Filed 11/21/19 Deville v. Bloch CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FRANK DEVILLE, Plaintiff and Appellant, v. JAMES R. BLOCH et al., Defendants and Respondents.	B291099 (Los Angeles County Super. Ct. No. BC624734)

APPEAL from orders of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Frank Deville, in pro. per., for Plaintiff and Appellant.

Dechert, William W. Oxley and Nathan M. McClellan, for Defendants and Respondents James R. Bolch, Phillip Damaska, Ed Mopas, John Hogarth, and Paul R. Hirt, Jr.

Steptoe & Johnson, Jason Levin and Melanie A. Ayerh, for Defendant and Respondent Exide Technologies.

Plaintiff and appellant Frank Deville (Deville) appeals from trial court rulings that sustained without leave to amend demurrers filed by Exide Technologies (Exide) and certain of its officers and managers: James R. Bloch, Philip Damaska, Ed Mopas, John Hogarth, and R. Paul Hirt, Jr. (the Individual Defendants). The trial court found the bulk of Deville's causes of action, which allege he suffered harm from exposure to toxic chemicals while employed at an Exide plant in Vernon, California, were barred because the statutory workers' compensation scheme was the exclusive available remedy for injuries suffered in the course and scope of employment. We consider whether Deville alleged facts negating application of the exclusive remedy provisions of the Workers' Compensation Act (Lab. Code, § 3200 et seq.).

I. BACKGROUND

A. Deville's Injury

"Because this appeal arises from a ruling on a demurrer, we treat the demurer as admitting all properly pleaded material facts. [Citations.]" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 205.)

Deville worked at Exide's hazardous waste treatment and storage plant in Vernon for 29 years. At that location, Exide recycled automotive batteries, which recovered the lead used in the batteries. Deville was a forklift driver and furnace operator.

On April 24, 2013, the Department of Toxic Substance Control (DTSC) ordered Exide to suspend operations in Vernon because plant operations were causing discharge of illegal amounts of lead into the air, water, and soil.

Before operations at Exide's Vernon facility were halted, Deville experienced what he calls two "profound" health-related incidents at work. On one occasion, Deville lost consciousness while cleaning one of the facility's furnaces. (Previously, Deville had only experienced dizziness while cleaning furnaces; on occasion, he had reported these episodes of dizziness to Exide's management.) After regaining consciousness, Deville drove himself to Exide's medical facility where a doctor examined him, advised him to consult with his personal physician, and told him he could return to work the following day. On the second occasion, which also arose in connection with cleaning one of the furnaces, Deville felt dizzy, left the furnace, and went to a restroom where he produced a urine stream that he says was black in color.[1]

B. Deville's Lawsuit

In June 2016, more than three years after these two alleged incidents and suspension of operations at Exide's Vernon plant, Deville sued the Individual Defendants, alleging unspecified injuries caused by exposure to lead and other hazardous chemicals while working at the Vernon facility. He later added Exide as a defendant.

Deville subsequently filed the operative first amended complaint. It asserts six causes of action: negligence, negligence per se, strict liability for ultrahazardous activity, misrepresentation and fraudulent concealment, private

---

[1] The operative complaint does not say whether Deville told anyone at Exide—either a manager, coworker, or a company health care worker—about this second incident.

permanent nuisance, and unfair competition (Bus. & Prof. Code, § 17200). Deville alleged he was injured by defendants' collective failure (though not much was alleged regarding the role of the Individual Defendants) to properly use and store hazardous and toxic substances at the Vernon plant, to disclose fully and accurately the risks presented to human health presented by the chemicals used at the plant, to remediate or clean up contaminants, and to provide proper safety equipment and training. As a result of defendants' misconduct, Deville alleged his health had been "slowly deteriorating" since operations at the Vernon facility were suspended in 2013.

Although the operative complaint alleges defendants concealed the "great danger" posed by various chemicals at the plant, it does not allege defendants knew he had suffered a work-related injury. Rather, the operative complaint avers defendants were aware of "injuries and damages suffered" by plaintiffs in *other* cases brought against Exide, but were only "aware of the *risk* that [Deville] and other employees could have suffered and were suffering" (emphasis ours) injury from work-related chemical exposure. The operative complaint also does not allege facts to suggest defendants concealed from Deville their knowledge he had been injured or that this supposed injury had been aggravated by any such concealment.

C. The Trial Court Sustains Defendants' Demurrers

1. The Individual Defendants

In their demurrer to the operative complaint, the Individual Defendants argued, among other things, that all of Deville's claims were precluded by workers' compensation exclusivity principles, i.e., that an employee who suffers an injury

in the course and scope of his or her employment must seek redress through the no-fault statutory workers' compensation scheme and cannot sue in court for compensation. (See generally *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 283 [Labor Code section 3600 "establishes the exclusive jurisdiction of the workers' compensation system by furnishing an employer immunity from civil liability for any injury sustained by an employee and his or her dependents arising out of and in the course of his or her employment"].)

In opposition, Deville contended the Individual Defendants fraudulently concealed "the dangers of working at the Facility" and his claims were therefore excepted from workers' compensation exclusivity principles under a statute that allows an employee to bring an action at law for damages against his or her employer "[w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment . . . ." (Lab. Code, § 3602, subd. (b)(2).) In the event the trial court sustained the demurrer, Deville requested leave to amend his complaint—but on grounds irrelevant to the workers' compensation exclusivity issue. He asserted he could allege facts concerning when he was diagnosed with "brain damage and other medical issues" and when Exide "finally admitted to violating environmental laws."

In reply, the Individual Defendants maintained the Labor Code's fraudulent concealment exception applies only to employers. The Individual Defendants argued further that exceptions under the Workers' Compensation Act for claims against fellow employees would only arise under circumstances not at issue in the operative complaint: injuries caused by either

a fellow employee's willful and unprovoked acts of physical aggression or a fellow employee's intoxication.

The trial court sustained the Individual Defendants' demurrer without leave to amend. We know this only because there is a minute order in the appellate record that states: "The demurrer to the first through fifth causes of action is sustained without leave to amend based on the exclusivity issue. [¶] The Court grants its own motion for judgment on the pleadings regarding the sixth cause of action [i.e., the unfair competition claim]. There is nothing to enjoin." The record does not include a reporter's transcript of the hearing on the demurrer, nor does it include a judgment of dismissal as to the Individual Defendants.

2. Exide

Exide separately demurred to the operative complaint, making the same workers' compensation exclusivity argument (among others) on which the Individual Defendants had prevailed. Deville opposed Exide's demurrer by reprising almost verbatim the arguments he had made in response to the Individual Defendants' demurrer.[2] In addition, he similarly

---

[2] In support of his opposition to Exide's demurrer, Deville asked the trial court to take judicial notice of various documents, including court records; DTSC reports regarding violations at, and a "Closure Plan" for, the Vernon facility; and various records from Exide's bankruptcy proceedings. The subsequent minute order sustaining the demurrer does not indicate whether the trial court granted or denied Deville's request for judicial notice. We infer from the trial court's silence that judicial notice was taken of the court and government records identified in Deville's request. (Evid. Code, § 456; *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 918-919.)

reprised his request for leave to amend on grounds immaterial to workers' compensation exclusivity.

The trial court sustained Exide's demurrer without leave to amend and dismissed the case. Again, all we have is a minute order reflecting the court's ruling, and there is no signed judgment of dismissal in the record.[3]

Deville appealed separately from each of the trial court's demurrer orders. We consolidated the appeals for decision.

II. DISCUSSION

The Individual Defendants' demurrer was properly sustained without leave to amend because the operative complaint alleges the Individual Defendants were acting within the scope of their employment and did not allege any facts that would satisfy the two exceptions to workers' compensation exclusivity rules when individual defendants (as opposed to an employer) are sued. Similarly, Exide's demurrer to the bulk of Deville's claims was properly sustained because the operative complaint does not adequately allege facts establishing any of the elements of the fraudulent concealment of injury exception to workers' compensation exclusivity on which Deville relies to maintain his action. Both in the trial court and this court, Deville has proffered no facts to suggest he can amend his

---

[3] The minute order states, in relevant part: "The demurrer is sustained without leave to amend. [¶] . . . The workers[']compensation exclusivity is not applicable. [¶] The Court orders this case dismissed." In context, the reference to "not applicable" is an obvious typographical error and Deville does not contend otherwise.

pleading to avoid the workers' compensation exclusivity bar. And Deville has waived any challenge to the trial court's ruling on his unfair competition cause of action by failing to adequately present the issue in his briefs. We shall therefore affirm.[4]

A. Standard of Review

"'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' [Citation.] If the demurrer was sustained without leave to amend, we consider whether there is a 'reasonable possibility'

---

[4] Deville moved us to take judicial notice of a number of documents, none of which was presented to the trial court, including various reports by and correspondence from DTSC regarding the Vernon facility and correspondence to Deville from Exide's bankruptcy counsel and the Department of Health. We deny the motion. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326.)

We also resolve the appeal on the merits despite Deville's appeal from the trial court's orders sustaining the demurrers that are, strictly speaking, non-appealable, rather than from final judgments of dismissal, which are appealable. (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 203-204 ["To promote the orderly administration of justice, and to avoid the useless waste of judicial and litigant time that would result from dismissing the appeal merely to have a judgment formally entered in the trial court and . . . new appeal[s] filed, we order the trial court to enter [two] judgment[s] of dismissal nunc pro tunc as of the date[s] of the order[s] [sustaining defendants' respective demurrers without leave to amend], and we will construe the notice[s] of appeal to refer to th[ose] judgment[s]"] (*Flores*).)

that the defect in the complaint could be cured by amendment. [Citation.] The burden is on plaintiffs to prove that amendment could cure the defect. [Citation.]" (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.)

B. General Principles: Workers' Compensation Exclusivity

"As a general rule, an employee injured in the course of employment is limited to the remedies available under the Workers' Compensation Act." (*Davis v. Lockheed Corp*. (1993) 13 Cal.App.4th 519, 521, citing *Foster v. Xerox Corp*. (1985) 40 Cal.3d 306, 308 (*Foster*); accord, *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060 ["when a complaint affirmatively alleges facts indicating that the Act applies, no civil action will lie, and the complaint is subject to a general demurrer unless it states additional facts that negate application of the exclusive remedy rule"].) "[T]his rule of exclusivity is based on the '"presumed 'compensation bargain,"'" in which '"'[t]he employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.'"' (*Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1001 (*Torres*).)

"An employee who suffers an injury in the course of his employment may recover damages in an action at law only if he comes within certain exceptions to the workers' compensation law. [Citations.] One of these exceptions is embodied in [Labor Code section 3602, subdivision (b)(2)]. It provides that an action at law may be brought 'Where the employee's injury is aggravated by the employer's fraudulent concealment of the

existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation.'" (*Foster*, *supra*, 40 Cal.3d at p. 308, fn. omitted.)

The fraudulent concealment exception is "extremely limited." (*Jensen v. Amgen, Inc.* (2003) 105 Cal.App.4th 1322, 1326.) To maintain a civil action against an employer under the fraudulent concealment exception, a plaintiff must "in general terms" plead three essential facts: (1) the employer knew of the plaintiff's work-related injury; (2) the employer concealed the knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment. (*Foster*, *supra*, 40 Cal.3d at p. 312; accord, *Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 89-90.) If any one of these elements is lacking, the exception does not apply and the employer is entitled to dismissal of the lawsuit. (*Hughes Aircraft Co. v. Superior Court* (1996) 44 Cal.App.4th 1790, 1797.)

As for on-the-job injury lawsuits brought not against employers but co-employees, the Legislature in 1959 provided co-employees immunity from such suits for conduct committed within the scope of employment. (*Torres*, *supra*, 26 Cal.4th at p. 1002.) The only exceptions to this rule are those created by statute: "willful and unprovoked physical act[s] of aggression" or "intoxication" by the other employee. (Lab. Code, § 3601, subd. (a)(1)-(2); *Hendy v. Losse* (1991) 54 Cal.3d 723, 738-739; *Oliva v. Heath* (1995) 35 Cal.App.4th 926, 931-932.)

C. The Trial Court Correctly Found the Bulk of Deville's Claims Are Barred by Workers' Compensation Exclusivity Principles

1. As alleged, any injury Deville suffered arose out of and in the course of his employment

Courts apply a two-prong test in determining whether an injured employee's claim is preempted by the Act's exclusive remedy provisions. First, the injury must "arise[ ] out of and in the course of the employment." (Lab. Code, § 3600, subd. (a); *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15.) "To be within the scope of employment, the incident giving rise to the injury must be an outgrowth of the employment . . . . " (*Torres*, *supra*, 26 Cal.4th at p. 1008.) Second, the acts or events giving rise to the injury must constitute "'a risk reasonably encompassed within the compensation bargain.'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 819-20.) "If they do not, then the exclusive remedy provisions are inapplicable because the malfeasor is *no longer* acting as an 'employer.'" (*Id.* at p. 820.)

A long line of California cases has held that workplace safety failures, including those related to exposure to hazardous chemicals, are a risk reasonably encompassed within the compensation bargain. (See, e.g., *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 467-475 (*Johns-Manville*); *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 719-723 [workers' compensation is exclusive remedy for employee injured by exposure to dangerous chemical substances even though employer concealed dangers from employee]; *Wright v. FMC Corp.* (1978) 81 Cal.App.3d 777, 779 [workers' compensation is exclusive remedy for employee injured by

exposure to noxious chemicals even though employer "concealed and misrepresented the hazard to induce [employee] to accept employment"]; and *Buttner v. American Bell Tel. Co*. (1940) 41 Cal.App.2d 581, 582, 584 [workers' compensation is exclusive remedy for employee injured by exposure to carbon tetrachloride even though employer represented exposure was "harmless"].) In *Johns-Manville*, for instance, the plaintiff employee alleged an asbestos manufacturer employer knew the dangers of long exposure to asbestos yet concealed this knowledge from the employee, assured the employee that it was safe to work with asbestos, failed to provide adequate protective devices, and violated government regulations governing dust levels at the workplace. (*Johns-Manville*, *supra*, 27 Cal.3d at p. 469.) Our Supreme Court held such intentional employer misconduct in failing to provide a safe workplace is not actionable in a civil suit for damages. (*Id*. at pp. 474-475.) The court reasoned that it is not an uncommon aspect of the employment relationship for an employer to know of the existence of a danger to an employee yet fail to take corrective action. (*Id*. at p. 474.) If civil lawsuits were allowed for such employer misconduct, the Court found, the workers' compensation system would be undermined. (*Ibid.*; accord, *Fermino v. Fedco, Inc*. (1997) 7 Cal.4th 701, 723, fn. 7 ["regulatory crimes such as violations of health and safety standards or special orders" are actions within the normal course of employment].)

Deville's operative complaint alleges facts that put his claims squarely within the exclusive remedy constraints of the Workers' Compensation Act. The complaint alleges he sustained his injury during the 29 years he worked at the Vernon plant. It further alleges Deville was injured during the course of normal

business operations at the plant. The fact that he was allegedly injured by defendants' failure to safeguard Exide's employees from hazardous chemicals does not remove his claim from the Act's purview. As our high court has made clear, the risk of injury from defendants' alleged safety failures is one reasonably encompassed within the compensation bargain. (*Johns-Manville*, *supra*, 27 Cal.3d at pp. 474-475.) Thus, to maintain his lawsuit, the burden was on Deville to allege facts showing his claims fell within an exception to workers' compensation exclusivity principles.[5]

2. The operative complaint does not adequately plead an exception to workers' compensation exclusivity

As to the Individual Defendants, the operative complaint is devoid of any allegations sufficient to invoke the two statutory exceptions to co-employee civil suit immunity for workplace injury. The operative complaint nowhere alleges or even implies that any Individual Defendant injured Deville by willful and

---

[5] Deville's assertion that he was diagnosed with lead poisoning three years after he stopped working at the Vernon facility does not put him outside the workers' compensation system. Numerous California cases have held that diseases which manifest after employment ends are nonetheless subject to workers' compensation. (See, e.g., *Chevron U.S.A. Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1186-1189, 1199 [asbestos-related disease diagnosed after worker no longer employed by defendant is industrial injury covered by workers' compensation]; *Ashdown v. Ameron Internat. Corp.* (2000) 83 Cal.App.4th 868, 874-878.)

unprovoked acts of physical aggression or while intoxicated. The trial court therefore properly sustained the Individual Defendants' demurrer to Deville's first through fifth causes of action (i.e., all but his unfair competition claim). (Lab. Code, § 3601, subd. (a); *Hendy v. Losse*, *supra*, 54 Cal.3d at pp. 738-739; *Oliva v. Heath*, *supra*, 35 Cal.App.4th at pp. 931-932.)

As to Exide, the operative complaint's allegations that the company knew there were risks to employees like Deville from lead and other chemicals are insufficient to invoke the fraudulent concealment exception to workers' compensation exclusivity for claims against employers. (*McDonald v. Superior Court (Flintkote Co.)* (1986) 180 Cal.App.3d 297, 303 ["Plaintiff alleged in the complaint that Flintkote knew of and fraudulently concealed the 'risk of the development of pulmonary disease' and 'risk of asbestos exposure.' But he did not allege that Flintkote knew and concealed that plaintiff was suffering from the disease, thereby aggravating that injury by its fraud. Such knowledge of an existing work-related injury is essential to establish a claim under [section 3602,] subdivision (b)(2)"].) It is "[a]n employer's *actual* knowledge of the existence of an employee's injury connected with the employment [that] is a necessary prerequisite to establishing a claim against the employer for fraudulent concealment under section 3602(b)(2)." (*Palestini v. General Dynamics Corp., supra*, 99 Cal.App.4th at p. 93, citing *Foster*, *supra*, 40 Cal.3d at p. 312.)

There is no allegation in the operative complaint that Exide had actual knowledge that the only two specific health-related episodes Deville identifies were symptoms of lead poisoning. In fact, Deville alleges facts suggesting Exide did *not* know he had been poisoned by exposure to lead or any other hazardous

chemicals at the plant: after he visited Exide's medical facility following the loss of consciousness episode, the complaint alleges the company doctor cleared him to return to work the following day. Although Deville alleged he had reported prior episodes of dizziness to Exide, no facts were alleged tying those prior episodes to chemical exposure, as opposed to any other cause like heat, dehydration, or exhaustion. And as for the black urine episode, Deville never alleged he told anyone at Exide—managers, coworkers, or medical personnel—about it.

The operative complaint also alleges no facts that would permit an inference Deville can satisfy the two remaining elements of the fraudulent concealment exception, i.e., that Exide concealed its supposed knowledge of Deville's injury from Deville himself and that Deville's injury was aggravated as a result of such concealment. To state the obvious, if Deville is complaining about injuries in the form of losing consciousness and producing black urine, these are not injuries Exide could have concealed from Deville even if the company wanted to.

The bottom line is Deville's allegations about defendants' knowledge of risks and their failure to implement proper safety measures do not provide a proper basis to believe Deville can maintain his civil action under Labor Code section 3602, subdivision (b)(1). The trial court was therefore correct to sustain Exide's demurrer to his first through fifth causes of action.

D. The Issue of Leave to Amend Is Forfeited

In determining whether the trial court abused its discretion by sustaining defendants' demurrers without leave to amend, we assess whether "there is a reasonable probability that the complaint could have been amended to cure its defects.

[Citation.] '[T]he burden is on the plaintiff to show in what manner the complaint can be amended and how such an amendment would cure the defect.' [Citation.]" (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 826.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action. [Citations.] Absent such a showing, the appellate court cannot assess whether or not the trial court abused its discretion by denying leave to amend." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"].)

Deville has not come close to making the showing necessary to warrant leave to amend. The proposed amendments he identified in the trial court concerned only statute of limitations issues, not the critical points concerning the fraudulent concealment and coworker exceptions to workers' compensation exclusivity. Deville's opening brief does not discuss or request leave to amend the operative complaint at all, and his reply brief includes only a conclusory request for leave to amend that does not specify what facts he would allege or how they would avoid the workers' compensation exclusivity bar. He has therefore forfeited the issue and we need not discuss why there was no abuse of discretion in denying leave to amend. (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 369; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 282; see also *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to

support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"].)

E. Deville's Insufficiently Presented Challenge to the Trial Court's Ruling on His Unfair Competition Claim Is Waived

As to the Individual Defendants, the trial court granted judgment on the pleadings on Deville's Unfair Competition Law claim, ruling there was no conduct it could then enjoin. The trial court's minute order on Exide's demurrer does not expressly reference the unfair competition claim but sustains the demurrer without leave to amend and orders "this case" dismissed. On appeal, Deville's argument in his opening brief regarding the unfair competition claim is limited to two conclusory paragraphs that mainly recite general law on the nature of an unfair competition violation and the remedies available. The reply brief repeats these paragraphs nearly verbatim, though adding a sentence and an unavailing (and incomplete) case citation. The challenge to this aspect of the trial court's ruling is insufficiently presented and, accordingly, waived. (See, e.g., *Flores*, *supra*, 224 Cal.App.4th at pp. 204-205; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

DISPOSITION

The trial court is directed to enter a judgment of dismissal nunc pro tunc as of the date of the orders sustaining the demurrers without leave to amend. The judgments are affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J. KIM, J.