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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENNETH W. FULLER,

Cross-complainant and Appellant,

v.

DAN NEYENHUIS,

Cross-defendant and Respondent.

G044838

(Super. Ct. No. 30-2009-00120211)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed and remanded with directions.

Law Offices of Ernest Mooney, W. Ernest Mooney for Cross-complainant and Appellant.

The Dewberry firm and Robert H. Dewberry for Cross-defendant and Respondent.

Kenneth W. Fuller appeals from an order dismissing his cross-complaint against Dan Neyenhuis. The dismissal followed – albeit in rather circuitous fashion – the trial court’s order sustaining Neyenhuis’ demurrer to Fuller’s first amended cross-complaint. The court did give Fuller 20 days leave to amend, but Fuller submitted his proposed second amended cross-complaint two days late – apparently due to counsel’s illness – and was thus obligated to seek a court order allowing it to be filed.

The court refused to allow the second amended cross-complaint to be filed against Neyenhuis, but in doing so, appeared to focus solely on the interests of several *additional* proposed cross-defendants whom Fuller had sought to add into that second amended cross-complaint. Those proposed additional cross-defendants strenuously opposed the motion to allow the second amended cross-complaint to be filed against them, arguing it was too close to the trial date to allow a second amended cross-complaint to be asserted against them for the first time.

By contrast, Neyenhuis’ opposition frankly *assumed* the second amended cross-complaint would be filed, and simply requested that Fuller’s claims against him be severed for a later trial “as a condition of” allowing the filing. Nonetheless, the court denied the motion to file the amended pleading against Neyenhuis as well as those proposed additional cross-defendants, and thus terminated Fuller’s *previously initiated* claims against Neyenhuis.

At no point in the proceeding did the court express any concerns about the two-day tardiness of Fuller’s attempt to file the amended pleading against Neyenhuis, or about the credibility of counsel’s excuse for that tardiness – i.e., the only appropriate grounds for refusing to allow the amended claims to be filed against Neyenhuis. In fact, the court’s comments at the hearing suggest it was unaware that its ruling would actually affect Fuller’s claims against Neyenhuis.

But it certainly did. The court’s denial of Fuller’s motion to file his second amended cross-complaint meant that Fuller had no pending claims alleged against

Neyenhuis, and provided the basis for Neyenhuis to later successfully move for dismissal of that second amended cross-complaint against him, with prejudice. We reverse that order of dismissal.

FACTS

The cross-complaint at issue in this appeal stems from a complicated real estate transaction. However, because neither the details of that transaction, nor the propriety of any causes of action arising out of it, are at issue herein, we will describe it only in the briefest of terms.

In essence, Fuller alleges he entered into an agreement to buy a piece of property already in escrow. The escrow had been opened by John Turpin, who had retained the right to assign his purchasing right to another – ultimately, Fuller. Howard Marans, plaintiff in the main action, loaned Fuller \$1,000,000 to be paid into escrow and credited toward the purchase of the property, and Fuller signed a promissory note agreeing to repay that sum to Marans.

After the loan agreement was struck between Fuller and Marans, Turpin signed an amendment to the escrow instructions, stating he assigned his interests in the property, and in the funds deposited into escrow, to Fuller. Thereafter, Turpin allegedly forged Fuller's signature to escrow instructions which ultimately caused the escrow company to cancel the escrow and release \$750,000 directly to Turpin.

Marans filed the main complaint in March of 2009, naming both Fuller and Turpin as defendants, and alleged causes of action for breach of promissory note against Fuller, breach of loan agreement and conversion against Turpin, and seeking judicial foreclosure of a deed of trust given by Fuller to secure the promissory note.

Fuller then filed a cross-complaint against Turpin and the escrow company, among others, on April 20, 2009, alleging 15 causes of action. Then, on June 4, 2009, slightly more than a month later, Fuller filed his first amended cross-complaint, in which he added an additional cause of action, styled "Imposition of Constructive Trust" against

Turpin as well as Neyenhuis.¹ In support of that cause of action, Fuller alleged he had recently learned that at least \$265,000 of the sums misappropriated by Turpin were used to purchase a piece of real property in Corona del Mar, and that while Turpin owns half of that property, legal title to it is owned solely by Neyenhuis. He alleged it was necessary to impose a constructive trust over the property, decreeing that Turpin and Neyenhuis hold it as constructive trustees for his benefit.

Neyenhuis successfully demurred to Fuller's first amended cross-complaint, and on September 10, 2009, the court gave Fuller 20 days leave to file a second amended cross-complaint. Meanwhile, on September 21, 2009, while Fuller's second amended cross-complaint was pending, the court held a trial setting conference, and scheduled the case for trial in March of 2010.

Unfortunately, due to the illness of his counsel,² Fuller submitted his second amended cross-complaint to the court two days late, and he was subsequently notified he would have to seek a court order allowing it to be filed.

Fuller's proposed second amended cross-complaint retained his request for imposition of a constructive trust over Neyenhuis' Corona del Mar property, alleged three legal theories against Neyenhuis – unjust enrichment, money had and received, and conversion – and also added additional cross-defendants and new causes of action against them into the case. The new cross-defendants included plaintiff Marans, against whom Fuller alleged causes of action seeking rescission of the promissory note which was the subject of the main complaint; two individuals alleged to be alter egos of the escrow

¹ As the trial court correctly pointed out, "imposition of a constructive trust" is a remedy, not a cause of action. However, in evaluating the sufficiency of a cause of action, the courts focus on the substance of the allegations, not the title employed. "Regardless of the label attached to the cause of action, we must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory." (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 745.)

² According to the declaration filed by Fuller's counsel, he experienced a recurrence of a chronic health condition near the deadline date, which made it "essentially impossible" for him to either finish the amended cross-complaint by the deadline or prepare papers for and appear on an ex parte request to extend the deadline. No one questioned the truthfulness or challenged the sufficiency of this explanation.

company named in the earlier cross-complaint; and the company alleged to be acting as the surety for the escrow company.

When Fuller learned the clerk had declined to file the tardily submitted second amended cross-complaint, he promptly moved, ex parte, for an order allowing it to be filed. At the ex parte hearing on October 14, 2009, the court declined to order it be filed on an ex parte basis because of the added claims and parties, and suggested Fuller file a noticed motion.

Approximately a week later, Fuller filed his noticed motion. Marans filed a substantive opposition to the motion, arguing that Fuller had delayed inexcusably in asserting an affirmative cross-complaint against him; that the rescission issue would be fully litigated as part of Fuller's defense to the complaint; and that it was unfair to make him participate in a complicated trial involving Fuller's various third party claims, none of which was determinative of any issues raised in the main complaint.

By contrast, Neyenhuis filed a document characterized as an "opposition" to the motion for leave to file a second amended cross-complaint, but in fact it was not. Instead, the document merely informed the court that the scheduled trial was only four months hence, and Neyenhuis intended to challenge the sufficiency of the proposed second amended cross-complaint. He theorized the amended complaint would thus not be at issue against him until approximately one month before the scheduled trial date. Based upon that scenario, he asked the court "sever the portions of the cross-complaint alleged against him for the purpose of the actual trial." He also noted that Fuller's claims against him were derivative of Marans' claims against Fuller, and noted a trial of the cross-complaint against him would actually be unnecessary if Marans did not prevail on the main complaint.

At the hearing, the court appeared to focus entirely on the portions of the proposed second amended cross-complaint which sought to add new cross-defendants. As the court summed it up: "The new miscreants which he has located include the

following: Howard Marans. Of course, Mr. Marans is the plaintiff. He's been around since the case started. [¶] Next, he wants to add . . . the owners of Escrow Legends, but Escrow Legends is a cross-defendant. In fact, Mr. Fuller's been suing Escrow Legends since last April. [¶] One thing that I take it he wants to make explicit is that [the owners] are the alter egos of Escrow Legends, not that alter ego is a cause of action. [¶] Finally, Mr. Fuller wants to add American Contractors Indemnity Company, which he says issued an indemnity bond to Escrow Legend."

The court then noted that Fuller had "reshuffled the deck," meaning he had changed the order of the causes of action he alleged, and that "several of the proposed new causes of action were not causes of action at all. They're just requests for equitable remedies; for example, rescission. The first four causes of action are just for rescission."

And then the court concluded "for all that, I'm going to deny this motion, except for the bonding company. The other proposed new defendants have all been known to Mr. Fuller from the outset." Somewhat confusingly, the court then explained that the case against the bonding company "would not even be mature until there were a judgment in this case in favor of Fuller against Escrow Legends," and that "[i]t's way premature to say that he necessarily gets a cause of action out of this." The court then furthered the confusion by stating "that Mr. Fuller will have to be content with the 16 causes of action that he's already put before the court," given that those 16 causes of action – presumably referring to the ones stated in Fuller's first amended cross-complaint – would include the imposition of constructive trust claim against Neyenhuis (to which he had already successfully demurred) but none against the bonding company.

When Fuller's counsel pointed out to the court that he had already alleged a cause of action against Neyenhuis, and that a demurrer had been sustained, the court seemed unfamiliar with it, asking "when did you bring in Neyenhuis as a cross-defendant?" After Fuller's counsel briefly explained, the court responded, "I'm not going to grant this motion. You're just going to have to go to trial with the 16 causes of

action.” And when Fuller’s counsel explained that one of the 16 causes of action Neyenhuis had already demurred to, the court simply observed, “Oh, we’re down to 15?”

Neyenhuis’ counsel then attempted to get some clarification: “Your honor, I wanted to just ask you – I’m a little bit unsure where this leaves Neyenhuis. Because the last – in the last round of pleadings, the demurrer” – But the court cut him off. “You know, if you are going to say ‘Do you have to answer?’ – or I don’t know whether you did answer the last complaint. You probably did.” Neyenhuis’ counsel then informed the court that he didn’t answer, but was instead “waiting to demur again.” The court then expressed surprise: “You haven’t demurred to a cross-complaint that was filed in June?”

After Neyenhuis’ counsel summarized the situation relating to the cross-complaint against him – reminding the court of the prior demurrer, the late submission of the amendment, and the ex parte hearing, the court acknowledged “you may have revealed a problem. I’m not quite sure I understand exactly how it falls out, . . . but I have a courtroom full of other people in other cases. . . . [¶] *I don’t know exactly where we’re left, but I have a feeling on that second amended complaint if you haven’t answered and you don’t have a motion on file, he’s either going to take your default, or you’re going to ask to get out of it, or you’re going to stipulate that your answer is good or – I mean, there’s only so much I can do. [¶] But I’m not really here to try to broker a deal between you two.*” (Italics added.)

The court then summed up by explaining “the case is really getting very complicated with all these causes of action and things going on, and *I can’t work it out right now on the bench. I did my best to cover the issues that I had to deal with today. [¶] As for the rest . . . why don’t you . . . work it out, if you can.*” (Italics added.)

Later that same day, Neyenhuis’ counsel wrote a letter to Fuller’s counsel, seeking confirmation that because the court had denied Fuller’s motion to file the second amended cross-complaint against Neyenhuis, there was no pending cross-complaint to

which he needed to respond to. Fuller’s counsel responded with that confirmation, although he noted they were “in the process of reviewing our options”

Apparently, nothing further happened in connection with the cross-complaint for nearly a year. Then, in October of 2010, Fuller filed a separate lawsuit against Neyenhuis. Then, in November of 2010, Neyenhuis filed a motion to dismiss the cross-complaint against him, with prejudice. In his motion, Neyenhuis claimed that after the court sustained his demurrer to the first amended cross-complaint, Fuller had “*elected not to file* an amended cross-complaint against [him], and as a result, [Neyenhuis] is entitled to an order of dismissal on the cross-complaint against him.”³ (Italics added.) Neyenhuis relied upon a case in which the plaintiff had voluntarily elected not to amend, as a basis for seeking a dismissal *with prejudice*.

Fuller, opposed the motion, and in doing so, pointed out the inaccuracy of Neyenhuis’ claim that he had not attempted to amend his complaint against Neyenhuis. He argued that a dismissal, with prejudice, was inappropriate when a party had not voluntarily elected to forego amendment. He also pointed out that, in accordance with the court’s earlier suggestion there were too many parties and claims asserted in his proposed second amended cross-complaint, and that those claims would more properly be asserted in separate actions, he had subsequently filed his claims against Neyenhuis in a separate action, which was pending.

At the hearing on the motion to dismiss, the court noted the case had a “complicated and somewhat irritating procedural history, including a lot of maneuvers

³ This characterization of the circumstances is clearly inaccurate. In his declaration filed in support of the motion to dismiss, Neyenhuis’ counsel claimed that after the court sustained Neyenhuis’ demurrer to the cause of action initially asserted against him in Fuller’s first amended cross-complaint, Fuller “never filed an amended cross-complaint against [him.]” Counsel claimed that Fuller “did attempt to file a second amended cross-complaint *against other cross-defendants*, but ultimately, the court denied Fuller leave to file a second amended cross-complaint.” (Italics added.) Although Fuller pointed out this inaccuracy in both his opposition to the motion to dismiss, and in his brief on appeal, Neyenhuis (who continues to be represented on appeal by the same counsel who represented him at the trial court level and signed the inaccurate declaration supporting the motion to dismiss), fails to acknowledge or explain the inaccuracy in his respondent’s brief. The omission is disappointing, to say the least.

that were successful in postponing the trial” and that “[o]ne way of looking at today’s motions by Mr. Neyenhuis is that he became unnecessarily embroiled in the larger suit as a result of that maneuvering process”

The court then recited its erroneous understanding of the procedural history of the case, including the fact that (a) Fuller “did try to file a second amended complaint” until “a couple of months late[]” and (b) the proposed second amended cross-complaint was “radically different from the first amended complaint [, with] several new parties and causes of action, and we had a trial date coming up. So that was denied.” The court then frankly acknowledged that in the wake of its decision to deny Fuller’s motion to file his second amended cross-complaint, it had *continued to believe Neyenhuis would be a cross-defendant at trial*, and even inquired “on my own initiative, on the first day of trial, . . . what had become of Mr. Neyenhuis”

The court then stated that when Fuller’s counsel informed him what had happened, “I probably should have just dismissed him at that time, but it didn’t occur to me to do that. [¶] So that’s just a long way of saying that Mr. Neyenhuis has every reason to bring on today’s motion for dismissal, and I’m going to grant it, with prejudice.”

When Fuller’s counsel reminded the court that he had attempted to file his second amended pleading two days late, rather than two months late, and the delay had been due to health reasons, the court acknowledged that, stating, “I remember,” but then explained that it had denied the motion not merely for untimeliness, but for “a variety of reasons, I told you there were other parties, other causes of action. I hadn’t given you a blank check to amend this complaint.”

Fuller’s counsel then reminded the court it had originally expressed the belief there were too many parties and too many claims included in his second amended cross-complaint, and had suggested they should be brought as separate actions – which is exactly what he had done by electing to simply sue Neyenhuis in a separate case, rather

than continue efforts to pursue his cross-complaint against Neyenhuis in the original case. The court then expressed surprise that Fuller had a separate case pending against Neyenhuis, acknowledging that it had “missed that” fact in his opposition papers.

Nonetheless, the court stated it was “not persuaded to change my mind in terms of what I’m going to do. So I’m going to grant the motion to dismiss.”

I

Fuller claims the court erred in two ways: First, it abused its discretion by refusing allow him to file his proposed second amended cross-complaint against Neyenhuis, since his initial effort to do so was only two days late, with the slight delay caused by counsel’s illness; and second, its subsequent order of dismissal, even if otherwise proper, should have been made without prejudice, in light of his efforts to file that second amended cross-complaint herein and to pursue his claim against Neyenhuis in a separate action. We need address only the first point.

We begin with the proposition, cited by Neyenhuis, that “the trial court has wide discretion in allowing the amendment of any pleading, [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown.” (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486, citations omitted.) However, we are also mindful of California’s “policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.’ [Citation.] Indeed, ‘it is a rare case in which “a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.”’ [Citation.]” (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158.)

In this case, we conclude the court would have committed an abuse of discretion in deciding to terminate Fuller’s cross-complaint against Neyenhuis based upon the delay in counsel’s effort to file his amended version of it – if we believed the

court actually intended to do that. But we do not. Instead, it's pretty clear the court simply lost track of this particular claim, due to the confusion generated by Fuller's effort to initiate entirely new claims against additional cross-defendants in the same pleading.

Indeed, the only justification articulated by anyone, at either the trial level or this one, for the court's refusal to allow Fuller to file his second amended cross-complaint, was that he had waited too long to *initiate* claims against the *other* proposed cross-defendants in that pleading. The court's explanation for its refusal to allow the filing focused entirely on those other parties and claims. But those arguments have nothing to do with whether the court should have allowed Fuller to pursue an amended version of the claim he had *previously filed* against Neyenhuis. Indeed, the court had expressly given Fuller leave to amend the first cross-complaint, after Neyenhuis demurred to it, and the only reason Fuller needed an additional court order to do that was because he had missed the 20-day deadline for amendment by two days, because of his counsel's illness.

Even Neyenhuis himself offered no argument actually *opposing* Fuller's request to file the second amended cross-complaint against him in the trial court. He asked only that the court sever that claim from the main action, so that it could be tried later. And on appeal, Neyenhuis' argument citing Fuller's "unexplained failure to file amended cross-complaint sooner" has nothing to do with any claim asserted against *him*. It consists entirely of a quotation from the trial court's explanation of why it would not allow Fuller to initiate cross-claims against *other parties* for the first time in his proposed second amended cross-complaint.

A two-day delay, caused by counsel's illness, is simply not a meritorious reason to reject the filing of an amended pleading. Such a ruling would flout the policy of liberality of amendments, and severely punish Fuller for having retained counsel who was subject to normal human frailties. That is not a basis upon which lawsuits should be resolved.

Luckily, it does not appear the trial court actually *meant* to resolve Fuller’s claim against Neyenhuis on that basis. To the contrary, the court’s comments make it abundantly clear that it simply misunderstood the status of that claim, both at the hearing on the motion to allow the second amended cross-complaint to be filed, and at the trial itself. At the hearing, the court explicitly stated that it assumed Neyenhuis would be answering that second amended cross-complaint, on pain of default;⁴ and as the court acknowledged at the hearing on the motion to dismiss, it had fully expected to try the cross-complaint against Neyenhuis at trial. However, the court was mistaken on both counts.

We now rectify that mistake. Fuller should not have been deprived of the opportunity to pursue his cross-complaint against Neyenhuis, merely because his counsel’s illness delayed his attempt to file the second amended cross-complaint by two days. And because it appears the main action was already tried, Neyenhuis is effectively granted his wish that the amended pleading be filed on the condition the cross-complaint against him be severed from the main action for trial.⁵

DISPOSITION

The order dismissing Fuller’s cross-complaint against Neyenhuis, with prejudice, is reversed. The case is remanded to the trial court with directions to grant

⁴ As the court told Neyenhuis’ attorney, “I don’t know exactly where we’re left, *but I have a feeling on that second amended complaint, if you haven’t answered and you don’t have a motion on file, he’s either going to take your default, or you’re going to ask to get out of it, or you’re going to stipulate that your answer is good* or – I mean, there’s only so much I can do. [¶] But I’m not really here to try to broker a deal between you two.” (Italics added.)

⁵ We express no opinion on the merits of the claims asserted against Neyenhuis in Fuller’s second amended cross-complaint, as against a demurrer. That issue was not raised or decided below in connection with the motion to allow the pleading to be filed. Neyenhuis will have the opportunity to pursue any appropriate challenge to the pleading on remand, just as he would have had if the court had allowed Fuller to pursue the legal claims asserted against him in that second amended cross-complaint in the first instance.

Fuller's motion to allow his second amended cross-complaint to be filed as against Neyenhuis. Fuller is to recover his costs on this appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.