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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JO SMITH,

Plaintiff and Appellant,

v.

COUNTY OF ORANGE,

Defendant and Respondent.

G045155 consol. w/G045250

(Super. Ct. Nos. 30-2010 00374831 &
30-2010 003761130)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Jo Smith, in pro. per., for Plaintiff and Appellant.

Madory, Zell, Pleiss & McGrath and Mark G. McGrath for Defendant and Respondent.

The trial court dismissed Jo Smith's consolidated lawsuits filed against the County of Orange (the County) as a discovery terminating sanction and entered judgment in the County's favor. Smith appealed from the court's order denying her motion for a declaratory judgment in her breach of contract action. She filed a separate appeal from the court's judgment dismissing both lawsuits. We have reviewed the entire record and find no reversible error.¹

I

The issues on appeal relate to procedural questions and, accordingly, we limit our recitation of the underlying facts to the following brief summary. Smith enrolled in the Ryan White HIV/AIDS program,² and the County received federal funds from this program. The County, through its REACH (Risk Reduction, Education, and Community Health) program, used the federal funds to provide bus passes to eligible persons living with HIV/AIDS to increase their access to health care services. Smith enrolled in the REACH program and was provided three bus passes per week.

In 2009, the County learned it had to take several corrective actions with respect to how it issued bus passes in order to continue receiving its federal funding for the REACH program. In September 2009, the County notified everyone in the program they would need to provide a new verification of disease form, and demonstrate they were using the bus passes to receive medical services. Smith was repeatedly advised of the new policy in September, November, and December 2009. She continued to receive

¹ Smith provided a clerk's transcript that was inadequate for a meaningful review of the record. The County provided this court with a four volume, 904-page augmented record, but because there were over 90 documents, it was of limited usefulness without a table of contents or tabs. Therefore, on our own motion, we took judicial notice of the entire superior court file in this case. (Evid. Code, § 459.)

² Ryan White is administered by the United States Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA), HIV/AIDS Bureau (HAB).

bus passes to have a reasonable opportunity to obtain the necessary verification forms. At the end of December, Smith's request for additional bus passes was denied.

In May 2010, a grievance panel reviewed Smith's complaint and authorized bus passes for an additional 30 days so Smith could abide by the policy and submit verification of her HIV status and documentation of her health care visits. Smith failed to submit the necessary documents and, thereafter, the County refused to issue any additional bus passes.

Meanwhile, from March 13, 2008, to June 8, 2009, Smith received services from the County's Comprehensive Risk Counseling Services (CRCS) program. The CRCS program's services included intervention and education on HIV-1 risks and transmission. To qualify for this program, Smith was again required to establish she was HIV positive.

Smith filed two separate lawsuits against the County. On May 21, 2010, Smith filed a professional negligence action relating to services she received from a public employee working as a therapist in the REACH program (hereafter referred to as the professional negligence action). A few days later, on May 26, she filed a breach of contract action against the County relating to its "case management and transportation services" and other wrongdoings of the REACH program (hereafter referred to as the service contract action).

The County filed a demurrer and motion to strike the professional negligence action. Smith filed an opposition. The court sustained the demurrer with leave to amend the negligence cause of action but without leave to amend the fraud cause of action. Smith filed a first amended complaint (FAC).

The County filed an answer to the service contract action and propounded several discovery requests, including form interrogatories, requests for documents, and requests for admissions. In September 2010, the County filed motions to compel further

responses to its discovery requests, arguing Smith failed to provide full and complete responses. Smith filed oppositions to these motions.

In October 2010, the County filed a demurrer and motion to strike Smith's FAC asserting professional negligence. Smith filed an opposition.

On November 23, 2010, the court ordered Smith to respond within 10 days to all the form interrogatories (except for 16 listed interrogatories), all requests for documents (except for two requests), and all requests for admissions in the professional negligence action. The court overruled the County's demurrer and on its own motion scheduled an order to show cause (OSC) regarding consolidation of the two cases.

In December 2010, the cases were consolidated for discovery and trial. The professional negligence case was designated the lead case.

At the end of December 2010, the County moved to dismiss the contract service action pursuant to Code of Civil Procedure section 2023.030, subdivision (d)(3),³ due to Smith's failure to comply with the trial court's November discovery order. Alternatively, the County requested \$300 in sanctions. Smith filed an opposition.

Also in December 2010, the County propounded several different discovery requests regarding the professional negligence action. And on January 5, 2011, the County served Smith with a notice to take her deposition and requested the production of several documents at her deposition scheduled for January 20, 2011.

On January 18, 2011, the court issued a minute order stating "[a]s more fully discussed on the record, motion [to dismiss] taken off calendar without prejudice to a new motion by [the County] challenging the quality of discovery responses." The parties did not submit a copy of this portion of the reporter's transcript, but we can infer the order was prompted by Smith's statement she intended to comply with the November court discovery order.

³ All further statutory references are to the Code of Civil Procedure.

The day before Smith's scheduled deposition, she sent the County a "response to deposition" stating she was out of the state from January 15 to April 15 and to "[r]eschedule [the] deposition accordingly."

In February 2011, the County filed motions to compel answers to interrogatories regarding the service contract action and the professional negligence action. On the same day, it filed a motion to compel Smith's deposition and to compel the production of requested documents in both lawsuits. The County also filed motions to deem answers admitted in both lawsuits.

On March 8, 2011, the court ruled, "All motions granted. [Smith] is ordered to respond to the [i]nterrogatories and [d]ocument [r]equest under oath, in writing, properly verified, and without objection, in strict accordance with [sections] 2030.210 (a) and (c) and . . . 2031.210 within five days hereof." In addition, the court ruled, "All requests for admission deemed admitted subject to a motion by [Smith] for relief from this order to be filed within 10 days hereof. [¶] [Smith] is ordered to appear for . . . deposition at the office of defendant's counsel within 20 days hereof at a date to be mutually agreed upon in advance. [Smith] is further ordered to produce all documents the production of which was heretofore noticed in the original [n]otice of [t]aking [d]eposition. [¶] The motion for sanctions for failure to previously appear at a noticed deposition will be under submission following said deposition date upon the filing by counsel for the moving party of a declaration notifying the court that the said deposition has been completed or that the deponent failed to appear. [¶] Failure to file said declaration within five days of the conclusion of said deposition will be deemed a waiver of the request for sanctions. [¶] Sanctions for failure to respond to other previous discovery is awarded against [Smith] in the amount of \$500.00."

In February and March 2011, the court considered and denied Smith's motions to quash the subpoena issued to UC Irvine Medical Center for production of her medical records, her motions for declaratory judgments, and her motion for a judgment

on the pleadings. On March 22, 2011, the County moved to dismiss the consolidated complaints due to Smith's failure to comply with the trial court's discovery orders.

On April 12, 2011, the court dismissed the actions with prejudice as a terminating sanction based on Smith's failure to comply with discovery and the court's discovery order. The County prepared a final notice of ruling on the dismissal, and on May 2, the court ordered the complaints dismissed. The trial court entered a final judgment in favor of the County on May 25, 2011.

On April 27, 2011, Smith filed a notice of appeal from the court's order denying her motion for a declaratory judgment in the service contract action. On May 2, Smith filed a notice of appeal from the "order of dismissal entered on [April 12, 2011]." This court consolidated Smith's two appeals.

II

A. *Declaratory Relief*

Smith's opening brief is difficult to decipher because it is repetitive, incomplete, lacking relevant case authority, and disorganized. Nevertheless, we have determined she makes three main points with respect to the court's ruling on her declaratory relief motion.⁴ She contends: (1) the minute order denying her motion for declaratory relief was a final judgment in the case; (2) the motion should have been granted because she proved a contract was breached when the County failed to provide her with bus passes; and (3) breach of contract is only proper when there is an issue of public policy and no public policy exists in this case. Her contentions lack merit.

We begin our analysis by first noting self-represented litigants are "held to the same standards as attorneys. [Citation.]" (*Kobayashi v. Superior Court* (2009))

⁴ On appeal, Smith does not challenge the court's denial of her declaratory relief motion related to the professional negligence claim. Accordingly, we will not address this ruling in our opinion.

175 Cal.App.4th 536, 543.) Our Supreme Court has explained, “[S]elf-representation is not a ground for exceptionally lenient treatment.” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.) The high court reasoned, “A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.” (*Id.* at p. 985.)

With this in mind, we turn to Smith’s contention the minute order denying her motion for declaratory relief was appealable. She is wrong. However, this mistake is not a material issue in the case. After filing her notice of appeal, this court advised Smith that she appealed from a nonappealable order. Smith later filed a copy of the final judgment. We will construe the appeal as properly arising from that final judgment.

Smith also argues her motion for declaratory relief should have been granted because she proved the elements of her breach of contract claim as a matter of law. Smith misunderstands the nature and purpose of declaratory relief. A threshold requirement for a declaratory relief action is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments “in cases of actual controversy relating to the legal rights and duties of the respective parties.” (§ 1060.)

“The purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach. ‘[D]eclaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.’ [Citations.] No such preventive benefit is possible here.” (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) Because Smith alleged the contract had already been breached, there was no need to employ the declaratory judgment procedure in this case.

Moreover, because declaratory relief is designed to settle disputes before they lead to an actual violation of rights, generally the requirements for a justiciable controversy must be met *at the pleading stage*. A plaintiff seeking declaratory relief “must allege facts from which the court may determine that an actual controversy relating to legal rights and duties of the respective parties exists.” (*Lord v. Garland* (1946) 27 Cal.2d 840, 851.) “Unless [all the] allegations of a complaint show that an actual controversy exists between the parties, there is no basis for declaratory relief. [Citation.]” (*Amer. Mission Army v. City of Lynwood* (1956) 138 Cal.App.2d 817, 819.) Smith did not demonstrate a pending controversy or need for declaratory relief in either complaint. She sought only damages relating to the County’s alleged past wrongdoings. In essence, Smith’s motion sought a summary adjudication of the breach of contract claim before trial, not declaratory relief regarding her rights under the purported contract.

The trial court recognized Smith’s motion appeared to actually be a motion for summary judgment. When considering the motion, it applied the rules regarding summary judgment motions and correctly determined the evidence submitted did not satisfy Smith’s burden of proof for adjudication of her claims as a matter of law. There was a material factual dispute about whether a contract existed and if it was breached. The motion was properly denied.

B. Motion to Dismiss

Smith asserts the court abused its discretion in granting the County’s motion to dismiss for several reasons. She maintains the court lacked jurisdiction to consider the motion because it was not filed in a timely fashion and it was “superseded” by her motion for a declaratory judgment. In addition, Smith contends the dismissal motion should have been denied because “this case has merit deserving to be tried” and the court was required to impose a less serious sanction for her discovery abuses. Her contentions lack merit.

First, without citing to any legal authority, Smith argues the motion to dismiss was untimely because it was not filed “four weeks before the hearing date.” The County’s motion for dismissal was made pursuant to section 2023.030, subdivision (d), permitting sanctions for misuse of the discovery process. Notice of any motion must generally be provided 16 days before the date of the hearing, and 21 days before the hearing if served by mail. (§ 1005, subd. (b).) The County served the motion on March 21, 2011, and it was heard 22 days later on April 12, 2011. The motion was timely filed and served.

Second, Smith maintains her motion for declaratory relief should have “taken precedence” over all other matters in the case. Again, she provides no legal authority to support this contention. Smith may have misconstrued section 1062.3, which gives declaratory relief actions brought under 1060 “precedence on the trial calendar except over earlier matters of the same kind and matters to which special precedence may be given by law. If the plaintiff seeks relief in addition to a declaratory judgment, the action takes precedence only on noticed motion and a showing that the action requires a speedy trial.” (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 849, p. 265.) There is no statutory provision stating a motion for declaratory relief “supersedes” other properly noticed motions. We find no reason to hold the court lacked authority or jurisdiction to consider the discovery sanction motion.

Alternatively, Smith contends the motion to dismiss should not have been granted because her causes of action were meritorious. Smith does not dispute she abused the discovery process, rather she suggests the appropriate sanction that should apply “would be to not allow [her] to present at trial any material discovery which was denied to [the County].” We find no error. “Although the ultimate sanction of default is a drastic penalty which should be sparingly used, the unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction; and the test on appeal is whether the lower court abused its discretion on the particular facts

before it. [Citation.]” (*Housing Authority v. Gomez* (1972) 26 Cal.App.3d 366, 371.) It cannot be said the court abused its discretion in this case. Despite being given several opportunities, Smith failed to comply with the trial court’s discovery orders. The day before her scheduled deposition, Smith advised the County she would be unavailable for the next three months (from January 15 to April 15). Given that trial was scheduled for May and Smith had not properly complied with any other written discovery requests, the County was placed in the difficult position of being unable to properly evaluate the case for trial or prepare a motion for summary judgment. Smith does not offer any excuse to justify her willful noncompliance with the trial court’s discovery orders. She believes the trial court should have allowed her to carry on to the trial and simply exclude the evidence she purposefully withheld from the County. That Smith does not see the inequity in her proposed solution only further supports the trial court’s decision a lesser sanction would not produce Smith’s compliance with the discovery rules. Under the unique circumstances of this case, the terminating sanction imposed by the court was fully justified.

III

The judgment is affirmed. Respondent shall recover its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.