaintiff and Appellant,

v.

AMERICAN CAMPUS COMMUNITIES,  
INC. et al.,

Defendants and Respondents.

E057018, E058347

(Super.Ct.No. RIC536488)

**OPINION**

APPEAL from the Superior Court of Riverside County. John W. Vineyard,  
Temporary Judge (pursuant to Cal. Const., art. VI, § 21) and Judge. Affirmed.

Anand L. Daniell, Plaintiff and Appellant in pro. per.

Locke Lord, Jason L. Sanders, Susan J. Welde, and Michelle C. Ferrara for  
Defendants and Respondents American Campus Communities, Inc., GMH Communities  
LP, and College Park Management, LLC.

No appearance for Defendant and Respondent Michael Reighter.

Anand Daniell filed this action for malicious prosecution against numerous named defendants. He took the default of three defendants; the trial court, however, granted their motion to vacate the default. Thereafter, the trial court sustained demurrers by those defendants (plus a fourth defendant) on the ground that Daniell could not plead favorable termination.

Daniell appeals. He contends that:

1. The trial court erred by vacating the default, because:
  - a. The bench officer who vacated the default was a commissioner at the time, and Daniell had not stipulated to have the matter decided by a commissioner.
  - b. The moving defendants did not submit a copy of their proposed pleading.
2. The operative complaint adequately pleaded favorable termination.
3. There was insufficient evidence to support the award of costs against Daniell.

We find no prejudicial error. Hence, we will affirm.

## I

### PROCEDURAL BACKGROUND

On September 21, 2009, Daniell filed this action for malicious prosecution against various named defendants, including American Campus Communities, Inc., GMH Communities LP, College Park Management, LLC (collectively American), and Michael Reighter.

On October 2, 2009, Daniell filed a “Notice of Non-Stipulation to Commissioner or Judge *Pro Tempore*.” (Capitalization altered.) The caption specified “HEARING DATE: Apr. 1, 2010,” “DEPT: 2,” and “JUDGE: Commissioner Paulette Durand-Barkley.” The text of the notice stated: “PLEASE TAKE NOTICE that Plaintiff ANAND L. DANIELL does *not* stipulate to the assignment of the above-entitled action to, or hearing of any pre-trial law and motion matter, trial, or subsequent post-trial law and motion matter pending in the above-entitled action before, the Honorable Paulette Durand-Barkley, *any other Commissioner . . . , or any Judge pro tempore . . . .*” (Some italics added.)

Meanwhile, on January 27, 2011, Daniell filed a first amended complaint. On June 6, 2011, he served the first amended complaint on American by personal service. Accordingly, American’s responsive pleading was due by July 6, 2011. (Code Civ. Proc., §§ 412.20, subd. (a)(3), 430.40, subd. (a), 435, subd. (b)(1).)

On July 7, 2011, Daniell filed requests for entry of American’s default. By mistake, however, he requested the entry of default on the original complaint, filed September 21, 2009, rather than on the first amended complaint, filed January 27, 2011. The trial court entered the default “as requested.”

On July 8, 2011, American presented a demurrer to the clerk for filing, but the trial court refused to accept it, noting that American’s default had already been entered.

On July 12, 2011, Daniell filed “[a]mended” requests for entry of American’s default. Although the amended requests have not been included in the appellate record,

apparently they corrected Daniell's mistake by requesting the entry of default on the first amended complaint.

On July 13, 2011, American filed an ex parte application to shorten time on a motion for relief from default. On July 14, 2011, the ex parte application was denied.

Thus, also on July 14, 2011, American filed a noticed motion for relief from default. According to the motion, on July 6, 2011, American's counsel had served the demurrer on Daniell by mail. American's counsel had also turned the demurrer over to their attorney service for filing. The attorney service had paid American's appearance fees and reserved a hearing date for the demurrer, but it inadvertently failed to actually file the demurrer.

In his opposition to the motion, Daniell argued, among other things, that the motion was not accompanied by a copy of the proposed pleading.

In reply, American argued that the clerk should not have entered its default in any event because Daniell's requests had referenced the wrong complaint. Along with its reply papers, American filed a copy of the caption page — but *only* the caption page — of its proposed demurrer.

On August 30, 2011, defendants' motion for relief from default was heard before then-Commissioner John Vineyard; the minute order recites that the parties stipulated to Commissioner Vineyard. He granted the motion and vacated the default. He ruled that relief was mandatory based on attorney fault, but, alternatively, that American was also entitled to discretionary relief.

American promptly filed a demurrer to the first amended complaint. The trial court sustained the demurrer with leave to amend.

Daniell then filed a second amended complaint. American filed a demurrer to the second amended complaint, on grounds including that Daniell could not truthfully plead favorable termination. Reighter also filed a demurrer to the second amended complaint, on essentially identical grounds.

Meanwhile, Daniell filed a “Motion to Set Aside Void Orders,” in which he asked the trial court to set aside the order vacating the default, on the grounds that he had not stipulated to Commissioner Vineyard and that the motion had not been accompanied by a proposed pleading.

That motion was heard before now-Judge Vineyard. He denied the motion. He also sustained both demurrers without leave to amend.

Accordingly, the trial court entered judgments of dismissal as to American and Reighter.

## II

### THE TRIAL COURT PROPERLY GRANTED RELIEF FROM DEFAULT

Daniell contends that the trial court erred by granting American’s motion for relief from default.

A. *Appealability.*

Preliminarily, American contends that Daniell cannot challenge the trial court's ruling on the motion for relief from default "because he did not include them in his Notice of Appeal."

Daniell's notice of appeal stated that he was appealing from a number of orders, including the judgment dismissing American, but not including the order vacating the default.

A notice of appeal must "identif[y] the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) However, upon an appeal from an appealable order or judgment, "the reviewing court may review the verdict or decision and *any intermediate ruling, proceeding, order or decision* which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906, italics added.) Thus, "[a] *prior nonappealable* order or ruling need *not* be specified in the notice of appeal from a subsequent appealable judgment or order. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 3:119.)

Here, Daniell quite properly appealed from the judgment of dismissal. The order granting relief from default was not separately appealable (*Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 122); it was not only unnecessary, but positively inappropriate to specify it in the notice of appeal. If it was erroneous, as Daniell claims, then he was entitled to have the default stand and ultimately to have judgment entered in his favor; instead, the

trial court entered judgment against him. Thus, the order granting relief from default (1) involves the merits, (2) necessarily affects the judgment appealed from, *and* (3) substantially affects the rights of a party. It is therefore reviewable in this appeal from the judgment of dismissal. (*Bernards v. Grey* (1950) 97 Cal.App.2d 679, 683.)

B. *Effect of Filing a Second Amended Complaint.*

American also argues that Daniell forfeited any issues regarding the default by filing a second amended complaint.

It relies on the general rule “. . . that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. [Citations.]’ [Citation.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.) This rule, however, does not allow the trial court to insulate its errors from review simply by ordering the plaintiff to file an amended complaint. Thus, for example, when a demurrer has been sustained without leave to amend as to some causes of action but not others, the rule does not apply; even if the plaintiff files an amended complaint, it does not forfeit the right to argue on appeal that the demurrer should have been overruled entirely. (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 208-209; *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 44-45.)

““An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions[] does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation

for which he was not responsible.” [Citation.]” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.) Here, Daniell objected appropriately to granting relief from the default. (Indeed, American does not really explain what else he could or should have done to preserve his objections.) Once the trial court ruled against him and allowed American to file a demurrer, he submitted to its authority by litigating the demurrer; when the trial court ruled against him on that, too, he submitted to its authority by filing the second amended complaint. This was not a forfeiture of his earlier objections.

C. *Failure to Stipulate to a Commissioner.*

Daniell contends that the order vacating the default was void because he had not stipulated to have the matter decided by a commissioner.

Daniell, however, filed a previous appeal, *Daniell v. DeRiggi*, case No. E055261,<sup>1</sup> arising out of the same trial court case but involving a different defendant. In it, he challenged Commissioner Vineyard’s rulings at a different hearing a month and a half later, arguing that they were void because he had not stipulated to Commissioner Vineyard. (*Daniel v. DeRiggi* (E055261 Apr. 29, 2014) 2014 Cal.App. Unpub. LEXIS 3017 at pp. 7-16 [nonpub. opn.].) We held that Commissioner Vineyard had jurisdiction because Daniell’s knowing failure to object was “tantamount to a stipulation that Commissioner Vineyard was authorized to sit as a temporary judge.” (*Id.* at p. 13.)

---

<sup>1</sup> We hereby grant American’s Request for Judicial Notice of our Opinion and related documents in the previous appeal.

The doctrine of law of the case requires us to reject Daniell’s virtually identical contention in this appeal. ““The law of the case doctrine states that when, in deciding an appeal, an appellate court “states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . , and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.” [Citations.]’ [Citation.]” (*People v. Alexander* (2010) 49 Cal.4th 846, 870.) “““The rule of ‘law of the case’ generally precludes multiple appellate review of the same issue in a single case. . . .” [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 196.)

Daniell argues that law of the case does not apply because the parties in the two appeals are not the same. He relies on formulations of the law of the case doctrine like the one in *In re Rosenkrantz* (2002) 29 Cal.4th 616, where the Supreme Court stated, “The doctrine of law of the case . . . governs later proceedings in the *same case* [citation] with regard to the rights of the *same parties* who were before the court in the prior appeal. [Citations.]” (*Id.* at p. 668, italics in original, fn. omitted.)

We agree that the party *to be bound by* law of the case must have been a party to the prior appeal. (*In re Rosenkrantz, supra*, 29 Cal.4th 616, 668-669; but see *People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 66-67 [Fourth Dist., Div. Two] [decision against named state and county officials in prior appeal was law of the case in current

appeal involving the People].) We also accept that the party *asserting* law of the case must be a party to the *underlying action* in the trial court.

Our research, however, has not revealed any case actually holding that the party asserting law of the case must have been a party to the prior appeal. On that issue, the “same parties” formulation is dictum. Much as with collateral estoppel (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812-813), we see no rationale for requiring total identity of parties. Such a requirement could only lead to wasteful litigation and, potentially, to conflicting outcomes. For example, a trial court might sustain demurrers to the same complaint on the same grounds, but by different defendants; once an appellate court has affirmed with respect to one set of defendants, we see no reason to let the plaintiff relitigate the identical issues with respect to a second set of defendants.

We note briefly, however, that we would reject this contention even if law of the case did not apply.

Daniell contends that he was not given due notice that Commissioner Vineyard was, in fact, a commissioner. He relies on California Rules of Court, rule 2.816, which requires a court to give notice when a matter will be heard by a temporary judge. (Cal. Rules of Court, rule 2.816(b).) It provides that the notice may be given either in writing or by “[a] conspicuous sign posted inside or just outside the courtroom, accompanied by oral notification or notification by videotape or audiotape by a court officer on the day of the hearing.” (Cal. Rules of Court, rule 2.816(c).) It then provides that, after such notice has been given, “[a] party is deemed to have stipulated to the attorney serving as a

temporary judge if the party fails to object to the matter being heard by the temporary judge before the temporary judge begins the proceeding . . . .” (Cal. Rules of Court, rule 2.816(d).)

Daniell argues that the record does not show that such notice was given; in particular, it does not show that there was any “conspicuous sign” or any “oral notification or notification by videotape or audiotape by a court officer.” These matters, however, would not normally appear in the record. The presumption that these official duties were regularly performed applied (Evid. Code, § 664); Daniell had the burden of proving that notice was not given in accordance with the rule.

In an effort to meet his burden, Daniell testified that he did not *recall* any oral notification. Counsel for defendants, however, testified that there was an oral announcement, and that Daniell was present at the time. Thus, the evidence presented a credibility dispute on this point which the trial court could and did resolve against Daniell. (See *Santa Clara County Correctional Peace Officers’ Association, Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1027.)

In addition, as Judge Vineyard later stated for the record, “[T]here was a sign on my bench indicating failure to object would be deemed a stipulation.” Daniell merely argues that there was no evidence that this sign was conspicuous. We reiterate, however,

that Daniell had the burden of proof, and he did not introduce any evidence that the sign was *not* conspicuous.<sup>2</sup>

Daniell also contends that his express objection to a commissioner prevented there from being any implied consent.

One problem with this is that Daniell filed his notice of nonstipulation in a way that prevented it from coming to Commissioner Vineyard's attention. Under California Rules of Court, rule 3.1110(b)(1), the first page of any motion papers must indicate the date and time of any scheduled hearing and the name of the hearing judge. This is to make sure that the correct papers go to the correct bench officer in time for the correct hearing. A bench officer who is hearing a particular law and motion matter cannot be expected to review each and every document filed earlier in the case. Here, the notice of nonstipulation had been filed almost two years earlier; it specified a different hearing date and a different judge. If Daniell had filed a notice of nonstipulation under a different case name and number, he could hardly contend that it was effective in this case. By

---

<sup>2</sup> Defendants contend that, in a related case, Daniell refused to stipulate to Commissioner Vineyard, thus demonstrating actual knowledge that he was a commissioner. In support of that contention, they have asked us to take judicial notice of a number of documents. Daniell argues that these documents are not judicially noticeable. He also argues that they fall short of demonstrating actual knowledge.

In the end, the record in this case is sufficient to enable us to resolve Daniell's contention without regard to the documents in any other case. Accordingly, we deny the request for judicial notice as irrelevant. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.)

analogy, once he filed it specifically in connection with a particular hearing, it was not effective at a different hearing.

Daniell claims that the court clerk had sent him a form notice indicating that he could object to a commissioner by filing a “notice of non-stipulation.” This claim is not cited to the record; we therefore disregard it. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294.) In any event, we accept that he could object by filing a notice of nonstipulation; we merely conclude that he had to do so in some way that brought it to Commissioner Vineyard’s attention. Otherwise, the constitutional requirement of consent to a temporary judge would be reduced to a matter of gamesmanship.

Another problem with Daniell’s reliance on his notice of nonstipulation is that his conduct in going forward with the hearing, despite being on notice of Commissioner Vineyard’s status, constituted a waiver. “A party may be found to have waived a right when its acts are ““are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.”” [Citations.]” (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 941.) Here, for the same reasons that Daniell’s failure to object specifically in connection with the August 30, 2011 hearing constituted an implied stipulation, it also constituted a waiver. After all, in the nearly two years since filing the notice of nonstipulation, he could have decided that, while he objected to most commissioners, he did not object to Commissioner Vineyard. Or he could simply have changed his mind about objecting at all.

We therefore conclude that Commissioner Vineyard properly heard the motion to vacate the default and that his order vacating the default was valid.

D. *The Trial Court Could Vacate the Default Despite American’s Failure to Submit Its Proposed Pleading.*

Daniell also contends that the trial court erred by granting the motion for relief from default because it did not include a copy of American’s proposed demurrer.

Code of Civil Procedure section 473, subdivision (b) contains two alternative provisions for relief from a default.

Under the first provision, relief is discretionary. It provides that the trial court “may” grant relief if the default was caused by the “mistake, inadvertence, surprise, or excusable neglect” of a party or his or her legal representative.

Under the second provision, relief is mandatory. It provides that the trial court “shall” grant relief if the default was caused by an attorney’s “mistake, inadvertence, surprise, or neglect,” if the motion “is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . .”

Code of Civil Procedure section 473, subdivision (b) also specifically provides: “Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed . . . , *otherwise the application shall not be granted . . . .*” (Italics added.) This proposed pleading requirement applies to applications for both

discretionary and mandatory relief. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 402.)

The proposed pleading requirement demands only substantial compliance, not strict compliance. (*Carmel, Ltd. v. Tavoussi, supra*, 175 Cal.App.4th at p. 402.) “Some courts have found substantial compliance with this requirement when the proposed pleading was filed and served before the hearing on the motion. [Citations.]” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1421, fn. 4, and cases cited.) In the absence of even substantial compliance, however, relief from default must be denied. (*Puryear v. Stanley* (1985) 172 Cal.App.3d 291, 293-294.)

Here — inexplicably — American never submitted a copy of its proposed demurrer. American points out that it served the demurrer on Daniell; however, this was not substantial compliance. “The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court.” (*County of Los Angeles v. Lewis* (1918) 179 Cal. 398, 400.) American never enabled the trial court to evaluate its demurrer.<sup>3</sup>

---

<sup>3</sup> American’s brief uses this quote from *Lewis*, but with an ellipsis in place of the words, “and the court.” It is hard to believe this omission was innocent. We remind American’s counsel of their ethical obligation “not [to] seek to mislead [a] judge . . . by an artifice or false statement of fact or law . . . .” (See Rules Prof. Conduct, rule 5-200(B).)

American also argues that it attempted to file the demurrer but was unable to do so because its default had already been entered. But once again, this failed to place the demurrer before the trial court. American could easily have attached the demurrer to its motion to vacate the default, or failing that, to its reply papers;<sup>4</sup> in the last extremity, it could have brought a copy of the demurrer to the hearing on the motion.

Finally, American claims that, on July 14, 2011, at the hearing on its *ex parte* application to shorten time, it “presented the Demurrer to the Court for filing,” but the court returned it to American when it denied the *ex parte* application. Parenthetically, we note that the transcript of the hearing does not reflect this; still, it is conceivable that it happened off the record. In any event, once again, this was not substantial compliance, because at that point, American was in default and had no right to file the demurrer *as a demurrer*; the trial court was *required* to refuse to file it. American could and should have filed it as an exhibit to the motion.

Thus, we conclude that the trial court erred by granting relief from default under Code of Civil Procedure section 473.

However, this does not end our inquiry. We can still sustain the trial court’s ruling if American was entitled to relief from default on some other grounds. “[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a

---

<sup>4</sup> We find it particularly puzzling that, even though Daniell was already arguing that American had failed to file a copy of its proposed pleading, American included only the caption page of the demurrer in its reply papers.

wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.” [Citation.]” (*Transamerica Ins. Co. v. Tab Transportation, Inc.* (1995) 12 Cal.4th 389, 399, fn. 4.)

American contends that the clerk erred in entering its default at all because Daniell requested the entry of default on the wrong complaint. This time, we agree.

“The clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute, his acts can have no binding force. [Citations.]” (*Reinhart v. Lugo* (1890) 86 Cal. 395, 398-399, disapproved on other grounds in *Herman v. Santee* (1894) 103 Cal. 519, 524.) Here, the clerk’s task was to determine whether “the defendant has been served . . . .” (Code Civ. Proc., § 585, subd. (b).) The request, however, specified the original complaint; there was no proof that that had been served. On the other hand, while there was proof that the first amended complaint had been served, Daniell was not requesting the entry of default on that complaint.

The request also failed to afford due notice to American. Daniell was required to provide proof that the request for entry of default had been mailed to American. (Code Civ. Proc., § 587.) Proof of mailing a request for entry of default on the original complaint did not authorize the clerk to enter default on the first amended complaint. We recognize that “[t]he nonreceipt of the notice shall not invalidate or constitute ground for

setting aside any judgment.” (*Ibid.*) Here, however, the problem was not that American failed to *receive* the notice; it was that Daniell failed to even *send* the requisite notice.

Daniell argues that Code of Civil Procedure section 585, concerning the entry of default, does not require the requesting party to specify any particular complaint at all. The California Constitution, however, gives the Judicial Council the power to “adopt rules for court administration, practice and procedure . . . .” (Cal. Const., art. VI, § 6, subd. (d).) The Judicial Council has adopted a rule making the use of certain forms mandatory. (Cal. Rules of Court, rule 1.31.) The “Request for Entry of Default” form (CIV-100) is mandatory. And it requires the requesting party to specify a complaint.

Because the court clerk lacked the power to enter the default, the default was void on the face of the record. (*Baird v. Smith* (1932) 216 Cal. 408, 411-412.) The trial court can set aside a void order under Code of Civil Procedure section 473, subdivision (d). The proposed pleading requirement of Code of Civil Procedure section 473, subdivision (b) does not apply.

We therefore conclude that the trial court properly granted relief from default.

### III

#### THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRERS

Daniell contends that the trial court erred by sustaining the demurrers to the second amended complaint.

A. *Additional Factual Background.*

The following facts are taken from the allegations of the second amended complaint, supplemented by matters that were the subject of judicial notice below.

In August 2007, five unlawful detainers were filed against tenants of the same apartment building. They were based on notices to pay rent or quit served in August 2007. In one of the unlawful detainers, Daniell was the named defendant. Although he was not named in the other four unlawful detainers, Daniell participated in those proceedings on the theory that he was a subtenant of the named defendants. American and Reighter allegedly filed all of these five unlawful detainers in retaliation for Daniell's "whistle-blowing" activities, which threatened to expose their fraudulent accounting and tax evasion. In September 2007, these unlawful detainers were voluntarily dismissed, without prejudice.

In October 2007, five new unlawful detainers were filed against the same defendants regarding the same apartments. They were based on notices to pay rent or quit served in September 2007. Between November 2007 and January 2008, the trial court granted summary judgment against all of the defendants in all of the unlawful detainers, including Daniell. Daniell and the other defendants appealed, but the judgments were affirmed.

B. *Additional Background.*

The second amended complaint (complaint) alleged five causes of action for malicious prosecution, based on the first five unlawful detainers, which had been

voluntarily dismissed. American and Reighter demurred, arguing, among other things, that the fact that the second set of five unlawful detainers had been successful conclusively negated favorable termination. As already noted, the trial court sustained the demurrers without leave to amend.

C. *Matters Subject to Judicial Notice Conclusively Demonstrated the Absence of Favorable Termination.*

““To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].” [Citation.]’ [Citation.]” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965-966, italics omitted.)

“To determine whether a party has received a favorable termination, we consider “the judgment as a whole in the prior action . . . .” [Citation.]’ [Citation.] Victory following a trial on the merits is not required. Rather, “the termination must reflect the merits of the action and the plaintiff’s innocence of the misconduct alleged in the lawsuit.” [Citation.]’ [Citation.]” (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 741.)

“However, a “favorable” termination does not occur merely because a party complained against has prevailed in an underlying action . . . . If the termination does not relate to the merits — reflecting on neither innocence of nor responsibility for the alleged misconduct — the termination is not favorable in the sense it would support a subsequent

action for malicious prosecution.’ [Citation.]” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342.)

““A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] ‘It is not enough, however, merely to show that the proceeding was dismissed.’ [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.” [Citations.]’ [Citation.]” (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524.)

A voluntary dismissal ““... is favorable when it reflects ‘the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant.’” [Citation.] . . . [¶] . . . The focus is not on the malicious prosecution plaintiff’s opinion of his innocence, but on the opinion of the dismissing party.’ [Citation.] ‘The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant’s guilt.’ [Citation.]” (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056-1057.)

The controlling case with regard to an action that is voluntarily dismissed and then refiled is *Jaffe v. Stone* (1941) 18 Cal.2d 146. There, it was alleged that the defendants had caused the plaintiff to be charged with grand theft without probable cause; the

criminal case had been dismissed at the preliminary hearing based on insufficiency of the evidence. (*Id.* at p. 149.)

The Supreme Court held that this adequately pleaded favorable termination. It explained: “[If] a dismissal or other termination without a complete trial on the merits . . . is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.” (*Jaffe v. Stone, supra*, 18 Cal.2d at p. 150.)

“Thus, the accuser or the prosecuting officers may abandon the proceeding because of . . . defects in the complaint, or doubts as to the jurisdiction of the offense, *with the intention of bringing a new proceeding in proper form or before a proper court.* Whether this abandonment takes place before the committing magistrate or at the actual trial itself, the dismissal cannot be regarded as a favorable termination in favor of the accused. [Citation.]” (*Jaffe v. Stone, supra*, 18 Cal.2d at pp. 150-151, italics added.)

“On the other hand, where the prosecuting officials press the charge before the committing magistrate, the accused does not seek improperly to prevent a fair hearing, and the complaint is dismissed for failure to produce a case against the defendant, there is a favorable termination sufficient to form the basis of a tort action. [Citations.]” (*Id.* at p. 151.)

Most significantly for our purposes, the court concluded that “the commencement of new criminal proceedings before the filing of the malicious prosecution suit *would be a defense to the action . . .*” (*Jaffe v. Stone, supra*, 18 Cal.2d at p. 158, italics added.)<sup>5</sup> However, it also held that the absence of any such new proceedings was not an element that the plaintiff had to allege: “If such subsequent proceedings have, in fact, been commenced, defendants may so plead in their answers. But, like other defenses, this should be raised in the answer, not anticipated in the complaint.” (*Id.* at p. 158)

“While *Jaffe* was a criminal proceeding, the same standard for favorable termination [has been] extended to civil cases . . . .” (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750, fn. 1.)

Here, matters subject to judicial notice showed that, although the original unlawful detainers were voluntarily dismissed, new unlawful detainers were commenced — and were litigated to a successful conclusion — before the filing of this malicious prosecution action. Under *Jaffe*, this means that Daniell cannot allege favorable termination.

Daniell argues that the trial court should not have sustained the demurrers because, under *Jaffe* itself, the plaintiff does not have to allege in the complaint that *no* new proceeding was commenced; rather, the *defendant* has to allege in the *answer* that a new proceeding *was* commenced. This overlooks the role that judicial notice plays in a demurrer. “[A] demurrer assumes the truth of the complaint’s properly pleaded

---

<sup>5</sup> Daniell refers to this, somewhat telegraphically, as the “subsequent action defense.”

allegations, *but not of . . . assertions contradicted by judicially noticeable facts.* [Citations.]” (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20, italics added.) “The complaint should be read as containing the judicially noticeable facts, ‘even when the pleading contains an express allegation to the contrary.’ [Citation.]” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.) Thus, in effect, Daniell’s complaint is saddled with self-destructive allegations regarding the new unlawful detainers.

Daniell retorts that defendants were improperly seeking judicial notice that the recitals in certain records (such as the factual findings of a trial judge or the statement of facts in an appellate opinion) were true. However, he does not support this claim by citing any portion of the record in which defendants sought judicial notice of any improper matter. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) Moreover, he does not claim that the trial court actually took improper judicial notice, or that its decision actually turned on improper judicial notice. The fact that the second set of unlawful detainers were filed and the fact that they were litigated to a successful conclusion are both judicially noticeable, and together, they are fatal to the complaint.

Finally, Daniell argues that the unlawful detainers that were voluntarily dismissed and the unlawful detainers that were ultimately successful were based on different notices to quit; he disputes that the first set of notices were ever properly served. He concludes that, until the second set of notices were served, defendants had no claim against him.

Both sets of unlawful detainers, however, sought to obtain possession of the premises based on the alleged failure to pay rent. The failure to serve a valid notice to quit would mean only that the first set of unlawful detainers were premature.

“‘[P]rematurity’ is among the recognized ‘technical grounds’ of disposition for purposes of malicious prosecution liability. [Citation.]” (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 457; accord, *Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855-1856.) Thus, the voluntary dismissal of the first set of unlawful detainers still would not be a favorable termination.

We therefore conclude that the trial court properly sustained the demurrers without leave to amend.

#### IV

#### COSTS

Daniell contends that the trial court erred by allowing American to recover costs.

##### A. *Additional Factual and Procedural Background.*

After the entry of judgment, American filed a memorandum of costs, seeking “[f]iling and motion fees” totaling \$2,714.86. Daniell filed a motion to tax costs. In its opposition, American admitted that the amounts sought actually included messenger fees. It attached invoices and other back-up documentation.<sup>6</sup>

---

<sup>6</sup> In the trial court, Daniell objected that the back-up documentation was hearsay and not properly authenticated. In this appeal, however, he does not argue that the trial court should have sustained these objections. We deem him to have forfeited any such contention.

The trial court granted the motion in part and denied it in part. It allowed American to recover \$1,390, representing American's appearance fees (\$410 for each of three defendants) and motion filing fees (\$40 for each of four motions). It disallowed all messenger fees.

B. *Analysis.*

Daniell reiterates many of the arguments that he raised below, ignoring the fact that the trial court did, to some extent, accept those arguments and did grant his motion in part.

Daniell claims that American conceded that the costs that it was seeking were not filing fees. Not so. It conceded that *some* of the costs were not filing fees; however, it was clear from the backup documentation that American was *also* seeking the following filing fees:

July 6, 2011	First appearance fees	\$1,230
July 13, 2011	Motion fee	\$40
August 31, 2011	Motion fee	\$40
September 1, 2011	Motion fee	\$40
December 28, 2011	Motion fee	\$40

As the trial court noted, these dates corresponded with dates on which American had, in fact, filed motions.

Daniell also argues that American introduced invoices, but failed to introduce evidence that it had actually paid those invoices. The very fact that the motions were

filed, however, was evidence that the filing fees were paid. If and to the extent that American’s messenger service advanced the fees, American did at least incur an obligation to repay the messenger service. “Costs are allowable if incurred, whether or not paid.” (Code Civ. Proc., § 1033.5, subd. (c)(1).)

We therefore conclude that the trial court’s cost award was proper.

V

DISPOSITION

The judgment is affirmed. American and Reighter are awarded costs on appeal against Daniell.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

McKINSTER  
Acting P. J.

CODRINGTON  
J.