Filed 12/3/20 Ouyang v. Achem Industry America, Inc. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LIN OUYANG, Plaintiff and Appellant, v. ACHEM INDUSTRY AMERICA, INC., Defendant and Respondent.	B290915 (Los Angeles County Super. Ct. No. BC556293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Lin Ouyang, in pro. per., for Plaintiff and Appellant.

Law Office of Ray Hsu & Associates, Ray Hsu and May T. To, for Defendant and Respondent.

INTRODUCTION

This appeal is from the second of two lawsuits filed by appellant Ouyang against her former employer, respondent Achem Industry America, Inc. (Achem). Ouyang's first suit, based on actions taken while she was employed by Achem, was tried to a jury and resulted in a defense verdict and an award of costs to Achem. In this, her second suit, she alleged six causes of action relating to Achem's alleged failure to increase her hourly wage, reimburse her for certain expenses she incurred in obtaining a green card, or pay for her health insurance while she was on unpaid leave. Her first four causes of action were disposed of when the trial court sustained Achem's demurrer without leave to amend and thereafter granted Achem's motion for judgment on the pleadings when Ouyang reasserted the same causes of action. Her fifth and sixth causes of action were disposed of following this court's directive to the trial court to grant summary judgment to Achem on the basis of preemption under the Employee Retirement Income Security Act (ERISA).

On appeal, Ouyang contends the trial court erred in sustaining the demurrer without leave to amend -- and thereafter granting Achem judgment on the pleadings -- as to her first three causes of action.[1] Additionally, Ouyang contends the trial court erred in denying her motion for

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[1] Ouyang asserts no error regarding the sustaining of the demurrer or the grant of judgment on the pleadings as to her fourth cause of action.

sanctions, based on Achem's filing a motion for leave to file a cross-complaint asserting offset in the amount of costs awarded Achem in the first lawsuit, and in denying her motion to strike the offset defense. She further assigns error to the trial court's failure to rule on her objections to Achem's proposed judgment or to issue a statement of decision before issuing its final judgment. Finally, Ouyang urges us to revisit our prior decision ordering the trial court to grant summary judgment as to her fifth and sixth causes of action. Finding no error, we affirm.

STATEMENT OF RELEVANT FACTS

A. *The First Action*

In August 2011, Ouyang filed a complaint against Achem alleging 11 causes of action relating to Labor Code violations, intentional infliction of emotional distress, breach of contract, fraud, and unfair business practices (the First Action). In October 2014, a jury returned a verdict against Ouyang on all causes of action. Ouyang was further ordered to pay Achem $63,180.04 in costs. Ouyang appealed, and we affirmed in *Ouyang v. Achem Indus. Am.* (Jun. 28, 2019, B261929) [nonpub. opn.]. In September 2019, our Supreme Court denied review and we issued a remittitur. In April 2020, the United States Supreme Court denied certiorari.

B. *The Current Action*

1. The Original Complaint

On August 29, 2014, Ouyang filed a verified complaint against Achem alleging six causes of action: (1) fraud; (2) national origin discrimination under the Fair Employment and Housing Act (FEHA); (3) wrongful constructive termination; (4) violation of Labor Code sections 2926, 2927, 223, 201, and 202; (5) breach of contract; and (6) "preventing subsequent employment by misrepresentation." In January 2015, Achem demurred to Ouyang's complaint arguing, among other things, that the statute of limitations barred the first four causes of action. Achem also argued the constructive termination cause of action failed to state facts sufficient to constitute a cause of action. The court sustained Achem's demurrer but granted Ouyang leave to amend.

2. The First Amended Complaint

In March 2015, Ouyang filed a verified first amended complaint. The first five causes of action remained the same, but the sixth was replaced by "fraud," alleging Achem falsely promised to pay for Ouyang's health insurance while she was on unpaid leave. As relevant to this appeal, she alleged:

–Ouyang worked for Achem from December 2002 to November 2013. In 2005 she sought a higher-paying job, but Achem induced her to stay by

promising her a wage increase after she received a green card. Achem asked her to prepay the attorneys' fees and costs needed to apply for a green card, but promised Achem would reimburse her for these expenses after she obtained it.

–In July 2008, when she was about to receive her green card, Ouyang asked Achem's president to pay her the promised wage, but he stated it was "a difficult time" and did not. When she asked a few months later to be reimbursed for her attorneys' fees, he told her it was not the "right time" to do so. At the time, Achem's parent company had been delisted from the stock exchange.

–In September 2009, she again asked Achem's president to increase her wage and reimburse her for the attorneys' fees; he again told her to wait, because someone new would be "tak[ing] over" Achem in a few months. Ouyang renewed the request in early 2010 and was told to ask the general manager. The general manager stated he no longer had the authority to approve the reimbursement, but did not say that Achem did not intend to pay, and Ouyang alleged she believed this meant she needed to speak with new management to be reimbursed.

–In September 2010, after Achem's parent company had been relisted on the stock exchange, Ouyang insisted Achem pay her the promised wage and threatened to sue. In

response, Achem accused Ouyang of not doing her job, and threatened to revoke her green card and to fire her if she sued. Achem's general manager also told her "some talents were willing to take low paid job due [to] their immigration status." Ouyang, who was from China, was aware that similarly situated employees from Taiwan were being paid the prevailing wage.

–Ouyang protested this discrimination, and Achem responded by cutting her workload significantly and harassing her, causing her to be injured both mentally and physically, and necessitating a two-week sick leave.

–In November 2010, Ouyang filed a workers' compensation claim. In January 2011, she received her first negative performance review and three days later Achem placed her on unpaid leave.

–In February 2014, Ouyang filed a complaint with the Department of Fair Employment and Housing for national origin discrimination and obtained a right-to-sue letter.

Achem demurred again, arguing that several of Ouyang's causes of action were time-barred. In sustaining the demurrer to the first four causes of action without leave to amend, the court found Ouyang "was on inquiry notice by early 2010 that Achem did not intend to reimburse her for the attorneys' fees she spent on her immigration petition"

and "the 'last illegal act' alleged [relating to her FEHA cause of action] occurred in January 2011." The court additionally noted the third cause of action for constructive termination failed to state facts sufficient to constitute a cause of action because Ouyang failed to allege facts demonstrating her working conditions "were so intolerable as to require a reasonable person to resign." The court also sustained Achem's demurrer to the fifth and sixth causes of action relating to Ouyang's claim that Achem had promised to pay for her health insurance while she was on unpaid leave, but granted Ouyang leave to amend.

3. The Operative Second Amended Complaint

In June 2015, Ouyang filed a verified second amended complaint, containing the first four causes of action to which Achem had already successfully demurred, and two causes of action for fraud and breach of contract relating to Achem's alleged promise to pay for her health insurance after she was placed on unpaid leave. Ouyang's fifth cause of action for fraud sought monetary damages to reimburse her for medical expenses she incurred, as well as compensation for "sever[e] emotional distress." Her sixth cause of action for breach of contract sought monetary damages for the same out-of-pocket medical expenses.

In answering the second amended complaint, Achem noted that "[b]ecause the Court has sustained Defendant's Demurrers to the First, Second, Third and Fourth Causes of

Action, which has the same effect as the granting of a motion for judgment on the pleadings as to these causes of action, Defendant is not required to respond to the allegations in the First, Second, Third and Fourth Causes of Action of the" second amended complaint. Achem further asserted ERISA preemption as an affirmative defense to the fifth and sixth causes of action.

4. Achem Moves for Judgment on the Pleadings and Leave to File a Cross-Complaint; Ouyang Moves for Sanctions

In September 2016, Achem moved for judgment on the pleadings on the first five causes of action. It also moved for leave to file a cross-complaint to assert an offset claim against Ouyang, asking that any amount awarded to Ouyang in the current action be offset by the judgment it had obtained in the First Action. In response, Ouyang moved for sanctions under Code of Civil Procedure section 128.5, arguing that both motions were frivolous. Of relevance to this appeal, Ouyang argued Achem's motion for leave to file a cross-complaint was frivolous because any amount awarded to her in the instant action would be exempt from collection, and therefore Achem's request to offset that amount constituted an illegal request to circumvent the exemption statutes. Ouyang also claimed to be indigent, and asserted she had received a waiver of filing fees.

In October 2016, the court granted Achem's motion for judgment on the pleadings as to the first four causes of action, but denied it as to the fifth cause of action. It also granted Achem's motion to file a cross-complaint. Achem filed its cross-complaint on October 24, 2016, but the court struck it three days later. The court then reversed its earlier ruling and denied Achem's motion to file a cross-complaint. In the order denying Ouyang's motion for sanctions, the court found that while Achem's cross-complaint was unnecessary -- noting the proper way to obtain an offset was to file an answer pleading offset -- "it was not filed entirely without purpose." The court additionally pointed out that it had initially granted Achem's motion for leave to file a cross-complaint, and it would be unjust to sanction Achem for filing a motion the court had granted. With the court's permission, Achem filed an amended answer, asserting both ERISA preemption and offset as affirmative defenses. The court denied Ouyang's request to strike the offset affirmative defense.

5. Motion for Summary Judgment

In February 2017, Achem moved for summary judgment on Ouyang's second amended complaint, arguing that: (a) its health insurance plan constituted an Employee Welfare Benefit Plan governed by ERISA; and (b) Ouyang's fifth and sixth causes of action -- the only causes of action remaining -- were related to that plan, and therefore

preempted by ERISA. In May 2017, the court denied the motion.

Achem petitioned this court for a writ of mandate and following briefing by both parties, we issued an opinion finding both causes of action preempted by ERISA and directing the trial court to vacate its order denying Achem's motion for summary judgment and enter a new order granting it. We also awarded Achem its costs. After we denied Ouyang's petition for rehearing, and our Supreme Court denied her petition for review, we issued a remittitur in December 2017.

6. Judgment

Achem submitted a proposed judgment in May 2018 and Ouyang objected. Among other arguments, she asserted that by finding her fraud and breach of contract causes of action preempted by ERISA, we "necessarily determined that plaintiff had stated facts creating an estoppel to set up the defense that Achem's false representation of plaintiff's employment status, relied on by the plaintiff, induced the belated filing of the wrongful termination and discrimination causes of action." She further argued the court "should exercise its equity power to bar Achem from asserting [a] statute of limitation[s] defense [citation], because Achem admitted in its verified answer that Achem represented to plaintiff that she was expected to return to Achem while she was on unpaid leave and admitted plaintiff believed that she was still employed by Achem as of November 2013." Ouyang

also requested the court "issue a statement of decision explaining the factual and legal basis for its decision."

The court did not issue a statement of decision or explicitly rule on Ouyang's objections. Instead, in June 2018, after correcting a typographical error, the court signed the proposed judgment Achem had submitted, entering judgment in favor of Achem and against Ouyang. Achem was awarded $945 in costs for the writ of mandate proceedings, as well as costs of suit for the trial court proceedings. Ouyang timely appealed.

DISCUSSION

A. *The Court Did Not Err in Sustaining the Demurrer Without Leave to Amend*

As noted, the court sustained Achem's demurrer to Ouyang's first four causes of action without leave to amend, finding the causes of action were barred by the statute of limitations, failed to state a claim, or both. Ouyang challenges those rulings as to the first three causes of action only. "We review a ruling sustaining a demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. [Citation.] 'We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons.'" (*Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 289.) When a demurrer is sustained without leave to amend, "we decide

whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

1. First Cause of Action for Fraud

In Ouyang's first cause of action, she alleged that Achem falsely promised to reimburse her for the attorneys' fees she incurred in obtaining a green card, and to increase her hourly wage once she obtained a green card. However, she alleged that she requested this reimbursement and wage increase several times, only to be denied each time. Specifically, when she was about to receive her green card in July 2008, she asked Achem to increase her hourly wage; Achem's president responded that this was a "difficult time" and did not increase her wage. When she asked a few months later to be reimbursed for her attorneys' fees, he told her this was not the right time. A year later, in September 2009, she again asked Achem's president to increase her wage and reimburse her for the attorneys' fees; he again told her to wait, because someone new would be "tak[ing] over" Achem in a few months. Ouyang renewed the request in early 2010 and was told to ask the general manager. The general manager stated he no longer had the authority to approve the reimbursement, but did not say that Achem did not intend to pay, and Ouyang alleged she believed this

meant she needed to speak with new management to be reimbursed.

In sustaining the demurrer to this cause of action, the court found Ouyang "was on inquiry notice by early 2010 that Achem did not intend to reimburse her for the attorneys' fees she spent on her immigration petition . . . ." Accordingly, her claim -- filed in August 2014 -- was barred by the statute of limitations.[2] On appeal, Ouyang argues the court erred because: (a) her fraud cause of action "relate[d] back to a timely filed original complaint" in the First Action; (b) Achem failed to allege it would be prejudiced by permitting this cause of action; (c) she was not on inquiry notice by early 2010; and (d) she could cure the defects of this cause of action through amendment. We disagree.

First, "[t]he relation back doctrine allows a court to deem an amended complaint filed at the time of an earlier complaint if both complaints rest on the same general set of facts, involve the same injury, and refer to the same instrumentality." (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 60.) But the "earlier complaint" must be filed in the same action. Ouyang presents no authority permitting a new complaint to "relate[] back" to a complaint filed in a different action. When an appellant fails to provide the appellate court with applicable case authority to support

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[2] The "'statute of limitations for fraud is three years.'" (*Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733.)

an argument, that argument is forfeited. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.)

Second, "no California decision requires a showing of prejudice to enforce a statute of limitations." (*State Farm Fire & Casualty Co. v. Superior Court* (1989) 210 Cal.App.3d 604, 612.) Ouyang presents no authority to the contrary.

Third, Ouyang argues the court erred in finding she was on inquiry notice in early 2010 because she alleged the general manager stated he had no authority to approve reimbursement, not that Achem was refusing to reimburse her. Ouyang misunderstands "inquiry notice." "Inquiry notice" does not occur when a plaintiff knows she has been injured. "Inquiry notice" occurs when a person has """"notice or information of circumstances to put a reasonable person *on inquiry*""" that she has suffered an injury. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 398.) "[T]he limitations period begins to run when the circumstances are sufficient to raise a suspicion of wrongdoing, i.e., when a plaintiff has notice or information of circumstances sufficient to put a reasonable person on inquiry." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 648.) Here, Ouyang requested Achem increase her hourly wage and reimburse her for attorneys' fees three times in three years. Each time she was put off; Achem never provided a date when the increase or reimbursement would occur, or informed Ouyang of some procedure she could follow to get those expenses reimbursed. We agree with the trial court that a reasonable person would have been on inquiry by early 2010.

Finally, Ouyang argues she could amend this cause of action by alleging Achem falsely promised her that she would be reimbursed to "avoid liability of paying required wage . . . ." Further allegations that Achem intentionally deceived her would not fix the fundamental defect that Achem's actions would have caused a reasonable person to be on inquiry by early 2010.

2. Second Cause of Action for FEHA Discrimination

Ouyang's second cause of action alleged Achem discriminated against her both because she was from China, and because she opposed Achem's allegedly illegal practices. The court sustained Achem's demurrer to this cause of action finding "the 'last illegal act' alleged occurred in January 2011." The statute of limitations for a FEHA claim was one year when Achem's demurrer was sustained. (Former Gov. Code, § 12960, subd. (d), effective January 1, 2006 ["No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred"].)

Ouyang argues her FEHA cause of action "is not barred by the statute of limitation[s] under the delayed discovery rule and the doctrine of equitable estoppel, because . . . Richard Du ('Du') fraudulently concealed the fact that he refused to increase Ouyang's wage because she was from China, [and] he misrepresented to Ouyang that the reason was that he needed to investigate Ouyang's job duties."

Ouyang claims she did not learn the real reason she was denied a wage increase until Du testified at trial in the First Action on October 10, 2014, that he already knew her job duties. She also argues that this testimony, coupled with the alleged lie that he needed to investigate her job duties, estopped Achem from asserting the statute of limitations.

First, the discovery rule does not apply to a FEHA cause of action. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 88-89, 92-93 [though plaintiff did not discover discriminatory reason behind decision not to hire him until it was too late to timely file an administrative claim, his FEHA claim was still time-barred under Government Code section 12960].)

Second, even if the discovery rule applied, Ouyang herself alleged that in September 2010 she asked Du for the "prevailing wage" and was told that "some talents were willing to accept low paid job due to their immigration status"; she further acknowledged being aware that similarly situated employees from Taiwan were paid the prevailing wage while she was not. She therefore "protested discrimination" to Du and threatened to sue for wages owed. Moreover, Ouyang's initial verified complaint filed on August 29, 2014, contained a cause of action for "National Origin Discrimination, Hostile Work Environment Harassment and Retaliation – FEHA." The allegations in the verified original complaint for this cause of action were substantively identical to those in the verified second amended complaint. Her claim that she did not discover she

suffered national origin discrimination until October 10, 2014 -- six weeks after she filed the original verified complaint claiming national origin discrimination -- is belied by the record.

Third, even if Ouyang could assert estoppel in the face of the express language of *Williams* and Government Code section 12960 -- a proposition for which Ouyang presents no authority -- the allegations in her second amended complaint did not demonstrate estoppel. If a defendant acts in such a way to wrongfully induce a plaintiff to believe her claim will be amicably resolved and causes her not to file suit, this may create an estoppel against pleading the statute of limitations. (See, e.g., *Industrial Indem. Co. v. Industrial Acc. Com.* (1953) 115 Cal.App.2d 684, 690.) Here, however, Ouyang alleged she protested discrimination and threatened to sue in September 2010. She contended Achem responded by accusing her of not performing her job duties, threatening to revoke her green card, telling her she would be fired if she sued, and subjecting her to other harassment. Achem did not act in a manner that could have led Ouyang to believe her claims would be amicably resolved.

Finally, Ouyang argues she could cure the defect by amending to allege she did not discover the impermissible bias until October 2014. Such an amendment would be futile, both because the discovery rule does not apply, and because this would be a sham pleading: by her own admission, Ouyang "protested discrimination" in 2010, and alleged it as a cause of action in August 2014. "'A court has

inherent power by summary means to prevent an abuse of its process and peremptorily to dispose of sham causes of action.'" (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391.)

3. Third Cause of Action for Wrongful Constructive Termination

Ouyang alleged in her third cause of action that Achem harassed, retaliated against, and discriminated against her, forcing her to resign in November 2013. "The idea of 'constructive termination' is that working conditions are made so *intolerable* by the employer that the wronged employee is *forced* to quit." (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 213.) The court sustained Achem's demurrer, finding both that the cause of action was time-barred, and that Ouyang had failed to allege facts demonstrating that her work conditions "were so intolerable as to require a reasonable person to resign."

In her opening brief, Ouyang does not contend the court erred in finding that her cause of action failed to state facts constituting a cause of action because she failed to state facts demonstrating intolerable working conditions. She has thus forfeited any challenge to the court's determination of that issue. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [affirming summary adjudication where appellants challenged only one of multiple grounds on which adjudication was granted: "Generally, appellants forfeit or

abandon contentions of error regarding the dismissal of a cause of action by failing to raise or address the contentions in their briefs on appeal"].) We therefore need not address her argument that the court erred in finding this cause of action time-barred. (See, e.g., *Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1237, fn. 3 ["Since we uphold the trial court's ruling on the first basis for demurrer, we need not address this second argument"].)

In Ouyang's reply brief, she briefly argues that "Achem's illegal request to conceal material accounting misstatement when the headquarter[s] was about to issue corporate bonds to public and Achem's discriminatory practice of refusing wage increase because of national origin" were allegations of intolerable conditions. ""[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before."" (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1478.) "'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.'" (*Id.* at 1477.) Ouyang shows no good reason for failing to present these points in her opening brief. Even were we to consider them, we would find that these allegedly intolerable conditions occurred prior to her unpaid leave in January 2011, and therefore could not have been the cause of her resignation in November 2013.

B. *Motion for Judgment on the Pleadings*

Ouyang argues the court erred in granting Achem's motion for judgment on the pleadings for the same reason it erred in granting Achem's demurrer. We find the court did not err in granting the motion for judgment on the pleadings for the same reason it did not err in granting the demurrer.

C. *Trial Court's Failure to Rule on Estoppel Objection*

After Achem submitted a proposed judgment, Ouyang objected on the ground that Achem was estopped from asserting a statute of limitations defense. In June 2018, the court entered Achem's proposed judgment without substantive change, and without explicitly ruling on Ouyang's objections.

Ouyang argues the trial court erred by failing to rule on her estoppel objection to Achem's proposed judgment. We interpret the court's entry of judgment to be an implicit overruling of Ouyang's objections. Ouyang cites no authority requiring a court to issue an explicit ruling on a party's objections to a judgment. In any case, as discussed above, there is no merit to her estoppel objection.

D. *Court's Failure to Issue a Statement of Decision*

In Ouyang's objections to Achem's proposed judgment, she requested the trial court "issue a statement of decision explaining the factual and legal basis for its decision." The court issued no statement of decision. Ouyang argues she

was prejudiced by the failure to issue a statement of decision because, without it, she cannot show how the trial court erred in entering judgment.

Code of Civil Procedure section 632 provides in pertinent part: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . . The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision."

Because there was no trial of fact, no statement of decision was required. (See *Wadler v. Justice Court of Merced Judicial Dist.* (1956) 144 Cal.App.2d 739, 744 [statement of decision under Code of Civil Procedure section 632 unnecessary "where no issue of fact is decided"]; *Rebmann v. Rohde* (2011) 196 Cal.App.4th 1283, 1294 ["By using the word 'trial' in the statute, the Legislature intended that a statement of decision is available only when the court conducts a *trial*"].) Further, Ouyang's request for a statement of decision did not specify the controverted issues as to which she was requesting a statement of decision. Ouyang cites no authority requiring the court to issue a statement of decision in such a situation.

Moreover, our review of the court's sustaining of a demurrer is de novo. Even had Ouyang been entitled to a

statement of decision, she could show no prejudice from the lack of one, and thus would not be entitled to reversal. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 ["a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review"].)

E. *Sanctions Under Code of Civil Procedure Section 128.5*

"A trial court may order a party . . . to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) "'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (*Id.* at § 128.5, subd. (b)(2).) "On appeal from a denial of a request for sanctions pursuant to Code of Civil Procedure section 128.5 we presume the order of the trial court is correct, and the standard of review is abuse of discretion." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) ""'Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: '*An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.* To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting

from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . .'''" (*Ibid.*)

Ouyang filed a motion for sanctions under Code of Civil Procedure section 128.5, alleging Achem's motion for leave to file a cross-complaint was frivolous. The court denied the motion, finding that while the cross-complaint was unnecessary, "it was not filed entirely without purpose." The court additionally pointed out that it had granted the motion for leave to file the cross-complaint, and it would be wrong to sanction Achem for a motion the court had granted. On appeal, Ouyang argues the court abused its discretion in denying her sanctions motion because the clear intent of Achem's motion was to obtain Ouyang's "exempt property," which was "totally and completely without merit . . . ."

When Achem moved to file a cross-complaint, the court had already sustained a demurrer without leave to amend to Ouyang's first four causes of action, leaving only the fifth and sixth causes of action. Code of Civil Procedure section 704.140 provides that "an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." (Code Civ. Proc., § 704.140, subd. (b).) Ouyang's fifth cause of action for fraud sought monetary damages to reimburse her for medical expenses she incurred due to Achem's alleged misrepresentation that it would pay for her medical insurance, as well as compensation for "sever[e] emotional distress." Her sixth cause of action for breach of contract

sought monetary damages for the same out-of-pocket medical expenses. While severe emotional distress may constitute personal injury (see *Sylvester v. Hafif (In re Sylvester)* (9th Cir. BAP 1998) 220 B.R. 89, 92), Ouyang presents no authority that a claim for expenses is one arising out of "personal injury." Further, though Ouyang claimed to be indigent and had received a fee waiver, she did not demonstrate how any amount she would receive for severe emotional distress would be necessary to support her. In short, she did not show the motion was without merit, much less frivolous. Moreover, as the court itself observed, it had granted Achem's motion. The court's sensible decision to decline to sanction Achem for filing a motion the court had expressly granted was not "a manifest miscarriage of justice."

F. *Offset*

Ouyang argues the court erred in denying her motion to strike Achem's affirmative defense for offset, because she claims any award received in this lawsuit would be exempt from collection. As explained above, it is far from clear that Achem would not be entitled to an offset. In any case, given that her entire action has been disposed of, this argument is moot.

G. *Reconsideration of Our Previous Order*

In August 2017, in *Achem Indus. Am., Inc. v. Superior Court* (Aug. 16, 2017, B282801) [nonpub. opn.], we ordered the trial court to grant Achem's motion for summary

judgment on Ouyang's fifth and sixth causes of action, because they were preempted by ERISA. We also awarded Achem its costs on appeal. Ouyang argues that "in the interest of justice," we should revisit both our orders that the trial court grant summary judgment, and the award of costs. Ouyang petitioned for rehearing of our opinion when it was initially issued, and we denied her petition. She then petitioned our Supreme Court for review, and it denied her petition. Our previous orders are final.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.

Filed 8/16/17 Achem Industry America v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ACHEM INDUSTRY AMERICA, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LIN OUYANG, Real Party in Interest.	B282801 (Los Angeles County Super. Ct. No. BC556293)

ORIGINAL PROCEEDINGS in mandate. Richard L. Fruin, Judge. Petition granted.

Law Offices of Ray Hsu and Ray Hsu for Petitioner.

No appearance for Respondent.

Lin Ouyang, in pro. per., for Real Party in Interest.

In the underlying action, real party in interest Lin Ouyang asserted claims for fraud and breach of contract against petitioner Achem Industry America, Inc. (Achem), her former employer, alleging that Achem improperly allowed her employment-based health insurance coverage to lapse when she took a leave of absence from her employment. Achem filed a motion for summary judgment or adjudication, contending the claims were preempted under the Employment Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) (ERISA). After the trial court denied the motion, Achem sought relief from that ruling by writ of mandate. We conclude there are no triable issues of fact whether the claims are subject to ERISA preemption. Accordingly, we grant the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2014, Ouyang initiated the underlying action. Her second amended complaint (SAC), filed June 11, 2015, contains claims for fraud, breach of contract, and wrongful termination in violation of public policy, along with claims under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and the Labor Code. Pertinent here are the SAC's claims for fraud (fifth cause of action) and breach of contract (sixth cause of action), which were based on allegations that after Ouyang began an unpaid leave in January 2011, Achem improperly failed to pay the premiums for her health insurance, which she obtained through Achem's group health insurance plan.

In October 2016, the trial court granted judgment on the pleadings with respect to the SAC's claims, with the exception of the fraud and breach of contract claims described above. In February 2017, Achem sought summary judgment or adjudication on those remaining claims, contending, inter alia, that they were subject to preemption under ERISA. The trial court denied Achem's motion in its entirety, concluding that there were triable issues regarding the application of ERISA preemption.

On May 30, 2017, Achem filed its petition for writ of mandate or peremptory writ. We issued an alternative writ of mandate and imposed a temporary stay.

DISCUSSION

Achem contends the trial court erred in denying summary judgment. As explained below, we agree.

A. *Standard of Review*

"An order denying a motion for summary adjudication may be reviewed by way of a petition for writ of mandate. [Citation.] Where the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate will issue. [Citations.] Likewise, a writ of mandate may issue to prevent trial of non-actionable claims after the erroneous denial of a motion for summary adjudication. [¶] Since a motion for summary judgment or summary adjudication 'involves pure matters of law,' we review a ruling on the motion de novo to determine

whether the moving and opposing papers show a triable issue of material fact. [Citations.] Thus, the appellate court need not defer to the trial court's decision. "'We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.'" [Citations.]" (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.)[1]

B. *Governing Principles*

"ERISA is a comprehensive federal law designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans. [Citation.] As a part of this integrated regulatory system, Congress enacted various safeguards to preclude abuse and to secure the rights and expectations that ERISA brought into being. [Citations.]

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[1] Ouyang asserted numerous objections to Achem's evidentiary showing. Because the trial court did not expressly rule on the objections, we presume them to have been overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) As Ouyang has not resurrected her objections before us, we examine the trial court's rulings in light of the entire body of evidence submitted in connection with Achem's motion for summary judgment or adjudication.

On a related matter, we note that the exhibits supporting Achem's petition include evidence not submitted to the trial court in connection with Achem's motion for summary judgment or adjudication. We decline to examine that evidence, as our review of a writ petition is limited to the record before the trial court. (*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 96, fn. 2 & 97.)

Prominent among these safeguards is an expansive preemption provision, found at section 514 of ERISA (29 U.S.C. § 1144 . . . [citations].)" (*Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045, 1050-1051 (*Marshall*).) That provision "is conspicuous for its breadth, establishing as an area of exclusive federal concern the subject of every State law that 'relates to' an employee benefit plan governed by ERISA. [Citation.]" (*Id.* at p. 1051.) The provision encompasses "state law claims" -- that is, causes of action predicated on state law -- meeting the criteria for preemption stated in the provision. (See *Morris B. Silver M.D., Inc., v. International Longshore & Warehouse etc.* (2016) 2 Cal.App.5th 793, 801 (*Morris B. Silver M.D.*).) Ordinarily, "[t]he consequences of ERISA preemption are significant for plaintiffs. ERISA limits plan participants and beneficiaries . . . to causes of action for recovery of policy benefits only. [Citation.]" (*Hollingshead v. Matsen* (1995) 34 Cal.App.4th 525, 532 (*Hollingshead*).)

Generally, section 514 of ERISA creates "an affirmative defense to a plaintiff's state law cause of action that entirely bars the claim; that is, the particular claim involved cannot be pursued in either state or federal court." (*Morris B. Silver M.D., supra,* 2 Cal.App.5th at p. 799.) In order to demonstrate that a claim is subject to ERISA preemption, a defendant employer must show (1) that it established "'an employee welfare benefit plan'" within the meaning of ERISA, and (2) that the claim appropriately ""relates to"" the plan. (*Hollingshead, supra,* 34

Cal.App.4th at pp. 533, 539-540.) The defendant has the burden of demonstrating the facts necessary to establish ERISA preemption. (*Marshall, supra,* 2 Cal.4th at p. 1052.) That defense need not be alleged in the answer, and may be raised for the first time by a motion for summary judgment.

Under ERISA, the term "'employee welfare benefit plan'" means "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise" specified benefits, including "medical, surgical, or hospital care or benefits, or benefits in the event of sickness [or] disability . . . ." (29 U.S.C. § 1002(1).) Although the existence of an ERISA plan is ordinarily a question of fact, that question may resolved as a matter of law on summary judgment when the pertinent facts are undisputed. (See *Hollingshead, supra,* 34 Cal.App.4th at pp. 533-539.)

Whether a state law claim relates to an ERISA plan depends on the extent to which the claim implicates matters subject to ERISA.[2] As explained in *Pacific Airmotive Corp.*

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[2] Generally, under ERISA, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (*Shaw v. Delta Air Lines* (1983) 463 U.S. 85, 97.) However, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." (*Id.* at p. 100, fn. 21; see *New York State Conference of Blue Cross & Blue*
(*Fn. continued on the next page.*)

v. First Interstate Bank (1986) 178 Cal.App.3d 1130, 1138-1139, four factors influence whether ERISA preempts a state law claim: "(1) the extent to which the law in question relates to an area traditionally within a state's domain [citations]; (2) the extent to which the law directly or indirectly impinges on the terms and conditions of an employee benefit plan [citations]; (3) the extent to which the relief sought is incompatible with ERISA [citations]; and (4) the extent to which the rights the plaintiff seeks to enforce arise under an employee benefit plan. [Citations.]" Whether a state law claim relates to an ERISA plan may be resolved on summary judgment. (*Provience v. Valley Clerks Trust Fund* (1984) 163 Cal.App.3d 249, 258-259 (*Provience*).)

Courts have concluded that ERISA preempts a wide variety of state law claims by employees relating to ERISA plan benefits, including claims against employers predicated on the improper denial or processing of plan benefits. (*Simon Levi Co. v. Dun & Bradstreet Pension Services, Inc.* (1997) 55 Cal.App.4th 496, 502 [discussing cases]; *Morris B. Silver M.D., supra*, 2 Cal.App.5th at p. 801 [discussing cases].) In *Metropolitan Life Ins. Co. v. Taylor* (1987) 481 U.S. 58, 61, an employee was enrolled in his employer-provided ERISA plan, which paid disability benefits. After

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Shield Plans v. Travelers Ins. Co. (1995) 514 U.S. 645, 655 ["If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then . . . preemption would never run its course"].)

suffering injuries in a car accident and undergoing a divorce, the employee took a leave of absence from work and received benefits under the plan. (*Id.* at pp. 60-61.) At the employer's request, the employee submitted to examinations by a psychiatrist and physician, who found that he was not disabled. (*Id.* at p. 61.) When the employee refused to return to work, his employer terminated his employment. (*Ibid.*) The employee sued his employer and the plan's insurer, asserting claims for wrongful termination and breach of contract, seeking compensatory damages for "'money contractually owed . . . , as well as immediate reimplementation of all benefits and insurance coverages . . . .'" (*Id.* at p. 61.) The United States Supreme Court concluded that the employee's common law contract and tort claims were subject to ERISA preemption. (*Id.* at p. 62.)

In *Drummond v. McDonald Corp.* (1985) 167 Cal.App.3d 428, 430, the plaintiff was enrolled in employer-provided health care and long-term disability benefit plans subject to ERISA. The plaintiff asserted claims against the employer for breach of the covenant of good faith and fair dealing, fraud, and intentional infliction of emotional distress, alleging that after she took a medical leave of absence, the employer improperly delayed the payment of disability benefits and refused to "convert" the plaintiff's group insurance to individual insurance. The appellate court held that the claims were subject to ERISA preemption. (*Drummond, supra,* at pp. 430, 432-434.)

B. *Ouyang's Demurrer to the Petition*

At the outset, we examine Ouyang's contention that Achem's petition must be dismissed due to formal defects. "A proceeding in mandamus is . . . subject to the general rules of pleading applicable to civil actions. [Citation.]" (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271 (*Chapman*).) For that reason, "it is necessary for the petition to allege specific facts showing entitlement to relief. . . . If such facts are not alleged, the petition is subject to general demurrer [citation] or the court is justified in denying the petition out of hand." (*Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573.)[3]

Here, Ouyang's return demurs to Achem's petition as fatally defective, arguing that it "does not consist [of] a petition setting out the ultimate fact allegations and issues," and that "the allegation of reversible error . . . is not supported by the [trial] court's order." We disagree. Although we do not condone Achem's failure to include within the petition a separate section in the form of a pleading, the petition adequately sets forth the factual allegations and issues. The petition describes the procedural history of the action, identifies the SAC's

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[3] We note that California Rules of Court, rule 8.486 sets forth other requirements, including that a petition for mandamus identify the real party in interest, contain a verification, and be accompanied by a memorandum of points and authorities and adequate record. Ouyang does not argue that Achem's petition fails to satisfy those requirements.

allegations potentially supporting ERISA preemption of the claims for fraud and breach of contract, and sets forth the trial court's ruling on the motion for summary motion or adjudication. We further observe that although Ouyang characterizes the petition as "uncertain," she has submitted two briefs (her return and a brief designated a "petition for rehearing" regarding the alternative writ) that include argument (with citation to legal authority) in support of the trial court's ruling. Accordingly, we overrule the demurrer. (*Chapman*, *supra*, 130 Cal.App.4th at pp. 271-272 [overruling demurrer to petition lacking "a traditional statement of facts" because petitioner's other submission identified the relevant facts and real party in interest addressed key issue in two briefs].)

C. *SAC's Claims for Fraud and Breach of Contract*

In assessing the denial of summary judgment, we look first to Ouyang's allegations in the SAC, which frame the issues pertinent to a motion for summary judgment or adjudication. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662 [""[I]t is [the complaint's] allegations to which the motion must respond by establishing . . . there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. [Citation.]""].)

The SAC alleges the following facts: From January 2011 to November 2013, Ouyang was on an unpaid leave from her employment with Achem. When Ouyang started

the unpaid leave, she had Health Maintenance Organization (HMO) health insurance through Achem's group health insurance plan with premiums paid by Achem at no cost to her. During the unpaid leave, Achem never notified her that her health insurance coverage had been discontinued or directed her attention to her option for coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (29 U.S.C. §§ 1161 et seq.) (COBRA). Instead, in September 2011, Achem sent Ouyang a notice stating that it would provide HMO health insurance to its California employees at no cost to the employees. Ouyang submitted a timely enrollment form to Achem, which sent her an insurance card with an effective date of October 1, 2011.

In January 2012, Achem, through its human resource agency ADP [T]otal [S]ource (ADP), again notified Ouyang that she was eligible to register for coverage through Achem's group medical insurance plan at no charge to her. Upon receiving the notice, Ouyang contacted ADP, which confirmed that she was an employee of Achem on unpaid leave and that Achem would pay the premiums for her HMO health insurance, at no cost to her. ADP provided Ouyang with instructions how to register for Achem's group insurance plan. After complying with the instructions, Ouyang received an insurance card with an effective date of February 1, 2012.

In June 2012, when Ouyang sought medical services, she discovered that Achem had not paid the premiums for

her health insurance. As a result, she was obliged to personally pay for the medical services. Ouyang contacted ADP and inquired regarding coverage under COBRA. ADP told Ouyang that she was eligible for employer-sponsored health insurance coverage but ineligible for COBRA coverage, and advised her to enroll in Achem's group health insurance plan when it opened for registration. In or after June 2013, Ouyang registered in Achem's group health insurance plan and received an insurance card.

In November 2013, when Ouyang left her employment with Achem, she received neither notification that her insurance terminated nor notice of her COBRA rights. She contacted ADP, which told her that she was not eligible for coverage under COBRA. As a result, Ouyang lost the option to continue her employer-provide coverage under COBRA. In May 2014, she suffered injuries in a car accident, and incurred medical expenses exceeding $3,870 due to lack of health insurance.

Notwithstanding the SAC's references to ADP, Ouyang's claims target Achem, as the SAC alleges that Achem "was in sole control of the administration and maintenance of [Ouyang's] medical insurance benefits." The fraud claim relies on allegations that Achem knowingly made false representations to Ouyang regarding the payment of her insurance premiums and her ineligibility for COBRA coverage. According to the SAC, Achem made no payments for Ouyang's health insurance as early as February 2012, falsely stated that it continued

to make the payments in order to "get a lower premium[] rate by keeping [Ouyang] out of [Achem's] group health plan," and misrepresented her eligibility for COBRA rights in order to cover up its "false promises." The breach of contract claim alleges that Ouyang, by submitting enrollment forms to Achem, "entered a written agreement" under which Achem "would provide medical coverage to [her] and make premium payments to [her] HMO medical insurance plan . . . while [she] remained an employee . . . ." Both claims sought damages, including economic losses exceeding $3,870.

D. *Achem's Motion for Summary Judgment or Adjudication*

Achem sought summary adjudication on Ouyang's claims on several grounds, including that the claims, as alleged in the SAC, were subject to ERISA preemption. Achem's motion also asserted that each claim failed on the merits, although it did not identify that purported failure as a separate ground for summary adjudication.

In an effort to show the claims were meritless, Achem maintained that in view of the allegations in the SAC, ADP -- rather than Achem -- was responsible for the misrepresentations that Ouyang attributed to Achem. Pointing to the SAC, Achem argued: "[O]nly ADP . . . made the misrepresentation[s] to [Ouyang regarding] her health insurance eligibility. . . . [Achem] did not make any

representations to [Ouyang] regarding her health insurance eligibility."

Achem also offered evidence challenging certain allegations underlying the claims. Achem contended that Ouyang's unpaid leave was valid for only 12 weeks, and that she never intended to return to work. In support of the latter contention, Achem submitted a declaration that Ouyang filed in connection with another motion, in which she stated: "I stopped working at Achem . . . since January 2011." Furthermore, in order to show that no written agreement required Achem to provide health insurance to employees who had stopped working, and that Ouyang knew that Achem paid for her insurance only when she worked full time or part time, Achem presented an excerpt from its employee handbook, which states: "While on an unpaid leave of absence, in most instances, the employee must make arrangements for direct payment of . . . health insurance . . . ."

E. *Ouyang's Opposition*

Ouyang opposed summary adjudication on her claims, asserting that Achem failed to show that her alleged agreement with Achem regarding her health benefits while on leave constituted an "employee welfare benefit plan," within the meaning of ERISA. Her principal contention was that the alleged agreement was an "individual agreement" outside the scope of ERISA, notwithstanding the SAC's allegations that she sought a

benefit offered generally to employees under Achem's group health insurance plan, and that she entered into the agreement by completing enrollment forms for that plan. In support of that contention, she relied on the excerpt from Achem's employee handbook, arguing that it established a triable issue whether her agreement with Achem while on unpaid leave was "not part of [Achem's] employee welfare benefit plan." She also pointed to Achem's responses to special interrogatories, which stated (1) that in 2011, Achem did not offer group health insurance to any employee not working full time and not on a valid leave, and (2) that from 2012 to 2104, Achem relied on ADP to make arrangements for terminating coverage for any such employee. In the alternative, Ouyang argued that Achem failed to carry its initial burden on summary judgment of showing that Achem's group health insurance plan, as alleged in the SAC, constituted an ERISA plan.

Ouyang also offered evidence to support certain allegations in the SAC. Ouyang submitted Achem's notice to employees dated September 19, 2011 -- a copy of which was also attached to the SAC -- which described the terms of Achem's group health insurance plan, including the availability of HMO health insurance coverage at no cost to employees. Additionally, Ouyang presented copies of health insurance cards issued to her in and after October 2011, as well as Achem's answer to the SAC, which

acknowledged that Achem paid her health insurance premiums for a period after she began her unpaid leave.

F. *Trial Court's Ruling*

At the hearing on Achem's motion, the trial court characterized Ouyang's claims as predicated on a promise -- namely, "[W]hile you're on your leave, you'll have insurance coverage" -- and remarked, "[I]t might be a jury question as to whether [that promise] is related to an ERISA claim. But [Ouyang] doesn't plead [an] ERISA claim; she claims breach of an oral promise."

Following the hearing, the trial court denied Achem's motion in its entirety. With respect to both claims, the court concluded there were triable issues, "including but not limited" to whether the claims related to an ERISA plan, whether ADP acted as Achem's agent in entering into an agreement with Ouyang to pay for her benefits, and whether Achem ratified that agreement by making some payments. The court further stated: "[Ouyang's] evidence, if credited by the trier of fact, is sufficient to establish that any agreement by [Achem] to provide health benefits to [Ouyang] . . . was outside of [Achem's] agreement to provide coverage for her while she was working."

G. *Analysis*

We conclude that summary adjudication was improperly denied on each of Ouyang's claims. Generally, when a defendant seeks summary adjudication of a claim on

the basis of ERISA preemption and additionally, on the ground that the claim lacks merit, the issue of ERISA preemption presents a threshold determination properly resolved prior to the merit-based challenge. (*Provience*, *supra*, 163 Cal.App.3d at pp. 258-259 & fn. 6.) For that reason, the focus of our inquiry is on the existence of triable issues relevant to ERISA preemption. As explained below, there are no such issues.

1. *Existence of ERISA Plan*

We begin with whether Achem demonstrated the existence of "an employee welfare benefit plan" within the meaning of ERISA. In *Marshall*, our Supreme Court explained that when an employer, in seeking to provide its employees with health care benefits, "purchases a group insurance policy, contributes toward premiums and remits them to the insurer, and retains authority to terminate the policy or change its terms," the employer "has 'established or maintained' an ERISA plan regardless of whether it also processes claims or otherwise administers the policy." (*Marshall*, *supra*, 2 Cal.4th at pp. 1054, fn. 3, 1057.) Applying those criteria, the court concluded that an employer's conduct in buying a group health insurance policy, paying the entire cost of the premiums for its employees, submitting enrollment forms to a third party administrator, and changing insurance providers when necessary "demonstrated beyond peradventure" that the

employer established an ERISA plan. (*Marshall, supra,* at p. 1056.)

Here, the SAC's factual allegations, coupled with the evidence submitted by Ouyang, establish that Achem's group insurance plan constituted an ERISA plan. As explained in *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 222, fn. 3, in seeking summary judgment, "a defendant may rely on the complaint's factual allegations, which constitute judicial admissions. [Citations.] Such admissions are conclusive concessions of the truth of a matter and effectively remove it from the issues." Furthermore, we may review all the evidence submitted by the parties to determine whether Achem carried its initial burden of showing the existence of an ERISA plan. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 750-751.)

The SAC expressly alleges that Achem purchased group health insurance through which it provided employees with HMO health insurance at no cost to the employees. Furthermore, attached to the SAC was a copy of Achem's September 19, 2011 notice to employees, which Ouyang also submitted with her opposition to Achem's motion. As the notice states that Achem had changed its health insurance provider and that employees would receive a new enrollment packet, the notice establishes Achem's authority over the group health insurance plan.

We further observe that although Achem's motion suggested that ADP -- rather than Achem -- was responsible for the misconduct Ouyang attributed to Achem, the record

demonstrates no triable issue whether Achem exercised sufficient control over the plan to foreclose its status as an ERISA plan. A plan may fall within the scope of ERISA even though the employer relies on a third party administrator. (*Marshall, supra,* 2 Cal.4th at p. 1057.) Here, the evidence submitted in connection with the motion shows that from 2012 to 2014, Achem employed ADP to manage its plan, and relied on ADP to make proper arrangements to terminate an employee's enrollment in the plan. As explained in *Marshall,* such delegation of administration tasks "is a common feature" of ERISA plans. (*Marshall,* at p. 1057.) In sum, there are no triable issues whether Achem established an ERISA plan.

2. *Claims Relate to the ERISA Plan*

We turn to whether Achem demonstrated that the SAC's claims for fraud and breach of contract relate to Achem's ERISA plan. Those claims are predicated on allegations that after Ouyang began her unpaid leave, Achem -- acting through ADP -- repeatedly told her that she continued to be eligible for HMO health insurance at no cost to her through Achem's group insurance plan, that she applied for the insurance as instructed, that at some point Achem stopped paying for her insurance, and that Achem did not provide timely notification of her COBRA rights, thus resulting in her failure to exercise those rights. Each claim seeks an award of damages, including $3,870 in

medical expenses she allegedly incurred for want of health insurance.

In view of these allegations, the claims are subject to ERISA preemption. Each claim alleges the existence of a right that -- according to the SAC -- was offered generally to Achem's employees, namely, the provision of HMO health insurance at no cost to an employee. Because that right implicated the economic value of the health insurance benefits offered under Achem's ERISA plan, it was a benefit of that plan. (*Magliulo v. Metropolitan Line Ins. Co.* (S.D.N.Y. 2002) 208 F.R.D. 55, 58 [right to health insurance at reduced price was benefit of ERISA plan]; see *Heffner v. Blue Cross and Blue Shield of Alabama, Inc.* (11th Cir. 2006) 443 F.3d 1330, 1338 [deductible-free insurance coverage was benefit of ERISA plan].) The fraud claim also alleges a failure to provide notification of COBRA rights, which renders the claim subject to ERISA preemption. (*Tingey v. Pixley-Richards West, Inc.* (9th Cir. 1992) 953 F.2d 1124, 1132-1133 [ERISA preempted state law claims alleging improper loss of COBRA rights].)

Before the trial court and in this writ proceeding, Ouyang has contended there are triable issues whether her claims relate exclusively to a promise or contract Achem made with respect to Ouyang as an individual, not to Achem's ERISA plan. In support of this contention, she points to the excerpt from Achem's employee manual, which states that "in most instances," an employee on unpaid leave must pay directly for health insurance.

Ouyang argues that the manual raises a triable issue whether her claims relate solely to "an individual benefit" outside the scope of ERISA.

Ouyang's contention fails, as it relies on a new theory of liability not pleaded in the SAC that is inconsistent with the SAC's allegations. "Under settled summary judgment standards, we are limited to assessing those theories alleged in the [SAC]. [Citations.] '"The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint.* A 'moving party need not ". . . refute liability on some theoretical possibility not included in the pleadings." [Citation.]' . . . '"[A] motion for summary judgment must be directed to the *issues raised by the pleadings.* The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings."'" [Citation.]" (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1275.) Thus, a plaintiff may not defeat a summary judgment motion by "present[ing] a 'moving target' unbounded by the pleadings." (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176.)

Nothing in the SAC reasonably suggests that Achem agreed to pay for Ouyang's HMO health insurance pursuant to an individual contract separate from Achem's ERISA plan. The SAC alleges that after Ouyang began her unpaid leave, Achem notified her that she was eligible for a health insurance benefit --- namely, no-cost HMO insurance --

generally available to Achem's employees, and that in accordance with instructions from Achem and ADP, she repeatedly registered for coverage through Achem's group health insurance plan. Although the SAC refers to Achem's "false promises" to pay for her health insurance, that phrase, viewed in context, designates a benefit of Achem's ERISA plan -- namely, the no-cost HMO insurance generally available to employees -- that Achem allegedly assured Ouyang she was eligible to receive. The SAC thus alleges only that Achem's alleged misconduct denied Ouyang a benefit of Achem's ERISA plan.

Achem's alleged false assurances that Ouyang was eligible for an ERISA plan benefit do not foreclose ERISA preemption of the SAC's claims. In *Wise v. Verizon Communications, Inc.* (9th Cir. 2010) 600 F.3d 1180, 1183, the plaintiff worked for a period for an employer, during which she was diagnosed with multiple sclerosis, and then left. (*Ibid.*) The employer, in order to lure the plaintiff to return to work, promised that her benefits coverage under its ERISA plan would "'bridge'" back to her initial period of employment, and that her multiple sclerosis would not be subject to coverage limitations as a pre-existing condition. (*Wise, supra,* at p. 1183.) In making those promises, the employer's recruitment team understood the bridging of benefits to be a "standard practice." (*Ibid.*) Later, after the plaintiff returned to work for the employer, the administrator of the employer's ERISA plan ruled that the multiple sclerosis was a pre-existing condition that limited

the plaintiff's benefits coverage, and she asserted a state law claim against her employer, alleging fraud, misrepresentation, and negligence. (*Wise, supra,* at p. 1184.) The Ninth Circuit held that ERISA preempted the claim, stating that "[t]he state law theories of fraud, misrepresentation, and negligence all depend on the existence of an ERISA-covered plan to demonstrate that [she] suffered damages: the loss of insurance benefits." (*Id.* at p. 1191.) That rationale also applies to the SAC's state law claims.

The three decisions upon which Ouyang relies are distinguishable, as each involved a promise or contract under which an employer agreed to provide benefits to an individual employee. In *Miller v. Rite Aid Corp.* (9th Cir. 2007) 504 F.3d 1102, 1104-1105, relatives of a deceased employee asserted claims for breach of employment contract and negligence, alleging the employer offered the decedent life insurance as an element of the decedent's employment contract, and repeatedly told the decedent and her relatives that such insurance existed, but failed to ensure that the decedent had an effective life insurance policy when she died. In holding that the plaintiffs' claims were not subject to ERISA preemption, the Ninth Circuit concluded that the employer's promise to provide life insurance, by itself, did not constitute an ERISA plan. (*Miller, supra,* at p. 1108.) As explained above, the claims in the SAC rely on an ERISA plan benefit, rather than any such promise.

The remaining two decisions involve contracts between an employer and an individual employee. In *Dakota,*

Minnesota & Eastern Railroad Corp. v. Schieffer (8th Cir. 2011) 648 F.3d 935, 936 (*Dakota, Minnesota & Eastern*), a railroad entered into a contract with its president in order to encourage his ongoing employment. The contract entitled the president to "lucrative" benefits should he be terminated without cause. (*Id.* at p. 936.) Later, after being so terminated, the president requested contract-based arbitration to determine his benefits, and the railroad successfully sought an injunction to bar the arbitration on the ground that it was subject to ERISA preemption. (*Dakota, Minnesota & Eastern, supra,* at p. 936.) Reversing, the Eighth Circuit concluded that the president's contract was not an "'employee welfare benefit plan'" within the meaning of ERISA because it provided benefits only for a single individual. (*Dakota, Minnesota & Eastern, supra,* at p. 938.)

In *Graham v. Balcor Co.* (9th Cir. 1998) 146 F.3d 1052, 1053-1054, an employee received an unfavorable performance review and faced termination of her employment. After contesting the review and threatening litigation if terminated, the employee entered into an agreement with her employer. (*Ibid.*) Under the agreement, the employee promised to forego her legal claims in exchange for continued health care benefits through the employer's plan. (*Ibid.*) Later, after the employee took a medical leave of absence, the employer discontinued her health insurance coverage, and she asserted state law claims against the employer based on that conduct. (*Ibid.*) The trial court

ruled that the claims were subject to ERISA preemption. The Ninth Circuit rejected that determination, concluding that the claims arose from the employee's agreement as a individual with her employer, which did not constitute an ERISA plan. (*Graham, supra*, at p. 1055.) In contrast to *Dakota, Minnesota & Eastern* and *Graham*, the claims pertinent here, as pleaded in the SAC, are dependent upon a plan generally available to Achem's employees. In sum, summary judgment was improperly denied on the SAC.

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DISPOSITION

Let a peremptory writ of mandate issue directing that respondent trial court vacate its order denying petitioner's motion for summary judgment and enter a new order granting summary judgment on the SAC. The alternative writ, having served its purpose, is discharged, and the temporary stay is vacated effective upon the issuance of remittitur. Petitioner is awarded its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIN OUYANG,
Plaintiff and Appellant,
v.
ACHEM INDUSTRY AMERICA, INC.,
Defendant and Respondent.

B290915
Los Angeles County Super. Ct. No. BC556293

THE COURT:*

Appellant's petition for rehearing is denied.

*MANELLA, P.J. COLLINS, J. CURREY, J.

Appendix C. Order of California Court of Appeal denying Petition for Rehearing

Court of Appeal, Second Appellate District, Division Four - No. B290915

S266270

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LIN OUYANG, Plaintiff and Appellant,

v.

ACHEM INDUSTRY AMERICA, INC., Defendant and Respondent.

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix D. Order of California Supreme Court denying Petition for Review

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/15/17

HONORABLE RICHARD FRUIN — JUDGE
E. GARCIA — DEPUTY CLERK
DEPT. 15

HONORABLE #8 — JUDGE PRO TEM
H. AVALOS, C.A. — Deputy Sheriff
J. AMAYA PRO TEMPORE, CSR# 13099 — Reporter
ELECTRONIC RECORDING MONITOR

8:31 am BC556293

LIN OUYANG
VS
ACHEM INDUSTRY AMERICA INC

R/W BC468795

Plaintiff Counsel: LIN OUYANG (X) IN PROPRIA PERSONA

Defendant Counsel: CATHERINE SUN (X)

NATURE OF PROCEEDINGS:

1) DEFENDANT ACHEM INDUSTRY AMERICA'S MOTION FOR SUMMARY JUDGEMENT OR SUMMARY ADJUDICATION;
2) DEFENDANT ACHEM INDUSTRY AMERICA'S MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES-GENERAL, SET ONE: NOS. 12.2,12.3 AND 50.1 AND REQUEST FOR SANCTIONS IN THE AMOUNT OF $2125.00 .
3) DEFENDANT'S MOTION TO CONTINUE TRIAL.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

Matter is called for hearing.

The Court having read and considered the moving and opposing papers, and having issued a tentative ruling, now hears arguments from both sides.

After arguments, the Court ADOPTS the said ruling, DENYING the said Motion for Summary Judgment, DENYING the Motion to Continue Trial and finally addressing the Plaintff's "Respectful Reminder of Pending Applications to Use a Settled Statement," by stating those issues have already been ruled on. Grounds for the Court's ruling are as fully reflected in the said ruling that is filed and incorporated herein by reference. Motion number 2 is GRANTED, sanction are denied.

Notice by Defense Counsel.

05/17/2017

MINUTES ENTERED
05/15/17
COUNTY CLERK

15

8 TENTATIVE RULING 8D:30 a.m., Monday, May 15, 2017

LIN OUYANG v. ACHEM INDUSTRY AMERICA, INC., et al. [#BC 556293]

A. MOTION OF DEFENDANT ACHEM INDUSTRY AMERICA, INC. FOR Summary Judgment/ Summary Adjudication

CONTINUED TIMELINE:

6/11/15: Plaintiff filed her verified 2AC, asserting 6 causes of action v. MP:
1. fraud – intentional misrep/false promise
2. national origin discrimination, hostile work environment – harassment and retaliation (FEHA)
3. wrongful constructive termination in violation of public policy
4. violation of statutory duty – br/Labor Code 2926, 2927, 223, 201, 202
5. fraud
6. br/K

10/21/16: Defendant's motion for JOP was granted as to causes of action 1-4 and denied as to cause of action 5

1/4/17: Plaintiff's demurrers to the 3rd Amended Answer, and m/strike, were overruled/denied

2/10/17: MP/Defendant filed this motion for SJ or, in the alternative, SAI re 6 "issues":
1. Defendant's health insurance constitutes an Employee Welfare Benefit Plan governed by ERISA
2. Plaintiff Ouyang's Fifth Cause of Action for Fraud is related to an employee Welfare Benefit Plan governed by ERISA
3. Plaintiffs Sixth Cause of Action for Breach of Contract is related to an employee Welfare Benefit Plan governed by ERISA
4. Plaintiffs Fifth Cause of Action is preempted by ERISA
5. Plaintiffs Sixth Cause of Action is preempted by ERISA
6. Plaintiffs Causes of Action are outside the statute of limitations

THE MOTION OF DEFENDANT ACHEM INDUSTRY AMERICA, INC. FOR SUMMARY JUDGMENT IS DENIED. Triable issues of material fact exist, including but not limited to: a) whether Plaintiff's 5th and 6th causes of action "relate to" an ERISA plan; b) whether the misrepresentations allegedly made to Plaintiff were made by ADP as an authorized agent of defendant ACHEM; and c) whether Plaintiff's claims are barred by the applicable statutes of limitation. See discussion below.

RE THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION, THE COURT RULES AS FOLLOWS:

1. Defendant's health insurance constitutes an Employee Welfare Benefit Plan governed by ERISA: DENIED. This isn't a proper issue for summary adjudication, as it doesn't completely dispose of any cause of action, affirmative defense, claim for damage or issue of duty in this case.
2. Plaintiff Ouyang's Fifth Cause of Action for Fraud is related to an employee Welfare Benefit Plan governed by ERISA: DENIED. See above re "issue" #1.
3. Plaintiffs Sixth Cause of Action for Breach of Contract is related to an employee Welfare Benefit Plan governed by ERISA: DENIED. See above re "issue" #1.
4. Plaintiffs Fifth Cause of Action is preempted by ERISA: DENIED. Triable issues of

05/16/2017

material fact exist, including but not limited to whether Plaintiff's claim "relates to" an ERISA plan; whether, in making the alleged misrepresentations at issue, ADP acted as an agent of ACHEM; and/or whether ACHEM ratified the alleged agreement by making payments. See, e.g., the evidence proffered by Plaintiff in opposition to defendant's facts 12, 20, 25, 26, 27, 29 and 31. Plaintiff's evidence, if credited by the trier of fact, is sufficient to establish that any agreement by defendant to provide health benefits to Plaintiff when she was on unpaid leave was outside of the employer's agreement to provide coverage for her while she was working.

5. Plaintiffs Sixth Cause of Action is preempted by ERISA: DENIED. Triable issues of material fact exist, including but not limited to whether Plaintiff's claim "relates to" an ERISA plan; whether, in entering into the alleged agreement at issue, ADP acted as an agent of ACHEM; and/or whether ACHEM ratified such agreement by making payments. See, e.g., the evidence proffered by Plaintiff in opposition to defendant's facts 12, 20, 33, 34, 36, 37 and 39-42. Plaintiff's evidence, if credited by the trier of fact, is sufficient to establish that any agreement by defendant to provide health benefits to Plaintiff when she was on unpaid leave was outside of the employer's agreement to provide coverage for her while she was working.

6. Plaintiffs Causes of Action are outside the statute of limitations: DENIED. Triable issues of material fact exist, including but not limited to when Plaintiff's 5th and 6th causes of action accrued. In fact, as movant submits no evidence as to when this lawsuit was filed, and doesn't request judicial notice of that fact, the burden doesn't shift.

B. RULING ON DEFENDANT'S MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES NOS. 12.2, 12.3 AND 50.1:

The Motion is GRANTED as to form Interrogatories Nos. 12.2 and 12.3 and DENIED as to Form Interrogatory No. 50.1. Whether plaintiff has interviewed witnesses or obtained statements from witnesses is not subject to the work product privilege. If defendant sought the production of any such documents the privilege could be raised. As to 50.1, plaintiff has sufficiently answered. The court declines to impose monetary sanctions.

C. RULING ON DEFENDANT'S MOTION TO CONTINUE THE TRIAL:

DENIED. MP does not show good cause to continue the trial.

D. PLAINTIFF'S "RESPECTFUL REMINDER OF PENDING APPLICATIONS TO USE A SETTELED STATEMENT":

The court has previously ruled, in written rulings served on the parties, that settled statements are used to evidentiary hearings. Plaintiffs seeks the preparation of settled statements for law and motion hearings. Settled statements are not required for such hearings, as the arguments are framed in the motion papers and decided in the minute order.

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Attorney for Defendant
ACHEM INDUSTRY AMERICA INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
UNLIMITED CIVIL JURISDICTION

LIN OUYANG, an individual,

Plaintiff,

vs.

ACHEM INDUSTRY AMERICA, INC., a California Corporation; DOES 1-50, inclusive;

Defendant.

Case No. BC556293

[Judge: Hon. Richard L. Fruin, Jr.]

~~[PROPOSED]~~ JUDGMENT

Dept: 15

On May 15, 2017, this matter came regularly before the Honorable Richard Fuin for Summary Judgment Motion. The motion hearing was held in Department 15 of the Los Angeles Superior Court, Stanley Mosk Courthouse, located at 111 N. Hill Street, CA 90012. Defendant was represented by Attorney Ray Hsu of the Law Offices of Ray Hsu; Plaintiff Lin Ouyang represented herself in pro per.

On October 21, 2016, the Court granted Defendant's Motion for Judgment on the Pleadings for the First, Second, Third, and Fourth Causes of Action of the Verified Second Amended Complaint of Plaintiff without leave to amend.

On December 1, 2017, after the Remittitur was issued by the California Court of Appeal, Second Appellate District, Division Four, through the writ of mandate proceeding, this Court was directed to grant the May 15, 2017 summary judgment motion of Defendant for the remaining fifth and the sixth causes of action of the Verified Second Amended Complaint of Plaintiff.

The Court ordered and entered Judgment as follows:

1. Judgment is entered in favor of Defendant, Achem Industry America, Inc. for the Verified Second Amended Complaint of Plaintiff, and Plaintiff takes nothing.
2. Defendant is awarded costs on writ of mandate appeal proceeding in the amount of $945.00
3. Defendant is awarded costs of suits for the trial court proceedings.

Dated: June 19, 2018

JUDGE OF THE SUPERIOR COURT