9/28/79

Memorandum 79-53

Subject: New Topics

During the past year we have received two suggestions for new topics, both of them dealing with pleading matters. One suggestion (see Exhibit 1--yellow) deals with Code of Civil Procedure Section 430.30(g) which provides as a ground for a special demurrer that in an action founded upon a contract it cannot be ascertained from the pleading whether the contract is written or oral. The suggestion notes that implied contracts are not covered by this provision; since a major reason for the provision is to ascertain whether the statute of frauds applies, the provision should be expanded to permit a demurrer on the ground that it cannot be ascertained from the pleading whether the contract is written or implied by conduct. For a discussion of the function of the demurrer provision, see the attached excerpt from 3 B. Witkin, California Procedure Pleading 830 (2d ed. 1971) (Exhibit 2--pink).

The other suggestion (Exhibit 3--blue) points out a gap in the rules governing voluntary dismissal of an action. Code of Civil Procedure Section 581 permits voluntary dismissal at any time prior to commencement of trial. Where there has been a demurrer sustained without leave to amend, under existing law the plaintiff may voluntarily dismiss before entry of judgment thereby preserving the cause of action and enabling the plaintiff to shop for a more favorable judge or forum. An analysis of this problem prepared for us by a Stanford law student is appended as Exhibit 4 (gold).

The staff believes that these problems are relatively minor and are not sufficiently substantial to warrant introduction of a resolution to authorize their study. Unfortunately, our authority to study pleading was dropped from our agenda of authorized topics a few years ago. The staff suggests that we refer these matters to Assemblyman McAlister as problems he might wish to cure. If at some time in the future when the Commission introduces a resolution to authorize study of some other more substantial matter it appears the problems have not been resolved, we would include in the resolution a study "to determine whether the law

relating to pleading in civil actions, including but not limited to the law relating to special demurrers in actions founded upon contracts and the law relating to voluntary dismissal following a demurrer sustained without leave to amend, and related matters should be revised." Our Annual Report at that time would state:

> A study to determine whether the law relating to pleading and practice in civil actions should be revised. A major revision of the California pleading laws was enacted in 1971 upon recommendation of the Law Revision Commission.[1] Since that time a number of improvements in the pleading and practice rules have been suggested to the Commission. For example, Code of Civil Procedure Section 430.30(g) provides a demurrer in an action founded upon a contract on the ground that it cannot be ascertained from the pleading whether the contract is written or oral; the section fails to provide a demurrer on the ground that it cannot be ascertained whether the contract is written or implied by conduct.[2] Code of Civil Procedure Section 581 permits voluntary dismissal at any time prior to commencement of trial; the section fails to restrict voluntary dismissal following a demurrer sustained without leave to amend.[3] A study should be made to determine whether the law relating to pleading in civil actions should be revised to cure these and other problems in the law.

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1. 1971 Cal. Stats. chs. 244, 950; 1973 Cal. Stats. ch. 828. See Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 501 (1971).

2. See Letter from Jack T. Swafford (February 27, 1979) (on file in the Commission's office).

3. See Letter from William B. Mayfield (July 11, 1979) (on file in the Commission's office).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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February 27, 1979

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Sirs:

A recent situation has caused me to suggest an amendment to Section 430.10 of the Code of Civil Procedure. In pertinent part, it presently provides:

> "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> * * *
>
> (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written or oral."

The problem is one of omission; subparagraph (g) does not recognize that an action may be founded upon an implied contract, one that is manifested by conduct.

Section 1620 of the Civil Code provides:

> "An express contract is one, the terms of which are stated in words."

Section 1621 of the Civil Code provides:

> "An implied contract is one, the existence and terms of which are manifested by conduct."

Whether a contract is written or oral, it is in both cases an express contract because it arises from the words used by the parties. But a contract that is created by reason of the conduct of the parties is

neither written nor oral, as the terms are not stated in words.

Implied in fact contracts require a manifestation of assent as much as an express contract. As noted in Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 Pac.2d 798 (1939):

> "The true implied contract, then, consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. (Dunham-Carrigan-Hayden Co. v. Thermoid Rubber Co., 84 Cal.App. 669 [258 Pac. 663]; Williston on Contracts, Vol. 1, Sec. 3)" (14 Cal.2d at 773)

It seems to me that the basic uncertainty in responding to a complaint founded on contract is that it cannot be ascertained whether the contract is or is not written. For example, the affirmative defense of the statute of frauds may be available, not only where the contract is oral but where it is implied merely from the conduct of the parties.

It is my recommendation, therefore, that consideration be given to amending subparagraph (g) of Section 430.10 of the Code of Civil Procedure, to read as follows:

> "In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, or whether it is oral or whether it is implied by conduct."

Sincerely,

Jack T. Swafford

Jack T. Swafford
of
BURRIS, LAGERLOF, SWIFT & SENECAL

JTS/bf

EXHIBIT 2

[3 B. Witkin, California Procedure Pleading 830 (2d ed. 1971)]

(g) [§830] Failure To Disclose Oral Contract.

In 1939 a new ground of demurrer was added (now C.C.P. 430 (8)): "That, in actions founded upon a *contract*, it cannot be ascertained from the complaint, whether or not the contract is written or oral." (See 13 So. Cal. L. Rev. 5; *Hills Transp. Co. v. Southwest Forest Ind.* (1968) 266 C.A.2d 702, 706, 72 C.R. 441; *Fisher v. MacInness* (1961) 191 C.A.2d 577, 580, 12 C.R. 798; *Moya v. Northrup* (1970) 10 C.A.3d 276, 281, 88 C.R. 783, infra, this section.)

This ground is, of course, directed at a special kind of uncertainty, and its main purpose and effect will be clarified if the background of law on pleading contracts within the statute of frauds is first examined.

Under familiar principles, if the complaint discloses an executory oral contract within the statute of frauds, or a written memorandum lacking an essential term or a signature, and the defense is not overcome by sufficient allegations of estoppel or part performance, a general demurrer will lie. (*Harper v. Goldschmidt* (1909) 156 C. 245, 252, 104 P. 451; *Bank of America v. West. U. Constructors* (1952) 110 C.A.2d 166, 242 P.2d 365; cf. *Loper v. Flynn* (1946) 72 C.A.2d 619, 622, 165 P.2d 256 [rule correctly stated, but court assumes defenses properly raised by special demurrer]; see supra, §§397, 398, 641 et seq.; 1 *Summary Contracts*, §589; on raising defense by answer, see infra, §894.) But the plaintiff may plead the contract according to its legal effect in such a manner as to avoid disclosure of its lack of sufficient writing or signature. Instead of holding such a pleading subject to a special demurrer for uncertainty, many courts created the artificial "presumption" that the contract was in writing, making it unnecessary for the plaintiff to allege a writing. (See *Warfield v. Basso* (1923) 62 C.A. 47, 50, 216 P. 48; *McLaughlin v. McLaughlin* (1958) 159 C.A.2d 287, 292, 323 P.2d 820 [complaint held good against motion for judgment on the pleadings]; Clark, pp. 278, 523, 613.)

C.C.P. 430(8) allows the defendant to raise the statute of frauds by demurrer in two stages: special demurrer to force disclosure of the defense, and then general demurrer to the complaint. The result is similar to that reached under the provision in force between 1929 and 1933 making it mandatory upon the plaintiff to plead a writing relied upon. (See *Bates v. Daley's* (1935) 5 C.A.2d 95, 100, 42 P.2d 706 [holding that this short-lived amendment reversed the presumption of written contract and substituted a new presumption that the contract was oral unless plaintiff alleged a writing].) But the following loopholes should be noted:

(1) The section does not require pleading of the contract *verbatim.* Hence it may be possible in some cases for the plaintiff, in response to this special demurrer, to allege that the contract is oral without giving sufficient details to classify it unmistakably within the complicated provisions of the statute of frauds, or to allege the fact of a writing without disclosing its insufficiency as a memorandum or its lack of a signature.

(2) The statute refers only to actions founded on *contracts.* The presumption of a writing may still remain where, e.g., the action is founded on an express trust within the statute of frauds. (See *Broder v. Conklin* (1888) 77 C. 330, 336, 19 P. 513 [dictum; not clear whether court regards case as involving trust distinct from agreement].)

(3) The statute does not apply to a complaint on a *common count.* In *Moya v. Northrup,* supra, plaintiff set forth two common counts: (1) "Within four years last past" defendants became indebted to plaintiff in the sum of $9,000 for money lent; (2) the same form for money paid at defendant's instance and request. Defendant demurred in order to force a disclosure of oral contract and thereby make applicable the 2-year *statute of limitations.* The trial court sustained the demurrer on the authority of *Miller v. Brown,* supra, §434. *Held,* reversed. In *Miller* the specific allegations were inconsistent with the general allegations, and the complaint was ambiguous on its face. Here there was no ambiguity, and the only question was whether the policy underlying C.C.P. 430(8) should prevail over the traditional acceptance of common counts as a permissible form of pleading (supra, §427). The court said:

"The utility of the common counts as an established manner of pleading must be weighed against the desirability of ferreting out stale and unsustainable claims at the pleading stage . . . . [T]he sufficiency of a pleading under the common counts has generally been upheld. It is no hardship on the defendant to require him to take affirmative action by answer and motion for summary judgment if the defense of limitations of actions in fact exists . . . If he wishes further particulars from the plaintiff, he may . . . request a bill of particulars before so proceeding." (10 C.A.3d 285.)

EXHIBIT 3

OFFICE OF
CITY ATTORNEY
CITY OF SAN JOSE

ROBERT J. LOGAN
CITY ATTORNEY

151 WEST MISSION STREET
SAN JOSE, CALIFORNIA 95110
(408) 277-4454

July 11, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re: CCP §581(1) Voluntary Dismissal Following Demurrer Without Leave to Amend

Gentlemen:

A significant gap in the voluntary dismissal statute (CCP §581(1)) has recently come to our attention and we would like to bring it to yours.

Following the sustaining of a demurrer without leave to amend but before a judgment of dismissal based thereon could be noticed and heard, the plaintiff filed a voluntary dismissal. Since no change of venue was pending and trial had not commenced as defined in that statute, the plaintiff's voluntary dismissal was held to prevail over the later dismissal based on the demurrer. The result might be a second shot at the demurrer upon refiling, which is only a form of forum shopping.

This may be a singular problem, but the only way to counter it presently would seem to be a race for ex parte mandatory dismissal after demurrer to beat a voluntary dismissal. I would appreciate your attention to this area if it can be done within your review schedule.

Very truly yours,

ROBERT J. LOGAN
City Attorney

WILLIAM B. MAYFIELD
Deputy City Attorney

WBM:ams

EXHIBIT 4

MEMORANDUM

To: Nathaniel Sterling

Fr: Marcia Grimm

Re: Code of Civil Procedure Section 581(1): Voluntary Dismissal Following Demurrer Without Leave to Amend

Da: August 24, 1979

Code of Civil Procedure Section 581(1) provides that a plaintiff may request voluntary dismissal of an action at any time before the actual commencement of trial, provided that affirmative relief has not been sought by the defendant's cross-complaint and no change of venue is pending. Under this rule it appears that a plaintiff may, by filing a voluntary dismissal following the sustaining of a demurrer without leave to amend but before a judgment of dismissal based on the demurrer, obtain a second shot at the demurrer upon refiling. Although the legislation is designed to provide plaintiffs who wish to contest orders sustaining demurrers with a remedy on appeal, the statute would not prevent an enterprising litigant from refiling in an attempt to gain a more favorable ruling on the demurrer in another forum.

This result follows from two important characteristics of voluntary dismissals: (1) Subject to the provisions of the statute, a plaintiff has an absolute right to dismiss, and neither the clerk nor the court has any discretion in the matter, Simpson v. Superior Court, 68 Cal. App.2d 821, 158 P.2d 46 (1945); Associated Convalescent Enterprises v. Carl Marks & Co., Inc., 33 Cal. App.3d 116, 108 Cal. Rptr. 782 (1973); 4 B. Witkin, California Procedure Proceedings Without Trial § 44, at 2709 (2d ed., 1971); and (2) because the entry of dismissal constitutes a ministerial rather than a judicial act and because the defendant who has not sought affirmative relief is not considered an aggrieved party, a voluntary dismissal is not a judgment and no appeal may be taken from it. Associated Convalescent Enterprises, supra; Cook v. Stewart McKee & Co., 68 Cal. App.2d 758, 157 P.2d 868 (1945); 6 B. Witkin, California Procedure Appeal § 58, at 4074. For the same reason, dismissal does not bar bringing a new action on the same cause within the period of the statute of limitations. 4 B. Witkin, California Procedure, Proceedings Without Trial § 55, at 2720.

By contrast, dismissals in all other cases, including those pursuant to an order sustaining a demurrer without leave to amend, have the effect of final judgments in terminating an action and are appealable as such. 6 B. Witkin, California Procedure, Appeal § 58, at 4073. Accordingly, a plaintiff who had filed for dismissal under Section 581(1) following a demurrer without leave to amend was denied appeal since neither a voluntary dismissal nor an order sustaining the demurrer, without judgment, is appealable; nor could the plaintiff subsequently obtain a judgment of dismissal based on the order, since the effect of the voluntary dismissal was to deprive the trial court of jurisdiction to further act in the matter. Parenti v. Lifeline Blood Bank, 49 Cal. App.3d 331, 122 Cal. Rptr. 709 (1975).

Prior to 1947, Section 581(1) authorized voluntary dismissals by the plaintiff "at any time before trial" and the courts interpreted this to mean any time before the final submission of the case. Jalof v. Robbins, 19 Cal.2d 233, 120 P.2d 19 (1942); Provencher v. City of Los Angeles, 10 Cal. App.2d 730, 52 P.2d 983 (1936). Under this interpretation, a hearing on demurrer resulting in an order sustaining it was held to be a trial within the meaning of Section 581(1) and consequently plaintiffs had no right in such a case to voluntary dismissal before judgment on the demurrer. Goldtree v. Spreckles, 135 Cal. 666, 67 P. 1071 (1902); Berri v. Superior Court, 43 Cal.2d 856, 859, 279 P.2d 8 (1955); Cf. Home Real Estate Co. v. Winnants, 39 Cal. App. 643, 179 P. 534 (1919) [where order sustained demurrer with leave to amend, plaintiff had a right to dismiss within the period allowed for amendment]. The 1947 amendment, in order to correct possible abuses by plaintiffs who waited until they suspected an adverse outcome to file a dismissal (see, e.g., dissenting opinion in Casner v. Daily News Co., 16 Cal.2d 410, 421, 106 P.2d 201 (1940)), provided that the plaintiff could dismiss at any time before the "actual commencement of" trial, and a definition of "trial" was added. Thereafter, courts strictly applied the provisions of subdivision 1, with the result that voluntary dismissals filed after orders sustaining a demurrer but before judgment were allowed and were held to prevail over attempts to obtain dismissals based upon the demurrer. See Parenti, 49 Cal. App.3d at 335:

> Since in the instant case no opening statement was made, witnesses sworn, nor evidence introduced, appellant had a right to

> obtain a voluntary dismissal. The effect of that voluntary dismissal is that the trial court is without jurisdiction to further act in the matter [citations]. Thus, even though appellant had a right to have judgment of dismissal entered after the order sustaining the demurrer without leave to amend, appellant cannot now obtain such a judgment because the trial court has nothing before it on which to act.

But see 4 B. Witkin, California Procedure Proceedings Without Trial § 51, at 2761: [Voluntary] [d]ismissal is clearly proper before the hearing on demurrer, and just as clearly improper after submission of the demurrer for a decision which ultimately consists of an order sustaining it without leave to amend [citing Goldtree, supra]."

It seems clear, at least to the courts which have considered the question, that the Legislature intended to allow plaintiffs an opportunity for review of orders sustaining demurrers by obtaining a judgment of dismissal pursuant to the order and then appealing the judgment. See Code Civ. Proc. § 581(3), authorizing dismissal on request of either party when a demurrer to the complaint is sustained without leave to amend and Patricia J. v. Rio Linda Union School District, 61 Cal. App.3d 278, 282, 132 Cal. Rptr. 211 (1976) [plaintiffs required to prepare orders sustaining demurrer and dismissing complaint in order to preserve their right of appeal]. An alternative procedure, whereby plaintiffs may obtain a writ of mandamus compelling entry of judgment pursuant to an order sustaining a demurrer in order to challenge the ruling on the demurrer by appeal, was authorized by the court in Berri v. Superior Court, 43 Cal.2d 856 [writ directing trial court to enter judgment of dismissal based on demurrer or to overrule demurrer]. See also California Ammonia Co. v. Macco, 270 Cal. App.2d 429, 433, 75 Cal. Rptr. 753 (1969) [affirming judgment of dismissal under Code Civ. Proc. §583 (dismissal for lack of prosecution) where plaintiff failed to pursue these remedies].

Although no case in which a plaintiff refiled his complaint in an apparent attempt to gain a favorable ruling on the demurrer in a different forum has been found, a comparable situation was before the court in Gherman v. Colburn, 18 Cal. App.3d 1046, 96 Cal. Rptr. 424 (1971), where plaintiffs filed for dismissal following the denial of their demand for jury trial and then filed a new action in another county. The court

denied a motion to vacate the dismissal over defendants' objections that the dismissal, followed by the filing of a second suit based on the same transaction, reduced the litigation to a "contest of logistics, trickery and deceit" and violated policy factors underlying the code, including those designed to discourage multiple litigation and forum-shopping. The court stated:

> The policy underlying the privilege of dismissing an action before the commencement of trial is to afford to the plaintiff a certain amount of freedom of action within the limits prescribed by the code [citations]. In order to curtail the plaintiff's privilege of dismissing his action voluntarily, the defendant must clearly and specifically bring himself within the terms of the statute; i.e., request affirmative relief, or prove that plaintiff has made an opening statement, or that a witness has been sworn or evidence introduced.
>
> * * * * *
>
> Moreover, it is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of an action pursuant to § 581, subdivision 1, the court is without jurisdiction to act further [citations], and any subsequent orders of the court are simply void.

Id., at 1049-1050.

Conclusions

The terms of Code of Civil Procedure Section 531(1) fail to prevent plaintiffs from obtaining a voluntary dismissal following a demurrer without leave to amend in order to avoid the effect of a judgment of dismissal based on the demurrer. Since voluntary dismissal deprives the court of further jurisdiction in the action where it is obtained and does not bar the plaintiff from bringing a new action on the same cause, some degree of "forum shopping" may result.

However, plaintiffs may instead challenge the demurrer directly by means of a dismissal based on the demurrer (under Section 581(3) or mandamus) and subsequent appeal, and the holding of Gherman seems to indicate that courts are somewhat tolerant of "forum shopping" in any event. Given this degree of tolerance and the courts' strict adherence to the statutory requirements governing voluntary dismissals, there can be little doubt that any change in the law designed to prevent this result must come from the Legislature.

Note — voluntary dismissal does not preclude award of costs + statutory atty's fees — see cases cited in Associated Convalescent etc., 33 Cal App 3d at 120.

NS