

Don Lee v. Bank of America, N.A., et al.

20CV44796

**MOTION FOR ORDER REQUIRING PLAINTIFF LEE AS A VEXATIOUS LITIGANT
TO FURNISH SECURITY AND FOR A PREFILING ORDER**

Defendant Bank of America, N.A. (BANA) moves, pursuant to Code of Civil Procedure section 391 *et seq.*, for an order requiring Mr. Lee to furnish security in this action, and for a pre-filing order prohibiting Mr. Lee from filing any new litigation in the courts of this state without first obtaining leave of the court where the litigation is proposed to be filed. BANA so moves on the grounds that “Lee is a litigant who files unmeritorious motions, pleadings, and papers [and] there is no reasonable probability that Lee will prevail in this action against Bank of America [and] Lee has repeatedly relitigated the settled 2014 action between him and Bank of America.” (See Notice of Motion at 2:2-6.)

BANA’s request for judicial notice is GRANTED. The Court takes judicial notice of the subject matters of the request, but with the exception of orders of court, not for the truth of the matters asserted therein.

As relevant here, the governing statute defines the term “vexatious litigant” to mean a person who either: “(2) [a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined”; or “(3)[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” (Code Civ. Proc., § 391, subs. (b)(2) and (3).)

The Court is unable to conclude that Plaintiff is a “vexatious litigant” under either definition. The Court does not find that the 2017 action (case No. 17CV42098), when filed, was an attempt to relitigate the causes of action, claims, controversies or issues determined in the 2014 action (Case No. 14CV40435). Moreover, it appears uncontroverted that there is an appeal pending in the 2017 action, which necessarily means that it has not been finally determined. As such, Plaintiff does not meet the definition provided in Code of Civil Procedure section 391, subdivision (b)(2).

In arguing that Plaintiff has “repeatedly file[d] unmeritorious motions, pleadings, or other papers,” BANA cites to the following arising out of the 2017 action: an appeal, a “Notice of Compliance with Judgment,” a motion to set aside and vacate judgment (subsequently withdrawn), and a second appeal. (See Support Memo at 2:1-3:4.) While the Court is

sympathetic to BANA's obvious frustration at the course the 2017 litigation has taken, the Court is not prepared to exercise its discretion and declare Plaintiff a vexatious litigant on this record. (See *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 972 [held: evidence was insufficient to support a vexatious litigant designation based on three unsuccessful motions filed over three years as to two separate judgments where the motions were not intended solely to harass, and there was no evidence of persistent or obsessive litigiousness, serious financial harm, or an unreasonable burden on the courts].)

Based on the foregoing, the motion is DENIED.

The clerk shall provide notice of this ruling to the parties forthwith. Plaintiff is to prepare a formal Judgment pursuant to Rule of Court 3.1312 in conformity with this ruling.

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DEFENDANT'S MOTION TO STRIKE PUNITIVE DAMAGES ALLEGATIONS

Defendant Bank of America, N.A. (BANA) moves, pursuant to Code of Civil Procedure sections 435 through 437, to strike, from the First Amended Complaint (FAC), certain allegations and prayers relating to Plaintiff's claim for punitive damages asserted against Bank of America.

The issues raised by the motion are MOOT in light of the Court's concurrent order sustaining BANA's demurrer to the FAC without leave to amend.

The clerk shall provide notice of this ruling to the parties forthwith. BANA to prepare a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.

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DEMURRER TO THE FIRST AMENDED COMPLAINT

Bank of America, N.A. (BANA) demurs, pursuant to Code of Civil Procedure section 430.10, subdivision (c), to the First Amended Complaint (FAC) on the grounds that another action is pending in the Court of Appeal on the same facts and issues. BANA further demurs, pursuant to Code of Civil Procedure section 430.10, subdivision (e), to each cause of action purportedly set forth in the FAC on the grounds that Plaintiff fails to allege facts sufficient to state a claim against BANA.

The Court rules on BANA's request for judicial notice as follows.

Request Nos. 1 and 3: GRANTED. The Court takes judicial notice of the Complaint filed in this action, and the Complaint filed in case No. 17CV42098, but not for the truth of the matters asserted therein.

Request Nos. 2, and 4-12: DENIED. The respective subject matters of these request numbers are not relevant to the Court's resolution of the issues raised by the demurrer.

The Court finds that the allegations of the FAC involve the same parties and the same subject matter as the Complaint filed in *Don Lee v. Bank of America, N.A., et al.*, Case Number 17CV42098 in this Court (098 Case). (Compare FAC with the Complaint in 098 Case attached as Exhibit D to the FAC.) Plaintiff acknowledges as much through his Opposition to this demurrer. (See Opposition at 16:4-6.) Plaintiff alleges in the FAC, and concedes through his Opposition, that the 098 Case is ongoing. (See FAC at ¶ 19, Opposition at 16:5-6.)

“It is well settled that the law abhors vexatious and unnecessary litigation wherein several lawsuits are brought involving the same parties and subject matter. (Citation.) An objection to a complaint on the basis that a substantially similar lawsuit is pending is properly raised by demurrer (Citation.), provided the defect appears on the face of the pleading or from judicially noticed facts.” (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 191-92.) In this case, because the Complaint in the 098 Case is both attached as Exhibit D to the FAC, and a proper subject of BANA's request for judicial notice, the defects appear both in the pleading *and* through judicially noticed facts.

Generally, it is an abuse of discretion for a court to deny leave to amend where there is any reasonable possibility that a Plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, the pleading party bears the burden of showing such reasonable possibility. (*Ibid.*) Here, the burden is on Plaintiff to show in what manner he can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Ibid.*; *Medina v. Safe Guard Products* (2008) 164 Cal.App.4th 105, 112 n.8; see also *Heritage Pac. Fin'l, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994 [court did not abuse discretion in denying leave to amend where, despite ample opportunity, plaintiff failed to demonstrate it could cure defect].)

Based on the nature of the defects – the identity of the parties and subject matter involved in this action and the 098 Case – the Court finds no reasonable possibility that Plaintiff can cure the defects by amendment. Plaintiff appears to concede the point by failing to address it through his Opposition.

Based on the foregoing, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

The clerk shall provide notice of this ruling to the parties forthwith. BANA to prepare a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.