

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/26/2010

TIME: 11:58:00 AM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager

CLERK: Lee Ryan

REPORTER/ERM: Peter C. Stewart CSR# 3184

BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: 37-2010-00088794-CU-PN-CTL CASE INIT.DATE: 03/29/2010

CASE TITLE: San Diego Police Officers Association vs. Jackson, DeMarco, Tidus & Peckenpaugh

CASE CATEGORY: Civil - Unlimited CASE TYPE: Professional Negligence

EVENT TYPE: Demurrer / Motion to Strike

APPEARANCES

The Court, having taken the above-entitled matter under submission the 7/23/10 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

After taking the matter into submission, the Court affirms its tentative ruling on Defendants Jackson, DeMarco, Tidus & Peckenpaugh and Mohamed Alim Ahmad Malik's (collectively "Defendants") demurrer to Plaintiff San Diego Police Officer's Association ("SDPOA" or "Plaintiff") as follows:

As a preliminary matter, the Court GRANTS the Defendants' request for judicial notice of Exhibits A-F. (Evid. Code § 452(b), (d).) The Court DENIES the Defendants' request for judicial notice of the documents listed in paragraph 7 of the Request for Judicial Notice because Defendants did not attach the documents to the request.

Standard for Demurrer

In determining whether to sustain a demurrer, the trial court admits the truth of all properly pleaded facts but does not assume the truth of contentions, deductions or conclusions of fact or law. (*Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 201; see also *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A demurrer will be sustained if the "pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer can only be used to challenge defects appearing on the face of the complaint or from matters that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Moreover, "points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) The Supreme Court has held that the complaint must allege ultimate facts supporting the cause of action with enough particularity to apprise the defendant of the nature, source and extent of the claim. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719 (hereafter "*Semole*"); see also *Davaloo v.*

State Farm Ins. Co. (2005) 135 Cal.App.4th 409, 414-415 (hereafter "*Davaloo*"); 4 Witkin, Summary of Cal. Law (5th ed. 2008), Civil Procedure, § 378, p. 514.)

Another Action Pending

A demurrer is proper when there is another action pending between the same parties on the same cause of action (Code Civ. Proc. § 430.10(c)) because a single cause of action cannot be the basis for two different suits. (See *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 856.) The plea of another action pending will succeed only if the defendant can show that both suits are based on the same cause of action, that both suits are pending, and that both suits are contested by the same parties. (*W.R. Grace & Co. v. California Employment Commission* (1944) 24 Cal.2d 720, 727; *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787-788 (hereafter "*Plant Insulation*").)

Same Cause of Action

Under California law, a cause of action involves the invasion of the plaintiff's primary right and the defendant's corresponding breach of duty. (*Plant Insulation, supra*, 224 Cal.App.3d at p. 787-788.; *Verdier v. Verdier* (1962) 203 Cal.App.2d 724, 738.) The violation of one primary right, or one cause of action, may give rise to two or more forms of relief. (*San Diego Unified School District v. County of San Diego* (2009) 170 Cal.App.4th 288, 305.) A cause of action is based upon the harm suffered and not the particular legal theory alleged by the plaintiff. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 (hereafter "*Slater*"); *Pieser v. Mettler* (1958) 50 Cal.2d 594, 605.) Thus, one injury gives rise to one claim for relief. (*Slater, supra*, 15 Cal.3d at p. 795.)

In the *Ellis* case, the injury alleged is the reduction of retiree health benefits. In the present action, the injury alleged is the amount of fees and costs paid to the Defendants for their negligently-provided legal services. In addition, only the individual members in the *Ellis* case would be eligible to recover damages for the loss of retiree health benefits while only the SDPOA in the present case can recover damages in the form of legal fees paid by the SDPOA. The two cases allege different causes of action even though both assert claims for legal malpractice. Moreover, in the present case, the Complaint alleges nine different negligent acts committed by the Defendants in support of a cause of action for the SDPOA's legal malpractice claim. One of these acts is factually similar to the allegations in the Complaint in the *Ellis* case. Any duplication of judicial resources will be avoided because both cases will be heard by the same judge. The SDPOA submitted proper notice pursuant to California Rule of Court 3.300. Accordingly, because the injury alleged is different in both cases, the cases involve two different primary rights and thus two different causes of action.

Same Parties

Furthermore, the present case and the *Ellis* case do not involve the same parties. Although a labor union is entitled to file suit on behalf of its members (*Anaheim Elementary Education Ass'n v. Board of Education* (1986) 179 Cal.App.3d 1153, 1157), the cases cited by Defendants do not stand for the proposition that a second case filed by the association is barred because a class action on behalf of the members of the association is pending in an earlier case. Because the SDPOA is an entity distinct from its individual members, the plaintiffs in *Ellis* and the Plaintiff in the present case are not the same parties.

Accordingly, the Court has jurisdiction to hear the present case because it does not involve the same cause of action or the same parties as the *Ellis* case.

Sufficiency of Pleading Causation and Damages in Legal Malpractice Claim

"The elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and

exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [citing *Loube v. Loube* (1998) 64 Cal.App.4th 421, 429].) In a litigation malpractice action, a plaintiff "must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244 (hereafter "*Viner*").) This method of proving causation, also known as a "case within a case" approach, is an objective way to determine what the result should have been in the underlying proceeding. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531 (hereafter "*Ambriz*"); *Viner, supra*, 30 Cal.4th at p. 1242.) Causation is generally a question of fact. (E.g., *Ambriz, supra*, 146 Cal.App.4th at p. 1531; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) However, in legal malpractice actions, whether the case within a case is decided by a court or a jury turns on whether the underlying issues are predominantly questions of law or fact. (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764; *Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 970.)

Negligence and proximate cause may be pleaded in legal malpractice cases just as in other negligence cases. (4 Witkin, Summary of Cal. Law (5th ed. 2008), Pleading, § 616, p. 747.) In general, allegations of negligence have long been excused from the code pleading requirement of specificity in pleading the cause of action. (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 154 (hereafter "*Rannard*"); see also *Pultz v. Holgerson* (1986) 184 Cal.App.3d 1110, 1116-1117.) For example, in *Charnay v. Cobert* (2006) 145 Cal.App.4th 170 (hereafter "*Charnay*"), the court held that to withstand a demurrer, the plaintiff had to plead that but for her attorney's malpractice, she would have received a more favorable judgment entered against her. (*Charnay, supra*, at p. 180-181.)

In their demurrer, Defendants claim that the SDPOA cannot establish the elements of causation and damages regarding only one of the nine negligent acts alleged in the Complaint. Defendants focus on the allegation by the SDPOA that it is entitled to damages in the amount of attorneys' fees and costs paid to Defendants because they failed to prevent available factual evidence to prevail in *SDPOA v. SDCERS*, which resulted in a reduction of retiree health benefits to members of the SDPOA. (See Complaint, ¶ 11(b).) However, the fact that this underlying litigation may have been decided as a matter of law does not mean that the Defendants did not handle the case negligently. The federal courts decided the case based upon the evidence in the record, as provided by the Defendants. Assuming the SDPOA's allegations in the Complaint to be true, if Defendants had diligently searched for and argued available factual evidence, then either the issue of retiree health benefits would not have been raised in the first place or the district court may have ruled favorably due to the additional factual evidence. The SDPOA has alleged that it would not have sustained damages in the form of attorneys' fees and costs paid to Defendants but for Defendants' negligence in handling the *SDPOA v. SDCERS* case. (*Id.*, ¶¶ 11, 12.) Accordingly, the SDPOA has properly pleaded the elements of causation and damages to state a cause of action for legal malpractice. (See *Rannard, supra*, 26 Cal.2d at p. 154; *Charnay, supra*, 145 Cal.App.4th at p. 180-181.)

The Supreme Court has held that the complaint should be liberally construed when examining the sufficiency of the pleading, "with a view to attaining substantial justice among the parties." (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719 [citing Code Civ. Proc. § 452].) Furthermore, Plaintiffs have alleged sufficient facts to apprise Defendants of the nature of the claim against them. (*Id.*; *Davaloo, supra*, 135 Cal.App.4th at p. 414-415.) In the interest of justice, the case should continue to discovery to afford the Plaintiffs the opportunity to substantiate their allegations

Based on the foregoing, Defendants' demurrer to Plaintiff's Complaint is **OVERRULED**.

Defendants are directed to file and serve their Answer by August 6, 2010.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: San Diego Police Officers Association vs. Jackson, DeMarco, Tidus & Peckenpaugh

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
37-2010-00088794-CU-PN-CTL

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 07/27/2010.

Clerk of the Court, by: , Deputy

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