Hubmann v. McKenna BMW

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Plaintiff Peter Hubmann appeals the dismissal of his complaint for wrongful termination and other torts arising out of his employment at a BMW dealership. The trial court sustained the demurrer of defendant BMW of North America LLC (BMWNA) without leave to amend, concluding that plaintiff's causes of action were procedurally barred. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND[1]

In July 2000, plaintiff was employed at defendant McKenna BMW (McKenna) as an automobile salesperson. His immediate supervisor was defendant Stewart Green (Green). In apparent retaliation for plaintiff's complaints about certain business practices, Green reprimanded plaintiff and made rude and intemperate remarks about plaintiff's German ancestry. Specifically, Green is claimed to have made derogatory comments about Germany's role in World War II. According to plaintiff, this created a "hostile, racist and discriminatory work environment." McKenna was alleged to be a franchisee of BMWNA and subject to the latter's "contracts, policies and procedures." Plaintiff claimed that BMWNA was aware or should have been aware of McKenna's unlawful conduct.

Plaintiff was terminated by McKenna and Green on October 10, 2000.[2]

In March 2001, plaintiff filed separate formal complaints with the Department of Fair Employment and Housing (DFEH) and Equal Employment Opportunity Commission against "McKenna BMW" and "Green, Stewart, an individual." No complaint was filed against BMWNA. Attached to the complaint were right-to-sue letters issued by the DFEH.

On March 3, 2003, plaintiff filed suit against all three defendants, alleging seven causes of action: violation of FEHA, the Fair Employment and Housing Act (Gov. Code, §§ 12690 et seq.); public policy; Article I, section 8 of the State Constitution; negligent and intentional infliction of emotional distress; negligent hiring, supervision or retention; and breach of implied covenant of good faith and fair dealing. Only the first five causes of action were against BMWNA.

Thereafter, the case proceeded along two separate tracks. McKenna and Green moved to compel arbitration of the claims against them. Those motions were granted. BMWNA meanwhile filed its demurrer. After the trial court sustained the demurrer without leave to amend, plaintiff filed his notice of appeal.[3]

STANDARD OF REVIEW

Since a demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion, we employ two separate standards of review on appeal. First, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. In so doing, we accept as true the properly pleaded material factual allegations, together with facts that may be properly judicially noticed. Reversible error exists if facts were alleged showing entitlement to relief under any possible legal theory. (Lee v. Los Angeles County Metropolitan Transportation Authority (2003) 107 Cal.App.4th 848, 854 (Lee).)

Second, where the demurrer is sustained without leave to amend, we must determine whether the trial court abused its discretion in doing so. " `It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment. Regardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. Plaintiff can make this showing in the first instance to the appellate court.' " (Lee, supra, 107 Cal.App.4th at p. 854, citations omitted, italics original.)

Applying these standards, we now review the trial court's order.

DISCUSSION

1. The Complaint Shows on Its Face that Each Cause of Action Against BMWNA is Barred by the Applicable Statute of Limitations, and that Plaintiff Failed to Exhaust Administrative Remedies as to His FEHA Claim

Plaintiff alleged five causes of action against BMWNA. If any is legally sufficient, the dismissal was improper. The trial court concluded, however, that each cause of action was barred by the relevant statute of limitations, which in each instance was one year. Because the unlawful conduct complained of took place no later than plaintiff's termination on October 10, 2000, the complaint, which was not filed until March 3, 2003, was time barred. Additionally, as to the FEHA claim, plaintiff failed to exhaust his administrative remedies. We proceed to consider each cause of action.[4]

FEHA Claim. Plaintiff's first cause of action is for violation of FEHA which is set forth in Government Code sections 12960 et seq. Before bringing a FEHA claim in state court, a plaintiff

must exhaust administrative remedies by filing a complaint with DFEH. (Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 116; Martin v. Lockheed Missiles & Space Co. (1994) 29 Cal.App.4th 1718 (Martin).) The exhaustion rule is jurisdictional. (Id. at p. 1724.)

Thus, before plaintiff was legally entitled to bring his present action against BMWNA, he was required to file an administrative complaint and obtain a DFEH right-to-sue letter. (Martin, supra, 29 Cal.App.4th at p. 1724.) The administrative proceeding must be commenced within one year of the unlawful conduct. (Gov. Code, § 12960, subd. (d).) Here, plaintiff attached his two right-to-sue letters to his complaint. His administrative claims were not attached, but pursuant to BMWNA's request, the trial court took judicial notice of them. (Evid. Code, § 452, subd. (h).) Neither in conjunction with the demurrer, nor on appeal, did plaintiff object to the court taking judicial notice of his FEHA complaints. Accordingly, any error is waived. (Landry v. Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700.)[5]

The complaints filed with DFEH are dated March 13 (McKenna) and March 16 (Green), 2001, respectively. These filings were within one year from the date of termination (October 10, 2000) and thus complied with Government Code section 12960, subdivision (d) insofar as they applied to McKenna and Green. No DFEH complaint was filed as to BMWNA, however. Nor are we able to construe the McKenna and Green DFEH complaints as including BMWNA. Several appellate courts have held that compliance with the exhaustion of administrative remedies statute is not satisfied by naming related entities or persons. (See Medix Ambulance Service, Inc. v. Superior Court, supra, 97 Cal.App.4th at p. 118; Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal.App.4th 1505, 1509 (Cole); Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1060-1061; but see Martin v. Fisher (1992) 11 Cal.App.4th 118, 119-123 [naming of corporation impliedly named supervisor who participated in the investigation].) Rather the party charged with unlawful conduct must be named either in the caption or the body of the complaint. (Cole, supra, at p. 1515.) BMWNA is not mentioned in any part of either the McKenna or Green DFEH filings. Accordingly, plaintiff failed to exhaust his administrative remedies and may not proceed with his FEHA claim against BMWNA.

Finally, it is too late now for plaintiff to file a FEHA claim because such a claim would be barred by the statute of limitations. A claim must be filed with DFEH within one year of the unlawful activity. (Gov. Code, § 12960, subd. (d).) Here the statute of limitations expired on October 10, 2001, one year after plaintiff was terminated from his employment.

Plaintiff's Second and Third Causes of Action. Plaintiff also alleged that BMWNA violated several statutory and constitutional provisions and the public policies embodied in them. In his motion for reconsideration filed in the trial court, he argued that those claims are governed by the three-year statute of limitations of Code of Civil Procedure section 338, subdivision (a) [liability founded on a statute]. In Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal.App.4th 1200, 1208-1209 (Barton), the appellate court expressly rejected such a rule, observing that, even though wrongful termination claims are often predicated on statutory or constitutional policies, "the cause of action

itself is a common law, judicially recognized cause of action, not a liability created by statute." (Id at p. 1209, fn. 6.) Barton held the one-year statute of limitations of Code of Civil Procedure section 340 governs wrongful termination actions founded on a violation of public policy. We agree.

Intentional and Negligent Infliction of Emotional Distress. The final two causes of action against BMWNA were for intentional and negligent infliction of emotional distress. Each is governed by a one- year statute of limitations. (See Roman v. County of Los Angeles (2002) 85 Cal.App.4th 316, 323 [negligent and intentional infliction]; Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 889 [intentional]); Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal.App.4th 1086, 1097 [negligent].) No acts are alleged in the original complaint that could constitute negligent or intentional infliction of emotional distress and that occurred after his termination date of October 10, 2000. Hence, his complaint, filed March 3, 2003, was time barred.

Code of Civil Procedure Section 335.1 Does Not Apply to Plaintiff's Claims. In 2002, the Legislature enacted Code of Civil Procedure section 335.1 which replaced the previous one-year statute of limitations for personal injuries with a two-year statute. The statute became effective on January 1, 2003. (Krupnick v. Duke Energy Morro Bay (2004) 115 Cal.App.4th 1026, 1028.) Although we have held that the two- year period limitations applies to then existing claims that were not time barred as of January 1, 2003 (Mojica v. 4311 Wilshire (2005) 131 Cal.App.4th 1069, 1072-1073, citing Mudd v. McColgan (1947) 30 Cal.2d 463, 468; see also Andonagui v. May Dept. Stores Co. (2005) 128 Cal.App.4th 435, 440), the amendment does not revive claims that were already barred by the statute of limitations (Krupnick v. Duke Energy Morro Bay, supra, at pp. 1028-1029.) Since the last day for plaintiff to have filed his action against BMWNA was October 10, 2001, one year after his termination, his claims were already time barred as of January 1, 2003, and were not revived.

2. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend

Unless the record shows that the plaintiff is not capable of amending the complaint, it is an abuse of discretion to deny the plaintiff that opportunity. (Lee, supra, 107 Cal.App.4th at p. 854.) Although the likelihood of a viable amendment necessarily turns on a case-by-case basis, denying leave to amend may be particularly appropriate when the facts disclose that the claim is barred by the statute of limitations. (See DeRose v. Carswell (1987) 196 Cal.App.3d 1011, 1030.)

Although both in his motion for reconsideration and in his reply brief, plaintiff asks for leave to amend, he does not explain how an amendment would cure the defects in the statute of limitations. Moreover, we have the benefit of the proposed first amended complaint he lodged with the trial court that included allegations against BMWNA and the actual first amended complaint filed with the court that was limited to McKenna and Green. The only amendments material to avoiding the statute of limitations were the allegations that after plaintiff was fired on October 10, 2000, he was rehired on November 7 of that year, and then was constructively discharged on April 5, 2001, when he quit because of, among other things, "continuing harassment."

Assuming the truth of those allegations and that they assert conduct that commenced a new one-year period, the causes of action were still time barred on April 5, 2002, well before the original complaint was filed on March 3, 2003, and well before the January 1, 2003, extension of the statute of limitations.

Under these circumstances, the trial court did not abuse its discretion in denying leave to amend.

3. Other Contentions

At oral argument, plaintiff cited Shuer v. County of San Diego (2004) 117 Cal.App.4th 476, for the proposition that BMWNA is estopped to assert plaintiff's alleged failure to exhaust administrative remedies. Although the doctrine is discussed in the case, plaintiff does not plead estoppel in his complaint; nor does he articulate a factual basis for an amended pleading that would raise the issue.

He also argued that he was told by DFEH that he could not include BMWNA in his FEHA complaint because BMWNA was not his employer. If it is true that BMWNA was not his employer then, of course, he would not have a wrongful termination claim against that entity. If BMWNA was in fact his employer-a fact not alleged in the complaint-then it was incumbent on him to file a legally sufficient FEHA claim and exhaust his administrative remedies.

Finally, he claimed at oral argument that his claim is not legally barred by the workers' compensation law. Although that may be true, there is nothing in the trial court's order that suggests it had ruled that the workers' compensation laws preempted plaintiff's lawsuit; hence no error occurred.

DISPOSITION

The judgment dismissing plaintiff's complaint is affirmed. BMWNA to recover its costs on appeal.

We concur: COOPER, P.J., BOLAND, J.

1. Our factual recitation comes from plaintiff's complaint. As we are reviewing a judgment of dismissal after the trial court sustained a demurrer without leave to amend, we assume the truth of the allegations in the complaint without passing on their veracity. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

2. In a proposed first amended complaint lodged on May 17, 2004, plaintiff alleged he was rehired on November 7, 2000, after promising not to complain about McKenna's business practices. He was then constructively discharged on April 5, 2001, when he tendered his resignation following defendants' further unlawful conduct. This allegation was not part of the original complaint and thus played no part in the trial court's sustaining of the demurrer. We discuss its significance, post, in the context of whether plaintiff should have been given leave to amend.

3. In a separate proceeding (No. B172611), plaintiff appealed the orders granting McKenna's and Green's motion to compel arbitration. On April 5, 2004, we dismissed that appeal on the grounds that it purported to be from a non-

appealable order and was also untimely. On March 15, 2005, we granted plaintiff's request to augment the record with documents pertaining to the demurrer. On July 15, 2005, we denied plaintiff's request to augment the record with numerous other documents including those related to the arbitration proceedings.

4. We observe at the outset that neither the opening nor the reply brief addresses the grounds on which the trial court based its ruling sustaining the demurrer: statute of limitations and failure to exhaust administrative remedies. Although we could treat the failure to address these points as a waiver of the argument, we exercise our discretion to consider the merits of the trial court's ruling. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 594- 595, pp. 627- 630.)

5. Plaintiff argued below and on appeal that on a demurrer the defendants cannot argue facts that are not in the complaint. This argument is only partially correct because facts that are susceptible to judicial notice may also be considered on demurrer. (Lee, supra, 107 Cal.App.4th at p. 854.) In any event, plaintiff's point has nothing to do with judicially noticed facts but rather his contention that BMWNA was improperly arguing that it was neither a party to, nor aware of, the employment relationship between plaintiff and McKenna, facts that were not set out in the complaint. There is nothing in the record that suggests that this point was considered by the trial judge in ruling on the demurrer. It was legally irrelevant to the trial court's conclusion that the complaint was barred by the statute of limitations and the failure to exhaust administrative remedies.