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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WEBSTER BIVENS, Plaintiff and Appellant, v. SANFORD L.P. et al., Defendants and Respondents.	B184864 (Los Angeles County Super. Ct. No. SC 075348)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Reversed.

The McMillan Law Firm, Scott A. McMillan and Bryan C. Rho, for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Gregory A. Long, Amy Harrell and Chad J. Levy for Defendants and Respondents Sanford L.P., Newell Operating Company, and Costco Wholesale Corporation.

Plaintiff Webster Bivens (Bivens) appeals the judgment and cost award in his action under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200) and the False Advertising Law (FAL) (Bus. & Prof. Code, § 17500).[1] The trial court granted defendants' motion for judgment on the pleadings because the passage of Proposition 64 on November 2, 2004, while the case was pending, deprived plaintiff of standing to bring an action based upon alleged deceptive packaging of Sharpie pens. On appeal, plaintiff contends that the trial court abused its discretion in refusing to permit amendment to substitute a plaintiff with standing, and that in light of the retroactive application of Proposition 64's changes, any award of costs was a violation of due process and constituted a bill of attainder. We reverse, finding the trial court erred in refusing to permit amendment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 8, 2003, Bivens commenced this action for declaratory and equitable relief under the UCL, the FAL, and the Fair Labeling Act (Bus. & Prof. Code, § 12601). Bivens alleged that he was bringing the action on behalf of the general public pursuant to sections 17204 and 17535. Plaintiff's operative pleading, the Third Amended Complaint filed July 22, 2004, alleged two causes of action under the UCL and FAL, contending that that packages of "Sharpie" pens manufactured by defendant Sanford L.P. (Sanford) and sold by defendants Costco Wholesaling, Inc. (Costco) and Newell Operating Company (Newell) were defective because the packages contained less than the number of pens stated.

On November 2, 2004, the voters of California passed Proposition 64, which limited the ability of private parties to bring actions under the UCL. Specifically, the measure amended section 17204, describing those persons who may bring actions under the UCL, to eliminate the reference to suits brought by any person "acting for the

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[1] Unless otherwise noted, all statutory references herein are to the Business and Professions Code.

interests of itself, its members, or the general public" and adding the requirement that suit be brought only by a person "who has suffered injury in fact and has lost money or property as a result of unfair competition." (§ 17204; *Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223, 228 (*Mervyn's*).) Similarly, section 17203 authorizing injunctive relief was amended to add the words "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state." (§ 17203; *Mervyn's, supra,* 39 Cal.4th at pp. 228-229.)

On November 8, 2004, defendants moved for judgment on the pleadings, arguing that under the terms of Proposition 64's amendments to the Business and Professions Code, plaintiff's action failed to state a claim because plaintiff failed to allege any injury to himself and therefore lacked standing. Defendants contended that the terms of Proposition 64 became effective the day after the November 2, 2004 election pursuant to California Constitution, article II, section 10(a). Further, defendants argued no leave to amend should be granted because under the facts pleaded, plaintiff had admitted that he could not plead standing.

Plaintiff opposed the motion, arguing Proposition 64 applied prospectively only.

On December 3, 2004, the trial court heard the motion, and took the matter under submission, ordering the parties to brief the issue of whether leave to amend should be granted in the event the court granted defendants' motion for judgment on the pleadings.

On December 13, 2004, plaintiff moved to file an amended complaint to substitute his law firm as the plaintiff but otherwise sought substantially identical relief, based on the same grounds of liability, as the Third Amended Complaint. Plaintiff argued that because the law firm had actually purchased a package of pens containing less than the amount represented on the package, it had the necessary standing under the revisions to the UCL and FAL. Plaintiff lodged a proposed Fourth Amended Complaint.

Defendants opposed the motion, arguing that the numerous proposed amendments would create a fundamentally different lawsuit than the one that had been extensively litigated so far, creating prejudice to defendants because all prior discovery would not be binding on the new plaintiff and was therefore useless, and further because the newly-substituted plaintiff would receive a "second bite" at the discovery apple. Defendants also argued that they would be required to take additional depositions of McMillan Law Firm personnel and redraft their pending summary judgment motion. Furthermore, the theories of liability would be changed because an uninjured representative party would be replaced by an injured non-representative party. On the other hand, defendants asserted that no prejudice to plaintiff existed because plaintiff's law firm could file a separate lawsuit to address its own claims.

Oral argument regarding the supplemental briefing was held January 18, 2005. At that time, the trial court stayed its decision to await appellate decisions in other similar cases.

On May 31, 2005, the trial court heard further oral argument on the motions for judgment on the pleadings and for leave to file Fourth Amended Complaint. The trial court granted defendant's motion for judgment on the pleadings and denied plaintiff's motion for leave to amend the complaint. With respect to the motion to amend, the court denied the motion on the grounds argued by defendant, finding that the McMillan Law Firm did not possess the same claim as plaintiff, and plaintiff was attempting to bring in an entirely new party to prosecute its own action. Furthermore, plaintiff had not shown he could amend the complaint to allege actual injury or to meet the class certification requirements of Code of Civil Procedure section 382.

Thereafter, defendant filed a memorandum of costs in the amount of $10,480.29. A large portion of the costs consisted of deposition costs, as well as messenger costs for filing documents with the court. Plaintiff moved to tax costs, or in the alternative, to strike costs. Plaintiff argued in part that to allow costs arising from a judgment preordained by the passage of Proposition 64 amounted to an unlawful bill of attainder,

and that denying him the ability to continue to litigate the case because the electorate changed the law was different than entering an adverse money judgment against him.

On August 24, 2005, the trial court denied plaintiff's motion to strike costs, and denied in part the motion to tax costs. The trial court taxed deposition costs in the amount of $1,500 and struck the messenger costs in their entirety. Plaintiff timely appealed on September 23, 2005.

DISCUSSION

Subsequent to the filing of this appeal, on July 24, 2006, our Supreme Court decided the issue of the retroactive application of Proposition 64, concluding that the changes in the law applied to all pending cases not yet final on appeal. (*Mervyns, supra*, 39 Cal.4th at pp. 232-233.) In addition, in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, decided the same day, the Supreme Court held that the conclusion Proposition 64 operated retroactively did not in all cases preclude amendment of pending actions to substitute a party with standing. A "rule barring amendments *to comply* with Proposition 64 does not rationally further any goal the voters articulated" in passing the measure. (*Id.* at p. 241.) Rather, each case was to be decided on its own merits concerning whether amendment should be permitted. (*Id.* at p. 242.)

We now turn to the remaining issues plaintiff raises on appeal, namely (1) whether amendment to substitute his law firm should be permitted, and (2) whether the costs awarded constitute an unlawful bill of attainder.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT AMENDMENT TO CURE THE DEFECT IN STANDING.

Plaintiff argues he should be allowed to amend the complaint to substitute a plaintiff who satisfies the requirements of Proposition 64. Respondents contend that leave to amend was properly denied for the reasons stated in their initial motion. Plaintiff contends there is no prejudice to respondents, because trial will not be delayed, nor will critical evidence be lost. Rather, he contends, the same causes of action and facts are

alleged; only the party plaintiff is changing. Further, additional discovery would be minimal.

Branick, supra, 39 Cal.4th 235 noted that "courts have permitted plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest." (*Id.* at p. 243.) In general, motions for leave to amend pleadings are directed to the sound discretion of the trial court, and leave to amend is liberally granted. (Code of Civ. Proc., § 473, subd. (a)(1) ["The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading. . . ."]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.)

"If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530; see also *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) Prejudice to the opposing party exists where the amendment would require the trial court to delay trial, resulting in the loss of critical evidence or the added costs of preparation. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488; see also *Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

Here, there is no prejudice to respondents in permitting the amendment to substitute a new party plaintiff. No continuance of trial is necessary. The theories of liability remain the same, and are based upon the same factual scenario: Sanford's Sharpie pen packages contain less than the number of pens represented on the outside of the packages. Additional discovery of the parties in the McMillan Law firm regarding the purchase should not be extensive. (See *Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 136-137 [abuse of discretion in denial of amendment to substitute party with standing in UCL case post-Proposition 64].) Furthermore, the necessity of the amendment itself and any delay in making the amendment cannot be attributed to any fault of plaintiff. Once the voters

enacted Proposition 64, plaintiff lost standing. The delay in implementing this loss of standing was due to the necessity of judicially determining whether the changes to the relevant statutes should operate retrospectively to pending cases.

Because we reverse the judgment to permit plaintiff to amend the complaint, the awards of costs is vacated, and we need not address plaintiff's contentions the cost award constitutes a bill of attainder. (See *Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1031; Code of Civ. Proc., § 1032, subd. (b).)

DISPOSITION

The judgment of the superior court is reversed. Appellant to recover his costs on appeal.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.