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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OMAR GOMEZ, Plaintiff and Appellant, v. SAFWAY SERVICES, LLC, et al., Defendants and Respondents.	B281687 (Los Angeles County Super. Ct. No. BC587805)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross Klein, Judge. Affirmed.

McNicholas & McNicholas, Matthew S. McNicholas; Perez & Caballero, Frank J. Perez; Esner, Chang & Boyer, Stuart B. Esner and Steffi A. Jose for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Ernest Slome and Joseph C. Owens for Defendant and Respondent Safway Services, LLC.

Mavredakis Cranert Crawford, Joyce L. Mavredakis, David L. Phillips and William S. Edic for Defendant and Respondent Total Safety U.S., Inc.

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Plaintiff Omar Gomez appeals from the judgment of dismissal entered following the trial court's order sustaining defendants Safway Services, LLC's (Safway), and Total Safety U.S., Inc.'s (Total Safety), demurrers without leave to amend to plaintiff's first amended complaint. Plaintiff contends the trial court erred in finding that the doctrine of equitable estoppel did not apply to toll the statute of limitations in this action. We affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL SUMMARY

On October 29, 2012, plaintiff was working as an industrial radiographer technician at the Suncor refinery in Commerce City, Colorado when he fell from a scaffolding inside the confined space of a heater, was seriously injured and became a paraplegic. Plaintiff, a California resident, was employed by Mistras Group, Inc. (Mistras), located in Torrance, California; Mistras had assigned him to work at the Colorado refinery. Defendant Safway supplied, constructed and maintained the scaffolding from which plaintiff fell. Defendant Total Safety is a safety services company, which acted as the confined space attendant at the refinery. Both defendants have one or more places of business in California.

On September 24, 2014, plaintiff filed a complaint in California against defendants and Suncor for damages arising from his accident. He alleged causes of action for negligence and

premises liability against all three. This action was filed within the two-year limitations period for personal injury actions.

Safway and Total Safety answered the complaint. Suncor filed a motion to quash the summons and complaint on the ground that California lacked personal jurisdiction over it. On March 26, 2015, the trial court granted the motion.

On May 28, 2015, plaintiff filed a complaint in Colorado state court against defendants and Suncor, alleging negligence and premises liability.[1] On June 9, 2015, plaintiff dismissed his California action without prejudice.

On July 1, 2015, Suncor filed a motion to dismiss the Colorado action on that ground that Suncor was a statutory employer and could not be sued.[2]

On July 10, 2015, plaintiff filed his "first complaint" in the current action in California for negligence and premises liability against Safway and Total Safety.

On August 5, 2015, plaintiff filed a motion in the Colorado action to dismiss Safway and Total Safety without prejudice. On September 2, 2015, the trial court granted the motion.[3]

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[1] In connection with their demurrers, defendants requested the trial court take judicial notice of certain documents in the Colorado action. Although the record does not indicate whether the trial court granted the parties' requests, we may and do take judicial notice of Colorado court documents. (Evid. Code, § 452; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

[2] Plaintiff had alleged in his California action that his application for worker's compensation benefits was being litigated concurrently in the Los Angeles district offices of the Worker's Compensation Appeals Board.

On September 18, 2015, plaintiff filed a first amended complaint against defendants for negligence in California. This complaint alleged plaintiff had initially filed a complaint against defendants and Suncor on September 24, 2014, the trial court had quashed the summons and complaint as to Suncor for lack of personal jurisdiction, and plaintiff had filed a request for dismissal without prejudice against defendants on June 9, 2015. The first amended complaint contained no allegations concerning the Colorado action.

On November 25, 2015, defendants filed demurrers to plaintiff's first amended complaint. Both defendants demurred on the ground that the complaint was barred by the two-year statute of limitations for personal injury actions. Safway also demurred on the ground that plaintiff had not named Suncor, an indispensable party. Both defendants contended the statute of limitations had not been tolled, and specifically contended the doctrine of equitable tolling did not apply. Absent any tolling provisions, the statute of limitations would have expired on October 29, 2014, well before plaintiff filed his action in Colorado or his first amended complaint in California. In opposition, plaintiff argued that the doctrine of equitable tolling did apply and rendered his first amended complaint timely.

The trial court held a hearing on the demurrers on February 16, 2017. There is no reporter's transcript for the hearing and the parties have not provided a settled statement of

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[3] Plaintiff states in his brief that he dismissed Suncor with prejudice, and Safway appears to agree, but there is no dismissal in the record at the pages cited. In its ruling on plaintiff's motion to dismiss, the trial court noted that Suncor "has moved to dismiss."

the hearing. The minute order for the hearing states: "The Court adopts the tentative ruling as the final ruling and both demurrers are sustained without leave to amend." The record does not include a copy of the tentative ruling.

DISCUSSION

Plaintiff filed a total of three actions seeking redress for his injuries: an action in California state court, followed by an action in Colorado state court, followed in turn by a new action in California. He maintains the doctrine of equitable tolling should be applied to suspend the statute of limitations in California during the pendency of his first California action and his Colorado action, thereby rendering his second California action timely. Plaintiff contends the trial court's ruling sustaining defendants' demurrers without leave to amend must be reversed because it incorrectly found the doctrine of equitable tolling inapplicable to the circumstances of this case. He further contends there is no merit to Safway's alternate claim that the action must be dismissed because Suncor is an indispensable party.

We find the doctrine of equitable tolling does not apply as a matter of law when, as here, a plaintiff brings successive actions asserting the same claim in the same forum.[4] Without such tolling, plaintiff's claim is barred by the statute of limitations. Plaintiff does not point to any amendment that would cure this defect. Because we uphold the demurrer on statute of limitations

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[4] Because we decide this issue as a matter of law, the lack of a reporter's transcript or settled statement does not prevent or impede our review. (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700, fn. 2; see *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699.)

grounds, we need not and do not reach the issue of whether Suncor is an indispensable party.

1. Standard of review

In reviewing a trial court's ruling granting a demurrer without leave to amend, we treat as true all "properly pleaded or implied factual allegations" in the complaint. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) " 'We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) " 'Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

We then examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) As a corollary, we may find a complaint "insufficient on any ground set forth in the demurrer . . . even if that ground was not the ground relied upon by the trial court." (*Lin v. Coronado, supra,* 232 Cal.App.4th at p. 701.)

"If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081, citations omitted.)

2. Equitable tolling

Plaintiff takes a very broad view of the doctrine of equitable tolling, claiming that it applies to any case in which an injured

party can show three elements: (1) timely notice to the defendant by filing of the first claim; (2) lack of prejudice to the defendant; and (3) reasonable and good faith conduct by the plaintiff. He asserts that none of the "elements" for equitable tolling is negated by a plaintiff's successive filings of actions in the same forum; there is nothing about the origins or purpose of the equitable tolling doctrine that would preclude its application to such successive filings; and case law does not compel a ban on the application of equitable tolling to such successive filings. Plaintiff concludes that filing two successive actions in the same forum does not bar the application of the equitable tolling doctrine as a matter of law.

The doctrine of equitable tolling is much narrower than plaintiff's description suggests. Thus, applying the doctrine to the circumstances of this case as plaintiff urges would represent a major expansion of the doctrine and would be inconsistent with both its purpose and with existing case law.

Equitable tolling is a judicially created doctrine that, if applicable, will "suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness. (*Addison v. State of California* (1978) 21 Cal.3d 313, 318-319; see also *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 411.)"[5] (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one

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[5] *Bollinger v. National Fire Ins. Co.*, *supra*, 25 Cal.2d 399 (*Bollinger*) has been superseded by statute on other grounds as noted in *American Broadcasting Cos. v. Walter Reade-Sterling, Inc.* (1974) 43 Cal.App.3d 401, 406.

action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100 (*McDonald*).)

Under the most common application of the equitable tolling doctrine, "the statute of limitations in one forum is tolled as a claim is being pursued in another forum." (*Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 985 (*Martell*).) Less commonly, the doctrine applies to toll the statute of limitations in a single forum while an injured party pursues different remedies within the forum. (See *Myers v. County of Orange* (1970) 6 Cal.App.3d 626 (*Myers*).) This form of equitable tolling does not apply when a plaintiff pursues "successive claims in the *same* forum."[6] (*Martell, supra*, at p. 985.)

Another form of equitable tolling applies when a plaintiff would be left without a judicial forum through forces beyond his control. (*Bollinger*, *supra*, 25 Cal.2d at pp. 410-411.) "[T]hree elements [must] be present before the *Bollinger* rule of equitable tolling will apply: (1) the plaintiff must have diligently pursued his or her claim; (2) the fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff; and (3) the defendant must not be prejudiced by application of the doctrine (which is normally not a factor since the defendant will have had notice of

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[6] As used in *Martell*, the term "successive claims" means virtually identical claims. The court in that case characterized appellants' second complaint as "almost indistinguishable from the first." (*Id.* at p. 980.)

the first action). (*Wood v. Elling Corp.* [(1977) 20 Cal.3d 353,] 361-362; see also *Appalachian Ins. Co. v. McDonnell Douglas Corp.* [(1989)] 214 Cal.App.3d 1, 41.)" (*Hull v. Central Pathology Service Medical Clinic* (1994) 28 Cal.App.4th 1328, 1336.)

Plaintiff has not pled or shown that he was left without a forum due to forces outside of his control as required by the *Bollinger* rule, and we do not consider that form of equitable tolling any further.[7]

In non-*Bollinger* cases, the purpose of equitable tolling is to "ease[] the pressure on parties 'concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue.' " (*McDonald, supra,* 45 Cal.4th at p. 100.) The doctrine is also intended to benefit the court system "by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary." (*Ibid.*)

When, as here, a plaintiff pursues successive identical claims in the same court, he is simply re-filing an action that he has already dismissed once without prejudice. He is pursuing the same remedy a second time, not an alternative remedy. The doctrine of equitable tolling is intended to assist a plaintiff in pursuing alternative remedies; it is not intended to permit him to

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[7] Plaintiff voluntarily dismissed his first California lawsuit as to defendants. Although there were motions by defendants pending to dismiss the action, plaintiff dismissed the case before the court made any ruling on those motions. The same is true of the Colorado action. Dismissal in both cases was a strategic choice by plaintiff; he was not deprived of a forum by either a decision of the court or by some other force beyond his control.

pursue the same remedy repeatedly. (See *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 434 (*Thomas*) [plaintiff's act of filing medical malpractice claim, dismissing it and then re-filing it "was the singular pursuit of a medical malpractice action" in state court].) Further, permitting such successive filings would in no way benefit the court because it would not reduce the costs associated with duplicative filings. Potentially, it would increase the burden on the court and on defendants: "If a timely action dismissed without prejudice were, without more, to have the effect of tolling the statute of limitations during the pendency of that action, an indefinite extension of the statutory period—through successive filings and dismissals—might well result." (*Wood v. Elling Corp.*, *supra*, 20 Cal.3d at pp. 359-360.)

Plaintiff points to two cases in which he claims the equitable tolling doctrine *was* applied to successive claims in the same forum: *Myers, supra*, 6 Cal.App.3d 626 and *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494 (*Tarkington*). These cases may involve successive actions in the same forum, but there were significant differences in the actions. As we mentioned *ante*, *Myers* involved actions for two different remedies in the same forum. The plaintiff first sought equitable relief through a petition for writ of mandamus and then, when the writ was dismissed, damages through a legal action. Thus, the application of equitable tolling was appropriate. Here, plaintiff sought the same remedy in both actions he filed in California court.

The second case, *Tarkington*, involved a change in theories of liability and in parties between the first and second actions. Employees of two different employers first filed a petition against both employers alleging joint, several and alternative liability for

their actions in locking out union employees. After the trial court ruled that no such liability existed and there had been a misjoinder of parties, two of the petitioners filed a new petition against only their own employer under a theory of direct individual liability. The initial action continued with employees of the second employer seeking relief only as to that employer. Here, although the court dismissed Suncor from plaintiff's first California action, plaintiff was free to proceed in that action against the remaining defendants. His second California action sought to do exactly what he could have done in his original suit: proceed against defendants on the same negligence claim. Thus, unlike the situation in *Tarkington*, there is no significant difference between plaintiff's two actions.

Plaintiff also points to his intervening Colorado action as distinguishing his situation from those before the courts in *Martell* and *Thomas*. California courts have applied the doctrine of equitable tolling to a plaintiff's remedy involving the pursuit of state law claims in federal court (*Addison v. State of California, supra*, 21 Cal.3d at pp. 315-316), and we will assume for the sake of argument that a lawsuit in another state's court also qualifies as an alternate remedy for purposes of equitable tolling.

The equitable tolling doctrine tolls the statute of limitations in one forum while the plaintiff pursues an alternate remedy in another forum. Here, plaintiff chose to pursue his California remedy first. In theory, the equitable tolling doctrine would toll the statute of limitations in the second forum providing the alternate remedy while plaintiff pursued his first remedy in the first forum. In practice, plaintiff's alternate remedy was a Colorado court, and that court is not bound by California's judicially created doctrine of equitable tolling.

Plaintiff suggests that the equitable tolling doctrine could be applied to toll the statute of limitations *in California* while he pursued his Colorado action, permitting him to return to California. If plaintiff's second California action involved a different remedy than his first, his argument would merit consideration. However, plaintiff's foray into a Colorado court did not somehow transform his subsequent California action into a different remedy than the one sought in his first California action. Plaintiff is simply arguing for the application of equitable tolling to permit him to pursue his same remedy for a second time in the same court. As we have explained, equitable tolling does not apply in such situations. (See *Thomas*, *supra*, 95 Cal.App.4th at p. 434.)

Plaintiff has not identified any case that applies the doctrine of equitable tolling to any factual situation even remotely similar to his. Our colleagues in Division 5 of this District Court of Appeal have stated that equitable tolling does not apply to successive claims in the same forum. (*Martell, supra*, 67 Cal.App.4th at p. 985.) Even if, as plaintiff contends, this statement in *Martell* is dicta, it is consistent with the purpose of non-*Bollinger* equitable tolling. We find as a matter of law that equitable tolling does not apply to plaintiff's two California actions. As defendants set forth in their demurrers, plaintiff's claim is barred by the statute of limitations. Plaintiff has not shown that an amendment could cure this defect.

The trial court did not abuse its discretion by sustaining the demurrers without leave to amend.

DISPOSITION

The judgment is affirmed. Plaintiff to bear costs on appeal.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.