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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GUSTAVO VIEYRA

Plaintiff and Appellant,

v.

UNITED UNIVERSITY  
CHURCH,

Defendant and Respondent;

UNIVERSITY OF SOUTHERN  
CALIFORNIA,

Real Party in Interest and  
Respondent.

B278980

(Los Angeles County  
Super. Ct. No. BC601929

APPEAL from the judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Tyler & Bursch, Robert H. Tyler and Nathan R. Klein for Plaintiff and Appellant.

Musick, Peeler & Garrett, Richard S. Conn and Cheryl A. Orr for Defendant and Respondent.

Quinn Emanuel Urquhart & Sullivan, Michael E. Williams and Zachary A. Schenckan for Real Party in Interest and Respondent.

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Plaintiff Gustavo Vieyra is a member of defendant United University Church (Church). He sued the Church, seeking to enjoin it from selling its property located on West 34th Street in Los Angeles to real party in interest, University of Southern California (USC). Plaintiff alleges the Church violated its bylaws requiring a quorum of its members to be present at the meeting approving the sale, and that the sale contravenes a restrictive covenant contained in the deed by which the Church acquired the property, requiring that the property be used only for religious purposes.

On appeal, plaintiff challenges the trial court's order sustaining USC's and the Church's demurrer to his claims regarding the restrictive covenant. The trial court found that plaintiff lacked standing to assert those claims because he held no ownership interest in the property. He contends the complaint could be amended to state a derivative action on behalf of the Church. Plaintiff also contends the trial court erroneously denied his request to continue the hearing on USC's and the Church's motion for summary judgment, arguing that he could obtain discovery, if a pending motion to compel had been heard, to demonstrate a triable issue of fact. Finding no merit in either contention, we affirm.

### **BACKGROUND**

Plaintiff is a member of the defendant Church, a California religious nonprofit corporation. Defendant Church acquired the subject property in 1984 from its predecessor, the University

Methodist Church, which had merged with another church to create the defendant Church. University Methodist Church was the founding church on the USC Campus, and the subject property had purportedly been designed by USC's architecture department when the church decided to move its congregation off campus. The deed transferring the property to defendant Church provided that the property was to be "irrevocably dedicated to religious purposes."

In 2015, the Church began to solicit offers to purchase the property. On September 23, 2015, USC offered to purchase the property for \$10 million. The complaint alleges that the Church also received another, higher offer to purchase the property. The Church held a membership meeting on October 7, 2015, and presented the USC offer to the Church members. According to the complaint, the Church did not discuss the restrictive deed covenant, or the other offer, at the membership meeting. The Church members voted and approved the sale to USC.

The Church bylaws require 25 percent of the Church membership to be present at a meeting to constitute a quorum. The complaint alleged the Church has more than 92 members, and only 23 members were present at the meeting.

On November 20, 2015, plaintiff sued to enjoin the sale, stating causes of action for violation of covenant running with the land, equitable servitude, and violation of the Church bylaws.<sup>1</sup>

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<sup>1</sup> The complaint also alleged Corporations Code violations relating to plaintiff's right to inspect the Church membership records and meeting minutes. The Corporations Code claims were later determined to be moot because the records were made available during the litigation, and plaintiff does not challenge that finding on appeal.

The claims for violation of the restrictive covenant and equitable servitude stemmed from a deed restriction requiring that the property be used for religious purposes, and the fact that USC was a nonreligious entity. The cause of action for violation of the bylaws was based exclusively on the failure of a quorum to approve the sale. Plaintiff filed a first amended complaint on December 8, 2015, to add USC as a real party in interest.

On January 5, 2016, plaintiff's request for a preliminary injunction to block the sale was denied by the trial court, finding that plaintiff lacked standing to enforce any deed restriction; the deed did not create a restrictive covenant or equitable servitude; a quorum of active members was present at the meeting approving the sale; and on other grounds. The sale was consummated. Plaintiff appealed the denial of the preliminary injunction, but later abandoned his appeal.

On January 13, 2016, USC demurred to the operative complaint. Defendant Church joined in the demurrer. USC and the Church asserted that plaintiff lacked standing to enforce any deed restrictions. USC and the Church also argued that the claim of lack of a quorum to approve the sale failed on its merits.

Plaintiff opposed the demurrer, urging he had standing to enforce the deed restrictions based on his membership in the Church. Plaintiff argued the Church, as the party burdened by the deed, "has no interest in enforcing the . . . [d]eed restriction against itself." Plaintiff did not argue, or cite any authority for the proposition that the claims could be asserted in a derivative capacity. Plaintiff requested leave to amend, to allege that the Church failed to submit the other offer to purchase the property to its members. The opposition did not discuss the legal basis for the proposed amendment.

The trial court sustained the demurrer in part, finding that plaintiff lacked standing to enforce any deed restriction because he failed to allege an ownership interest in the property. As to the claim regarding violation of the bylaws' quorum requirement, the court found that resolution of that claim was not appropriate for demurrer. Plaintiff was denied leave to amend.

On May 16, 2016, USC moved for summary judgment on the remaining quorum claim. The Church joined in the motion. The motion was calendared for August 1, 2016.

During the pendency of the motion for summary judgment, plaintiff made a number of filings concerning the state of discovery, his complaint, and the summary judgment motion.

Plaintiff moved to compel further discovery responses from USC. The motion was calendared for hearing on August 5, 2016, four days after the scheduled hearing on the motion for summary judgment. According to the motion, USC refused to produce documents responsive to plaintiff's requests for production of documents without a protective order. The discovery request had been served on April 22, 2016. The parties had engaged in the meet and confer process, but were unable to resolve the discovery dispute, as plaintiff believed that the documents should be produced without entry of a protective order.

The motion argued that plaintiff "has come to learn of other irregularities arising from the meeting" at which the sale was approved, including the Church's failure to disclose to its members that it had received a competing offer to purchase the property for \$2.75 million more than USC's offer. Plaintiff sought documents and communications related to the meeting at which the sale was approved, all documents and communications relating to USC's future use of the property, all documents and

communications between USC and its broker concerning the property and this lawsuit, and other documents.

USC agreed to produce all nonprivileged documents relating to the only remaining cause of action, plaintiff's quorum claim, subject to an adequate protective order.

Plaintiff opposed the motion for summary judgment, arguing that USC's dilatory discovery tactics (the subject of his pending motion to compel) required a denial of the motion, or a continuance.<sup>2</sup> According to the supporting declaration of counsel, the disputed discovery supported plaintiff's claim that the Church did not disclose all material information to its members before they approved the sale, such as the competing offer to purchase the property. Counsel also declared the failure to provide the requested discovery impeded plaintiff's ability to conduct depositions. The motion and declaration did not identify which witnesses plaintiff wished to depose, arguing only that the failure to produce documents "prevented Plaintiff from meaningfully taking depositions." However, according to plaintiff's motion, USC had produced hundreds of pages of discovery during the pendency of plaintiff's motion to compel discovery.

Plaintiff also filed a motion for leave to file a second amended complaint, which was scheduled to be heard on the same day as the discovery motion.<sup>3</sup> The proposed amendment

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<sup>2</sup> Plaintiff also substantively opposed the motion, arguing that a quorum did not exist at the October 7, 2015 meeting. The trial court's resolution of this issue is not at issue on appeal.

<sup>3</sup> Plaintiff's opposition to the summary judgment motion also argued that his pending motion for leave to amend, calendared

sought to add additional defendants, including the real estate broker and various Church leaders, and seven new causes of action, largely based on the failure to disclose the second offer to purchase the property.

USC's reply in support of the motion for summary judgment argued that the request for a continuance should be denied because the outstanding discovery was irrelevant to plaintiff's only pending claim, that the quorum requirement was not met.

On August 1, 2016, the trial court granted the motion for summary judgment, and took the pending discovery motion and motion for leave to amend off calendar. Plaintiff filed a timely notice of appeal.

## DISCUSSION

### 1. Demurrer

Plaintiff contends the trial court erroneously failed to consider plaintiff's right to state derivative claims related to the deed restriction in sustaining USC's and the Church's demurrer without leave to amend. We disagree.

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer is

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for August 5, 2016, warranted a denial of the motion for summary judgment, or a continuance. He does not assert this argument on appeal, and thus has forfeited it.

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.” (*Ibid.*)

“The plaintiff bears the burden of proving there is a reasonable possibility of amendment. . . . [¶] To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ . . . The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ . . . and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. . . . Allegations must be factual and specific, not vague or conclusionary. . . . [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. . . . Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. . . .” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44, citations omitted.)

Courts require the plaintiff to state in the opening brief exactly what new or different facts can be alleged to cure the defective pleading. “A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend.



[Citation.] However, the vague claim that ‘concerns’ could be ‘address[ed]’ by an amendment or there may be a type of relief ‘that will not conflict with the [ground relied upon by the court in sustaining the demurrer]’ does not satisfy an appellant’s duty to spell out in his brief the specific proposed amendments on appeal.” (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.)

“[T]here is nothing in the general rule of liberal allowance of pleading amendment which ‘requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.’ [Citation.]” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387-1388.) The burden falls squarely on the plaintiff to demonstrate in what manner the pleading can be amended and how that amendment will change its legal effect. (*Id.* at p. 1388.)

The trial court sustained the demurrer to plaintiff’s claim that the property was required to be used for religious purposes without reaching the merits of the claim, reasoning that plaintiff had no ownership interest in the land, and therefore lacked standing. Plaintiff contends that the trial court read his complaint too narrowly, arguing that the allegations could reasonably be construed to state a derivative claim on behalf of the Church under Corporations Code section 9142, or that the complaint could have been amended to state such a claim.

Corporations Code section 9142 provides that a “member” “may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a trust under which any or all of the assets of a corporation are held.” (*Id.*, subd. (a).) An action under section 9142 is subject to the requirements of section 5710,

which requires that the plaintiff “alleges in the complaint with particularity plaintiff’s efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.” (§§ 5710, subd. (b), 9142, subd. (a)(1).)

Plaintiff has ignored the requirements of section 5710, which establishes specific standards for pleading a derivative claim under the Corporations Code. Plaintiff has never proposed to amend the complaint to specify his efforts to secure from the board a decision that the sale contravenes a restrictive covenant contained in the deed by which the Church acquired the property, requiring that the property be used only for religious purposes, or the reasons why he did not make such an effort, or any of the other facts required by section 5710 to be pled and proved. He argues only that he can allege that he is a member of the Church, that the court has authority to rescind the sale, and that the property which is the subject of the lawsuit is held in trust. It is plaintiff’s burden to establish that he can amend his complaint to state a cause of action. (*Rakestraw v. California Physicians’ Service, supra*, 81 Cal.App.4th at pp. 43-44.) He has failed to do so here.

## **2. Request for a Continuance**

Plaintiff contends the trial court erroneously denied his request for a continuance of the hearing on the summary judgment motion, so that he could resolve the outstanding discovery dispute and obtain evidence to oppose the motion. Plaintiff argues that the discovery related to his claim that the

Church did not disclose the other offer to its members when they approved the sale to USC. Plaintiff contends his operative complaint included allegations concerning nondisclosure of the competing bid for the property, and therefore the discovery was relevant to the pending motion.

“The [summary judgment] statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing . . . . [Citations.] Thus, in the absence of an affidavit that requires a continuance . . . , we review the trial court’s denial of appellant’s request for a continuance for abuse of discretion.” (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254; see also Code Civ. Proc., § 437c, subd. (h).)

A party seeking a continuance must show that the facts to be obtained are essential to opposing the motion, that there is reason to believe such facts may exist, and that additional time is needed to obtain these facts. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.) Declarations offered in support of a continuance ordinarily must show: “(1) ‘Facts establishing a likelihood that controverting evidence may exist and why the information sought is essential to opposing the motion’; (2) ‘The specific reasons why such evidence cannot be presented at the present time’; (3) ‘An estimate of the time necessary to obtain such evidence’; and (4) ‘The specific steps or procedures the opposing party intends to utilize to obtain such evidence.’” (*Johnson v. Alameda County Medical Center* (2012) 205

Cal.App.4th 521, 532, citations & italics omitted.) Denial of a request for a continuance is proper where the party seeking the continuance has had adequate time to conduct discovery and the additional discovery sought would pertain to irrelevant issues. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 75-76; see also *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 491-492.)

We conclude that a continuance was not mandatory, and that the trial court was within its discretion in denying plaintiff's request for a continuance. Contrary to plaintiff's representation on appeal, his complaint did not state a claim that the Church's bylaws were violated by the failure to disclose material information to the Church membership. Although this fact was recited in the complaint, it was not a basis for any stated cause of action. The only cause of action pending when USC and the Church filed their summary judgment motion was the cause of action for violation of the bylaws, and it was based exclusively on the failure of a quorum to approve the sale. A party moving for summary judgment "need not . . . refute liability on some theoretical possibility not included in the pleadings." [Citation.]” (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.) Nor may a party opposing summary judgment “defeat a summary judgment motion by producing evidence to support claims that are outside the issues framed by the pleadings.” (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674, fn. 6.) The discovery sought was irrelevant to plaintiff's pending claim, and therefore, plaintiff failed to meet his burden in seeking a continuance. (*Johnson v. Alameda County Medical Center, supra*, 205 Cal.App.4th at p. 532.)

A party who seeks to amend a complaint to add new allegations to defeat a summary judgment motion must obtain leave to amend before the hearing on the summary judgment motion. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) As set forth above, plaintiff moved for leave to amend but did not seek an order shortening time so the motion could be heard before the summary judgment motion. Plaintiff has asserted no error on appeal in the court's taking off calendar his motion for leave to amend which was set for hearing after the summary judgment motion.

**DISPOSITION**

The judgment is affirmed. Respondents are awarded their costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

HALL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.