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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HECTOR GUTIERREZ, Plaintiff and Appellant, v. INNER CITY EDUCATION FOUNDATION, Defendant and Respondent.	B333337 Los Angeles County Super. Ct. No. 23TRCV00067

APPEAL from a judgment of dismissal of the Superior Court of Los Angeles County, Deirdre Hill, Judge. Affirmed.

Hector Gutierrez, in pro. per., for Plaintiff and Appellant.

Cole Huber, Derek P. Cole, Tyler J. Sherman and Mathew L. Walker for Defendant and Respondent.

Plaintiff Hector Gutierrez appeals in propria persona from a judgment of dismissal entered in favor of defendant Inner City Education Foundation (ICEF) after the trial court sustained ICEF's demurrer to plaintiff's first amended complaint (FAC) without leave to amend. We affirm.

BACKGROUND[1]

In August 2011, plaintiff began working as a school janitor and maintenance worker at Inglewood Middle School Academy. The school operated under the control of ICEF. On February 14, 2012, at the end of the school day, plaintiff walked to the school's front office, where school employees had gathered and were laughing. The principal angrily approached plaintiff and, "out of nowhere," violently kicked him in the groin, causing plaintiff to bend over in "agony." Several employees saw the incident and laughed. Plaintiff suffered severe pain and emotional distress and has been unable to work since the injury.

Later, plaintiff filed three separate worker's compensation claims with the Workers' Compensation Appeals Board. Two of those claims—one with an injury date of February 14, 2022, and another filed January 12, 2023—related to injuries he allegedly sustained from the kick to the groin. As to the January 2023 claim, plaintiff alleged, "In retrospect beginning 3 weeks or so later after the kick applicant believes depression and other factors caused by the assault unbeknownst to him has caused

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[1] We draw our statement of facts from the allegations in the operative pleadings and other matters properly subject to judicial notice. (*Hanouchian v. Steele* (2020) 51 Cal.App.5th 99, 103 (*Hanouchian*).)

him to become morbidly obese." Plaintiff alleged his last day of work due to the injury was June 29, 2012.

On January 10, 2023, plaintiff sued ICEF for general negligence, intentional tort, and sexual assault and battery based on injuries he allegedly sustained from the principal's kick to his groin almost 11 years earlier.[2] ICEF demurred on the following grounds: (1) the Worker's Compensation Appeals Board had exclusive jurisdiction over plaintiff's injury claims; (2) worker's compensation was plaintiff's exclusive remedy; and (3) plaintiff's claims were time barred. Plaintiff did not file an opposition. On April 18, 2023, the court sustained ICEF's demurrer with leave to amend.

Plaintiff filed his FAC on May 9, 2023. He again pleaded the same causes of action, except for "intentional tort," and added causes of action—without the court's permission—for negligent and intentional infliction of emotional distress, as well "malice."[3] ICEF demurred on the same grounds as before and argued the new causes of action were time-barred, insufficiently pleaded, or weren't causes of action at all.

The day before the July 14, 2023 hearing plaintiff filed a response to ICEF's demurrer and a request for leave to file a second amended complaint, along with a request to continue the hearing. Among other points, he argued his claims were not time barred under Code of Civil Procedure section 340.16, subdivision (a)(2) and Civil Code (mistakenly written as "CCP")

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[2] The form complaint stated causes of action for intentional infliction of emotion distress and malice were attached but they were not.

[3] The cause of action for "malice" included no allegations.

section 1708.5.[4] Plaintiff appeared at the hearing and asked the court to continue it for medical reasons. The court continued the hearing to August 15, 2023, but stated no further continuances would be granted without a declaration from a doctor.

Around August 1, 2023, plaintiff emailed ICEF's attorney Karen Feld and asked for more time "to get the rest of [the] discovery to [ICEF]." Feld replied, "Of course." On August 9, plaintiff replied to Feld's response: "Would you be willing to stipulate to another continuance to Tuesday, September 19, 2023. I spoke with [Mathew] Walker [another ICEF attorney] and told him I would work diligently on the discovery but I just can't do it due to [medical issues]. I need more time." Feld responded the same day, "Absolutely. I have no problem if you need more time."

Plaintiff apparently served, but did not file, a motion to continue the August 15, 2023 demurrer hearing. The motion stated plaintiff had attached a declaration from his doctor and an email with defense counsel "to stipulate to a continuance until September 19th." ICEF opposed the motion.

Plaintiff did not appear at the August 15, 2023 hearing. The court nevertheless stated it had considered plaintiff's response. The court's seven-page ruling detailed plaintiff's allegations and arguments. The court sustained ICEF's demurrer without leave to amend. The court found plaintiff's claims were barred by the statute of limitations and the FAC's allegations were insufficient to state a cause of action. The court

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[4] Without citation to authority, plaintiff also asserted the court had "broad discretion and power to [waive] [the] statute of limitations in the interest of Justice and based on the merits of the case which is to be construed liberally."

also noted plaintiff failed to allege sufficient facts to support an exception to worker's compensation exclusivity. ICEF served a notice of ruling that same day. On August 31, 2023, the court entered judgment in favor of ICEF, and ICEF served a notice of entry of judgment on September 12, 2023.

After judgment had been entered, on September 27, 2023, plaintiff moved for reconsideration. Plaintiff accused ICEF's attorneys of fraud and of having "bamboozled" the court into believing counsel had agreed to give plaintiff more time to respond to discovery, not to a continuance of the demurrer hearing. Plaintiff argued "[d]efendants" violated his due process rights. He attached his email exchange with Feld and the letter from his doctor stating it would be a hardship for plaintiff "to currently continue with his court case" due to a medical condition. ICEF opposed the motion as untimely and unfounded, and included excerpts of the email exchange between Feld and plaintiff. Feld declared she granted several requests from plaintiff for more time to respond to discovery but did not grant "any request" to continue the demurrer hearing. Feld attached an email she sent plaintiff on August 13, 2023, explaining to him that she had agreed to a continuation of his discovery responses, and "[n]owhere in [the] email chain did [he] ask to continue the demurrer hearing."

The court heard plaintiff's motion on November 2, 2023. Both plaintiff and ICEF's counsel (Mathew Walker) appeared. The court issued a tentative ruling denying plaintiff's motion for reconsideration. The court's minute order notes plaintiff "briefly ask[ed] clarifying questions regarding the tentative and then submit[ted] on it." The court noted it had considered the moving and opposition papers as well as plaintiff's response to ICEF's

demurrer even though he had not appeared at the August 15 hearing. The court found the motion was untimely filed, and the court lacked jurisdiction to rule on it as judgment already had been entered.

Plaintiff filed a timely notice of appeal from the August 31, 2023 judgment of dismissal.

DISCUSSION

Plaintiff challenges the judgment of dismissal on the grounds he was denied his federal constitutional rights to due process and of access to the courts under the Fourteenth and First Amendments, respectively.

1. *Plaintiff's request to augment the record*

On January 22, 2025, plaintiff filed a motion to augment the record on appeal with the form interrogatories ICEF served on plaintiff.[5] Under rule 8.155 of the California Rules of Court, a party may augment the appellate record to include any document filed or lodged in the superior court. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

Plaintiff argues ICEF's discovery requests are "part of the case" and demonstrate ICEF knew plaintiff's case was one for sexual assault and battery "for which Workers Comp is not the sole nor appropriate venue of remedy." Nothing in the record, however, indicates ICEF's discovery requests ever were filed or lodged with the trial court. Accordingly, we deny the motion. (See *Garcia v. Martin* (1961) 192 Cal.App.2d 786, 788–789 ["It is

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[5] We granted ICEF's earlier-filed motion to augment the record to include relevant records filed with the trial court that were not part of the clerk's transcript, including plaintiff's FAC and ICEF's demurrer to the FAC.

only as to those documents which have been filed in or lodged with the superior court that augmentation of the record is permitted."]; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Augmentation does not function to supplement the record with materials not before the trial court."].)[6]

2. *Standards of review*

In reviewing a judgment of dismissal after a trial court has sustained 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." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) "We 'assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.' " (*Hanouchian, supra*, 51 Cal.App.5th at p. 106.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse;

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[6] Plaintiff's motion to augment and his reply brief contained numerous instances of extremely vulgar language to engage in highly offensive name-calling and biased attacks on the opposing party's counsel, and inappropriate, disrespectful remarks about the legal profession and the courts. Although we have exercised our discretion not to strike these filings, appellant is advised that such lack of civility and abusive conduct will not be tolerated. (See *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, 856–859 [gender biased comments and statements accusing court of intentionally refusing to follow law in appellate brief were misconduct]; *In re Koven* (2005) 134 Cal.App.4th 262, 264–265 [briefs falsely accusing court of deliberate dishonesty resulted in contempt proceedings and monetary fine].)

if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also review constitutional questions de novo. (*In re H.K.* (2013) 217 Cal.App.4th 1422, 1433.)

It is a fundamental rule of appellate review that an appealed judgment or order is presumed correct, and error must be affirmatively shown. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609; *Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564.) In the absence of a contrary showing in the record, the appellate court will make all presumptions in favor of the trial court's action. (*Jameson*, at p. 609.) Moreover, the party asserting trial court error may not rest on the bare assertion of error but must present argument and legal authority on each point raised. (*Hernandez v. First Student*, *Inc*. (2019) 37 Cal.App.5th 270, 277; *Lee v. Kim* (2019) 41 Cal.App.5th 705, 721.) Accordingly, "[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as forfeited." (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1075 (*Delta Stewardship*); *WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.* (2020) 51 Cal.App.5th 881, 894; see also *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205 [explaining these "same rules apply to a party appearing in propria persona as to any other party"].)

An appellant has the burden to show not only error but prejudice from that error. If an appellant fails to satisfy that burden, his argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963; see Cal. Const., art. VI, § 13.) "[W]e cannot presume prejudice and will

not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial. [Citations.]" (*Century Surety*, at p. 963.)

We are mindful plaintiff represents himself on appeal, as he did in the trial court. Nevertheless, he " 'is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.' " (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1; see also *Simms v. Bear Valley Community Healthcare Dist.* (2022) 80 Cal.App.5th 391, 406, fn. 5 [self-represented party is "held to the same standard of knowledge of law and procedure as an attorney"].)

3. *Plaintiff failed to demonstrate prejudicial error*

Plaintiff does not directly challenge the merits of the trial court's order sustaining ICEF's demurrer. From what we can discern, plaintiff contends the court denied his rights to due process, and to access the courts, because it adopted ICEF's counsel's interpretation of the email communication between plaintiff and Feld about the continuance without directly asking plaintiff about "the specifics." Plaintiff asserts the trial court "did not order [him] to speak or address the court, nor did it consider understanding [*sic*] what transpired between the parties or communication and email regarding an extension of time that [plaintiff] contends was agreed upon with" ICEF's attorney. Plaintiff accuses ICEF's counsel of unethical conduct, stating he believes ICEF's counsel "found it prudent to capitalize on" plaintiff's medical issues "and deprive [him] of a [s]econd amended complaint by any means necessary."

Plaintiff does not explain how the trial court's consideration of ICEF's view that plaintiff had asked for—and counsel had granted him—an extension to respond to discovery rather than a continuance of the demurrer hearing deprived him of procedural or substantive due process or denied him access to the courts. Nor does plaintiff cite any legal authority supporting his argument that the court denied his constitutional rights. He thus has forfeited the issue on appeal. (E.g., *Delta Stewardship, supra*, 48 Cal.App.5th at p. 1075.)

Nevertheless, we have reviewed the record and find no error. As ICEF notes, access to the courts must be " 'adequate, effective, and meaningful.' " (*Ryland v. Shapiro* (5th Cir. 1983) 708 F.2d 967, 972.) It is not "absolute or unconditional." (*Green v. Warden, U.S. Penitentiary* (7th Cir. 1983) 699 F.2d 364, 369–370.) The record shows plaintiff received adequate, effective, and meaningful access to the court.[7] After ICEF demurred to plaintiff's initial complaint, he had an opportunity to file his FAC. At plaintiff's request, the court continued the hearing on ICEF's demurrer to the FAC from July to August 2023 due to plaintiff's medical emergency. Before ruling on ICEF's demurrer, the court considered the written response plaintiff filed, even though he filed the response late and did not appear at the hearing. (Code Civ. Proc., § 1005, subd. (b) [opposition papers

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[7] Other than the denial of access to the courts, plaintiff identifies no fundament right of which he was deprived to support a substantive due process claim. (See *Shanks v. Dressel* (9th Cir. 2008) 540 F.3d 1082, 1087 ["To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest."].)

must be filed nine court days before the hearing].)[8] Indeed, the court explained in detail plaintiff's position in its ruling.

Nor did plaintiff demonstrate he did not receive due process under the Fourteenth Amendment. As ICEF notes, due process generally requires fair notice and a chance to be heard. (See *Mathews v. Eldridge* (1976) 424 U.S. 319, 348 ["The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' "].) The record shows ICEF served plaintiff with notice of its demurrer and the demurrer's hearing date, as well as the court's ruling sustaining the demurrer. ICEF also served plaintiff with notice that judgment had been entered. In any event, plaintiff does not contend he wasn't given notice.

Plaintiff also had a chance to be heard. As we said, he filed a response to ICEF's demurrer, and the court considered it. He does not articulate what other process he was due. Plaintiff argues the court failed to order him to address the court, but he did not appear at the August 15, 2023 hearing. It was plaintiff's burden to make any argument to the court. Moreover, the court held a hearing on plaintiff's belated motion for reconsideration at which plaintiff appeared and participated. The court acknowledged plaintiff's assertion that he had tried to file a request for a continuance—with the letter from his doctor—but was unable to do so before the August 15 hearing. The court also quoted from the emails between plaintiff and ICEF's counsel, including Feld's explanation sent two days before the hearing that she had agreed to an extension to respond to discovery,

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[8] Undesignated statutory references are to the Code of Civil Procedure.

not to continue the hearing. In any event, as the court held, it lacked jurisdiction to rule on plaintiff's motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859, fn. 29 [court lacks jurisdiction to rule on a motion for reconsideration after entry of judgment]; see also § 1008, subd. (a) [motion for reconsideration must be filed within 10 days of service of written notice of entry of order].)

Finally, to the extent plaintiff contends the trial court erred in declining to continue the August 2023 demurrer hearing, he has failed to demonstrate prejudicial error. "The decision to grant or deny a continuance is committed to the sound discretion of the trial court." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) Any error in failing to grant a request for a continuance "is reversible only if it is tantamount to the denial of a fair hearing." (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527–528.) An appellant has the burden to demonstrate prejudice. (*Ibid.*) As we discussed, the record demonstrates plaintiff received a fair hearing. Moreover, even if the court abused its discretion by conducting the August 2023 hearing and ruling on ICEF's demurrer (it did not), plaintiff failed to demonstrate it was reasonably probable he would have obtained a more favorable result had the court granted him a continuance. (See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 ["appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred"].) Plaintiff has not demonstrated how a continuance would have enabled him to show he could amend his FAC to state a cause of action not barred by the statute of limitations. (*Jensen v. The Home Depot, Inc.* (2018) 24 Cal.App.5th 92, 97 [plaintiff has the

“ ‘burden to establish how the complaint can be amended to state a valid cause of action’ ”].)

The statute of limitations for assault, battery, intentional infliction of emotional distress, and negligence is two years. (§ 335.1.) The court noted plaintiff referred to section 340.16 and Civil Code section 1708.5 to argue his claims stemming from the 2012 incident were not barred by the statute of limitations. Section 340.16 essentially gives a plaintiff 10 years from the date of a sexual assault, or three years from the date the plaintiff discovered or reasonably should have discovered an injury or illness resulted from the sexual assault, whichever is later, to bring an action for recovery of damages suffered as a result of the sexual assault. (§ 340.16, subdivision (a).) As the trial court noted, sexual assault under the statute means crimes described by specified sections of the Penal Code (such as rape), assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes. (§ 340.16, subd. (b)(1).) A kick to the groin does not fall within this definition of sexual assault. Nor has plaintiff alleged any facts on appeal to demonstrate section 340.16 applied.[9]

Accordingly, plaintiff has failed to meet his burden on appeal to demonstrate the court erred in sustaining ICEF’s demurrer to his FAC or that it abused its discretion in denying plaintiff leave to amend the FAC.

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[9] As the trial court noted, section 1708.5 of the Civil Code merely defines sexual battery. In his reply brief, and at oral argument, plaintiff mentioned section 340.1. That section also does not apply, however, as it relates to childhood sexual assault.

DISPOSITION

The judgment of dismissal is affirmed. In the interest of justice, the parties shall bear their respective costs on appeal.

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EGERTON, J.

We concur:

EDMON, P. J.

ADAMS, J.