IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

KAHTAN B. BAYATI, TRUSTEE OF KAHTAN BAYATI LIVING TRUST

Plaintiff and Appellant,

v.

TOWN SQUARE M. PROPERTIES, et. al.,

Defendants and Respondents.

B295426

(Los Angeles County Super. Ct. No. KC069904, consolidated with KC069113)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert A. Dukes, Judge, retired; Peter A Hernandez, Judge. Affirmed.

Kennedy & Souza, John W. Millar for Plaintiff and Appellant.

Reid & Hellyer, Scott Talkov and Meeghan H. Tirtasaputra for Defendants and Respondents.

Appellant Kahtan B. Bayati, trustee of the Kahtan Bayati Living Trust (collectively Bayati), first sued respondents Town Square M. Properties, LLC and William Musharbash dba JB Petroleum (collectively Town Square) about eight years ago. The suit ended in a judgment against Bayati. Bayati later filed this lawsuit against Town Square. The trial court sustained Town Square's demurrer to the complaint. Bayati contends the court improperly applied the doctrine of collateral estoppel (issue preclusion) based on his prior unsuccessful lawsuit. He argues his second lawsuit raised new and previously unlitigated causes of action and the court abused its discretion by denying him an opportunity to amend the complaint. Because the trial court correctly applied issue preclusion to bar the second lawsuit and Bayati forfeited the opportunity to amend his complaint, we affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

A. The First Lawsuit

Bayati owned two adjacent undeveloped properties. Town Square owned a gas station next door. In 2007, Town Square leased the Bayati properties, intending to grade them and/or add fill dirt to facilitate the movement of fuel trucks to and from the gas station. Shortly thereafter, Town Square began storing construction vehicles and machinery on the properties. In 2008, the city of Pomona issued Bayati a "Request for Correction," asserting storage of the vehicles and machinery without a business license and permit to use the properties as a parking lot was in violation of the municipal code. Bayati notified Town Square of the Request for Correction and Town Square removed

the vehicles and machinery from the properties. In 2009, Town Square obtained city grading permits, added fill dirt and graded the properties. Months later, the city discovered Town Square's grading of the properties had exceeded the scope of the permits and ordered the grading to stop until proper permits were obtained.

In 2012, representing himself, Bayati filed a complaint against Town Square alleging seven causes of action. The waste and negligence causes of action were premised on Town Square's alleged contamination of the properties, purportedly from (1) "hazardous substances" (oil and gas) leaking from the stored vehicles and machinery, and (2) the use of uncertified fill dirt in grading the properties.

Town Square moved for summary adjudication of the waste and negligence causes of action, arguing there was no factual basis for Bayati's claims his properties were contaminated by the stored vehicles and machinery and the uncertified fill dirt. In other words, Bayati could not prove causation. Moreover, Town Square argued it (1) had complied with the Request for Correction by promptly removing the vehicles and machinery; (2) had not observed any damage to the properties; (3) had never been advised by the city the stored vehicles and machinery "constituted the unlawful dumping of hazardous waste"; (4) was informed by the city's compliance officer the violations had been "corrected"; and (5) was never fined by the city.

Town Square further maintained it had propounded discovery to Bayati seeking disclosure of the factual basis for his contamination claims. Bayati responded with a copy of the Request for Correction, his own observations of "large machinery" and "large tankers" on the properties, photographs of the alleged

contaminated soil, and an assertion that "fill dirt" was "improperly added" to the properties. Most significantly, Bayati had no evidence the contamination — if any existed — had been caused by Town Square or its contractors. Bayati refused to provide an estimate of his claimed damages. He designated an expert witness on soil contamination, but later withdrew the designation.

The trial court summarily adjudicated the waste and negligence causes of action in favor of Town Square, finding no triable issues of fact "relating to any waste on the property [and] for any damage to the property relating to waste or negligence." On April 16, 2016, following further litigation, the court entered judgment in favor of Town Square on all causes of action. The record does not reflect that Bayati appealed from the judgment.

B. The Second Lawsuit

In 2017, represented by counsel, Bayati filed a complaint against Town Square asserting causes of action for continuing private nuisance, public nuisance, waste and declaratory relief. These causes of action were again based on Town Square's alleged contamination of the properties, purportedly from (1) "hazardous substances" (oil and gas) leaking from its stored vehicles and machinery and (2) the use of uncertified fill dirt in grading the properties. The causes of action also included what Bayati would later characterize as "new" factual allegations. This new claim alleged heavy rains within the last three years caused the hazardous substances to spread or migrate throughout the soil, resulting in greater contamination. The claim also alleged the amount of the uncertified fill dirt added in 2009 was 15,000 cubic yards. The fill still remained on the properties.

In the general allegations, Bayati averred for the first time allegations concerning property maintenance issues: "15. [A]t various times since [Town Square] leased [the properties] from [Bayati], [Bayati] has received notifications and/or citations from the city of Pomona for [Town Square's] failure to maintain the [properties], including but not limited to abat[ing] weeds, clean[ing] up any and all debris, keep[ing] the perimeter fences in good repair and . . . ensur[ing] . . . that dirt and/or other contaminants do not flow into the public frontage road and gutters in front of the [properties]. In fact, in 2017 alone, no less than three separate notifications [were received] from the city of Pomona regarding abatement of weeds, debris and upkeep of the perimeter fence."[1]

Town Square filed a demurrer asserting the complaint in the second lawsuit was precluded by res judicata (claim preclusion) and collateral estoppel (issue preclusion) based on the final adjudication in the first lawsuit. Judge Robert Dukes sustained the demurrer to the complaint without leave to amend, concluding issue preclusion barred the second lawsuit. Judge

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[1] Attached to the complaint and incorporated by reference was a copy of the lease, which read in relevant part: "3 Lessee acknowledges that the premises are not in good order and repair. Lessee however, shall, at its own expense remove all debris and weeds, upon execution of the agreement. Thereafter, during the duration of this lease agreement, Lessee shall be responsible to maintain [the properties] at own expense. The current fence on [the properties'] perimeter may be removed and replaced or maintained in its current configuration at Lessee's discretion. Upon termination of this lease, any new fencing installed by the Lessee becomes the property of the Lessor. If the original fence was removed by Lessee during the term, Lessee shall not be required to reinstall or replace original fence."

Peter Hernandez entered a judgment of dismissal based on the demurrer ruling. Bayati filed a timely notice of appeal.

DISCUSSION

A. Request for Judicial Notice

In its respondent's brief, Town Center relies heavily on an unrelated case, *Mesa v. Texaco Ref & Mktg* (July 28, 2005, B172850 [nonpub. opn]) and asks us to take judicial notice of it. We deny the request. Under California Rules of Court, rule 8.1115(a), with exceptions not relevant here, nonpublished opinions "must not be cited." They have "no precedential value." (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109; *Columbo v. Kinkle, Rodiger & Spriggs* (2019) 35 Cal.App.5th 407, 417, fn. 9.) We, therefore, will not consider the opinion.

B. Demurrer and Standard of Review

A party against whom a complaint or cross-complaint has been filed may file a demurrer to the pleading on particular grounds specified by statute, including the ground that the challenged pleading fails to allege facts sufficient to constitute a cause of action. (Code Civ. Proc. §430.10, subd. (e).) A demurrer does not "test the truth of the plaintiff's allegations or the accuracy with which he [or she] describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) As such, "the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

We review an order sustaining a demurrer de novo to determine whether the operative complaint alleges facts sufficient to state a cause of action under any legal theory. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citations.] 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.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

C. Issue Preclusion Bars Relitigation of Causation

"Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) "[I]ssue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. [Citations.]" (*Id.* at p. 825.)

Bayati argues the first and second lawsuits do not involve identical issues of harm. We disagree. His first lawsuit raised issues of harm related to the alleged contamination of the properties by Town Square's leaking vehicles and machinery and the use of uncertified fill dirt. The court in the first lawsuit found no triable issue on causation; there was no evidence from which a trier of fact could conclude Town Square had caused any

contamination of Bayati's properties. Hence, Bayati could not prove his negligence and waste causes of action.

Bayati contends on appeal, however, as he did before Judge Dukes, that his second lawsuit should not be precluded because his nuisance and waste causes of action raise "new" issues of harm linked to Town Square. Specifically, Bayati points to the migration of the existing contaminants throughout the soil from recent heavy rains and the 2009 addition of additional uncertified soil that remains on the properties.

As Judge Dukes reasoned during the hearing, the trial court in the first lawsuit found Bayati could not prevail on the issue of causation. There was no evidence to support Bayati's contention that Town Square's vehicles and machinery and uncertified fill dirt contaminated the properties. Even though Bayati contends the contaminants have migrated, the issue of causation in the second lawsuit is identical because the first judgment established Town Square did not cause the contamination in the first place. As Judge Dukes explained, the situation would be different if Bayati had alleged Town Square added new contaminants to the soil after judgment had been entered in the first lawsuit, but he did not. Judge Dukes said, "It's the same harm. The harm is just spread. . . . And [Bayati] wasn't able to prevail. . . . If there's new harm, that is new deposits, new oil, new contamination, then I think you're entitled to leave to amend, but the fact the original harm has in some way migrated doesn't make it new." Because the issue of alleged contamination of his properties by Town Square had been finally decided against Bayati in the first suit he is prohibited from

relitigating that issue in a new lawsuit. (*DKN Holdings LLC v. Faerber, supra*, 61 Cal.4th at pp. 826-827.)[2]

D. Failure To Allege The Property Maintenance Issues as Part of The Nuisance and Waste Causes of Action

In this lawsuit Bayati asserts for the first time Town Square's responsibility for certain property maintenance issues. In his nuisance and waste causes of action, Bayati incorporates by reference paragraph 15 of the complaint, which states the city notified or cited him concerning Town Square's failure to abate weeds, remove debris or repair the perimeter fence. Bayati fails, however, to allege in the charging paragraphs of his nuisance and waste causes of action that Town Square's failure to remedy problems with the weeds, debris or fence constituted nuisance or waste. The charging paragraphs instead refer solely to purported harm resulting from the rain-induced migrating contamination and the 15,000 cubic yards of uncertified fill dirt. We therefore do not consider whether the alleged maintenance issues support nuisance or waste causes of action. "Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action. If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

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[2] Because we conclude issue preclusion barred this lawsuit, we need not consider whether it also was barred by res judicata (claim preclusion).

E. Failure to Seek Leave To Amend the Complaint

1. Standard of Review

We review the trial court's decision denying leave to amend for abuse of discretion. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) In determining whether the court has abused its discretion, "we consider whether there is a 'reasonable possibility' that the defect in the complaint could be cured by amendment. [Citation.]" (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) "The burden is on the plaintiffs to prove that amendment could cure the defect. [Citation.]" (*Ibid.*)

2. Bayati Forfeited Any Objection to Judge Duke's Failure to Grant Him Leave to Amend

Courts should be liberal in permitting amendments to a complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) In his tentative ruling sustaining the demurrer, Judge Dukes invited Bayati to present grounds at the hearing to justify granting leave to amend. At the hearing, however, Bayati's counsel did not seek leave to amend the complaint, but stood on the claims as presented. Counsel never wavered from the complaint even after Judge Dukes indicated leave to amend would be granted if new and different harm could be alleged. On appeal, Bayati argues Judge Dukes erred in sustaining the demurrer without addressing how his complaint could be amended to cure the perceived defects. Bayati has thus forfeited any challenge to Judge Duke's failure to grant him leave to amend. (*Rakestraw v. California Physicians' Service, supra,* 81 Cal.App.4th at p. 44; see *Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1199.)

DISPOSITION

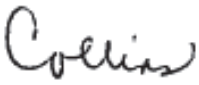
The judgment of dismissal and order sustaining the demurrer are affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.



COLLINS, J.