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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PINE VALLEY, INC.,

Plaintiff and Appellant,

v.

AJINOMOTO NORTH
AMERICA, INC. et al.,

Defendants and
Respondents.

B279541

(Los Angeles County
Super. Ct. No. BC613635)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Stern, Judge. Affirmed.

Klapach & Klapach and Joseph S. Klapach, William W. Bloch; Gabriel Salomons and Gary Keith Salomons for Plaintiff and Appellant.

Sheppard, Mullin, Richer & Hampton, Gregory P. Barbee and Joseph D. Barton for Defendants and Respondents.

Appellant Pine Valley, Inc. (Pine Valley) appeals from an order of dismissal following the sustaining without leave to amend of a demurrer filed by respondents Ajinomoto North America, Inc., a New Jersey corporation, Ajinomoto Frozen Foods U.S.A., Inc., a corporation (collectively Ajinomoto), and a more recently formed entity, Ajinomoto Windsor, Inc., an Oregon corporation (Windsor). The three Ajinomoto entities are collectively referred to as “respondents.” We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pine Valley developed a secret formula for a Chinese rice frozen food product (rice product) and alleges that it contracted with Ajinomoto to manufacture the product and sell it to appellant’s customers, most of which were retail market entities. The contracts the parties entered into protected Pine Valley’s rights in the formula and the rice product.

All went well until one day in 2013, when Trader Joe’s, a Pine Valley customer, stopped buying rice product from Pine Valley and announced it would start purchasing the product directly from Ajinomoto. Pine Valley learned that Ajinomoto had developed a “knock-off” product based on Pine Valley’s formula and Ajinomoto was selling directly to Trader Joe’s.

Pine Valley sued. It filed a complaint on July 9, 2014 (the first action), and named Ajinomoto North America, Inc., Ajinomoto Frozen Foods U.S.A., Inc., and Trader Joe’s Company. Pine Valley did not name Windsor, because at that time Windsor did not exist.

The complaint alleged nine causes of action including violation of California’s Uniform Trade Secrets Act and misappropriation of confidential and/or proprietary information.

The court initially scheduled the trial in the first action for April 15, 2015. Later, the trial was continued until July 6, 2015.

On June 18, 2015, less than three weeks before the July 6, 2015 trial date,¹ Pine Valley deposed a division sales manager at Ajinomoto who, according to appellant, “admitted that the Ajinomoto parties were using Pine Valley’s chicken fried rice and vegetable fried rice recipes to create knock-off products for sale to Smart & Final, Hy-Vee, and possibly other retailers.” (Smart & Final, Hy-Vee, and the other possible retailers are referred to collectively as “other customers”.)

Apparently because of a congested calendar, the trial of the first action trailed until January 2016.

Even though almost six months passed between the time Pine Valley learned about these other customers and the date the trial finally began, the record reflects no pre-trial attempts by Pine Valley to amend its complaint or to file a supplemental complaint. Moreover, the record shows no attempt by Pine Valley during the trial to move to amend the complaint to conform to proof with respect to sales to other customers.

Notwithstanding the foregoing, the record does reflect actions Pine Valley took during the first action to incorporate into its damage claim Ajinomoto’s sales to the other customers. These actions included the following: 1) In its complaint, Pine Valley

¹ In its briefs, Pine Valley makes assertions which find no support in the record. When this occurs, we refer to appellant’s assertions in its opening or reply briefs and treat them as judicial admissions. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1112 [“Although statements of counsel ‘may be treated as judicial admissions if they were intended to be such or reasonably construed by the court or the other party as such,’ such admissions must be clear and unambiguous.”].)

laid the groundwork with which to claim such damages in the first action. Paragraph 49 of the complaint in the first action referenced sales to “actual and prospective customers in the same geographic area where Pine Valley conducted business.” 2) During the trial Pine Valley called Smart & Final’s product manager, who described how it came to pass that Smart & Final started selling Pine Valley’s rice products. 3) During the trial, Pine Valley’s damages expert, a forensic certified public accountant, took into account sales to Pine Valley’s other customers in calculating what Ajinomoto owed Pine Valley. We quote a portion of his testimony:

“Q: Now, let’s go back to your first opinion about the damages Pine Valley has suffered. And before getting into specific details, let me ask, did your calculations take into account the counterfeiting of Pine Valley’s recipes and sales to Smart & Final and other chains using Pine Valley’s recipe?

A: Yes, they did. Yes, they did. I assumed that Ajinomoto had taken over the recipes and was now selling it to Trader Joe’s and other vendors.”

On January 28, 2016, the jury returned a verdict in Pine Valley’s favor in the sum of \$1,400,000 against Ajinomoto North America and the same amount against Ajinomoto Frozen Foods, for a total of \$2,800,000. In addition, the court awarded Pine Valley a four percent royalty, extending into the future, on all sales of Pine Valley’s rice products to Ajinomoto’s customers, “including but not limited to, Trader Joe’s, InnovAsian Cuisine, Hy-Vee Stores, [and] Smart & Final.”

Less than two months later, on March 11, 2016, Pine Valley filed a new complaint (the second action), which contained allegations that were all but identical to those in the first action. Five of the causes of action were the same, including fraud, negligent misrepresentation, unfair competition, violation of California Uniform Trade Secrets Act, and misappropriation of confidential and/or proprietary information.

Pine Valley's second action named Ajinomoto North America, Inc., Ajinomoto Frozen Foods U.S.A., Inc., and Windsor. Although not alleged in the complaint, Appellant claims in its opening brief on appeal that Windsor was not a party to the first action because "[i]t did not even exist when the original complaint was filed." The record is silent with respect to when Windsor sprung to life. Pine Valley included Windsor based on an alter ego theory.

All respondents demurred to the second action, in part on the ground that abatement was appropriate because another action was pending between the parties on the same causes of action. After considering Pine Valley's opposition, the trial court sustained the demurrer without leave to amend, dismissed the action, and entered judgment. This appeal followed.

DISCUSSION

1. *Standard of Review*

We review de novo a judgment dismissing an action based on the sustaining of a demurrer without leave to amend. (*Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) Based on well-settled law, we accept as true all of the facts contained in a complaint as well

as facts that may be implied or inferred from what is expressly alleged. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 866–967.) As long as there is no reasonable possibility that the plaintiff is capable of amending to cure the defects, we will affirm the judgment. Appellant has the burden of demonstrating that possibility. (*Los Angeles Memorial Coliseum Comm. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 819.) Also of importance in this case is the discretion courts of appeal have to disregard and consider forfeited issues not properly addressed in the briefs. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [“[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citation.]”]; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451–452.)

2. The Second Action is Barred by a Supreme Court Decision Which Pine Valley Failed to Cite

In 2002, our Supreme Court ruled on the precise issue this appeal presents when it decided *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215 (*Cadence Design Systems*). The opinion states the following:

“We granted the request for certification of the United States Court of Appeals for the Ninth Circuit pursuant to California Rules of Court, rule 29.5, to address the following question:

“Under the California Uniform Trade Secrets Act (UTSA), Civil Code, section 3426, when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret?

“We conclude that in a plaintiff’s action against the same defendant, the continued improper use or disclosure of a trade secret after defendant’s initial misappropriation is viewed under the UTSA as part of a single claim of ‘continuing misappropriation’ accruing at the time of the initial misappropriation. [Fns. Omitted.]” (*Cadence Design Systems, supra*, 29 Cal.4th at p. 218.)

“Our answer to the certified question is narrow. The potential damages encompassed by a continuing misappropriation claim may expand with each illicit use or disclosure of the trade secret. All we decide is that the UTSA views a continuing misappropriation of a trade secret of one party by another as a single claim.” (*Cadence Design Systems, supra*, 29 Cal.4th p. 226.)

“We conclude that a plaintiff’s claim for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim.” (*Cadence Design Systems, supra*, 29 Cal.4th at p. 227.)

Pine Valley ignored this decision until its reply brief. Appellant then tried to distinguish it, first by stating “No California court appears to have ever applied *Cadence Design Systems*’ rationale to a case involving res judicata.” We fail to see the relevance of this argument in light of 1) Civil Code section 3426.6 of the UTSA, which states, “For the purposes of this section, a continuing misappropriation constitutes a single claim,” and 2) the fact that Pine Valley already obtained the relief it sought with respect to the other customers.

Pine Valley also claims its circumstances are unique

because Ajinomoto intentionally concealed the scope of the misappropriations “until the eve of trial, rendering it impossible for Pine Valley to prosecute all of their misappropriations in the initial lawsuit.” We do not agree. The record contains no evidence of intentional concealment. Moreover, the trial was continued almost three months, then trailed almost another six months, giving Pine Valley ample time to move to amend its complaint (Code Civ. Proc., § 473), file a supplemental complaint (Code Civ. Proc., § 464), or during the trial, move to amend to conform to proof. (Code Civ. Proc., §§ 469, 470.) Pine Valley made none of those efforts. Finally, and most significantly, even if there was intentional concealment, it bears repeating that Pine Valley pursued these newly discovered misappropriations during the trial by having its expert witness consider them and include them in his damage calculations.

Pine Valley’s complaint in the first action alleged violations of California’s Uniform Trade Secrets Act (Civ. Code, § 3426 et seq). Pine Valley won. The jury found violations of the Uniform Trade Secrets Act. To the question whether Ajinomoto misappropriated plaintiff’s trade secret, the jury answered “yes.” The jury also found that defendants had misappropriated the trade secret “willfully and maliciously.” These jury findings justified an award of royalties stretching into the future, covering not only sales to Trader Joe’s, but to the other customers.

3. The Abatement Issue is Forfeited

Although it was clear that respondents’ demurrer centered on the pendency of another action pending between the parties on

the same causes of action,² Pine Valley’s counsel failed to discuss abatement in its opening brief, even though it was clear respondent based its demurrer on it. This alone justifies a conclusion that Pine Valley has forfeited the issue. (*Kelly v. CB&I Constructors, Inc.*, *supra*, at p. 451; *Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 388–389.) A party cannot reserve arguments for its reply brief. “[T]he issue was waived as to this court because it was noted only in appellants’ reply brief, and not in their opening brief. [Citation.]” (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12; see also *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1328, fn. 9.)

“Generally, the raising of a new ground for the first time in a reply brief is not proper appellate practice. [Citation.] Accordingly, the arguments are waived both because they were raised for the first time on reply and Raissi made no attempt to show good cause why we should consider them. [Citations.] [Fn. omitted.]” (*Murray & Murray v. Raissi Real Estate Development, LLC*, *supra*, 233 Cal.App.4th 388–389.)

Appellant forfeited any arguments regarding abatement.

4. *Pine Valley is Pursuing Additional Damages Based on the Same Causes of Action*

Even if the issue was not forfeited, we still find no error. Appellants say they are limiting the damages they seek to a time after the trial and only with the other customers. That does not rescue them, because the judgment gives them just that: a future

² Code of Civil Procedure section 430.10(c) authorizes a demurrer on this ground. (Also see *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770.)

four percent royalty, “including but not limited royalty to, Trader Joe’s, InnovAsian Cuisine, Hy-Vee Stores, [and] Smart & Final.”

As respondents point out, Pine Valley has alleged nothing more than entitlement to more money based on the facts supporting the causes of action it presented during the first trial. As our Supreme Court said in *Reichert v. General Ins.* (1968) 68 Cal.2d 822, 832, “[a]t best, plaintiff confuses a cause of action with damages resulting from a cause of action. ‘Compensatory damages do not constitute a plaintiff’s cause of action. His cause of action arises from the wrong inflicted on him, and for the infliction of that wrong he is allowed an award of such damages. Moreover, since the elements of consequential damage experienced by the plaintiff as the result of a particular wrongful act relate back to the injury itself, they cannot form subsequent bases for new causes of action.’ [Citation.]” Reminding us of the well-settled rule that a claim, be it contract or tort, cannot be sectioned into several suits, our Supreme Court went on to say that “[i]n such a case it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered. He is bound to prove in the first action not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to, for the judgment he recovers in such action will be a conclusive adjudication as to the total damage on account of the breach. [Citation]’ [Citation.]” (*Reichert, supra*, 68 Cal.2d at p. 832.)

Pine Valley’s forensic accountant said, “[i]f I had had specific sales information to some of these entities (other customers), that would have enabled me to maybe enhance my

projections.” He did not have such information, and Pine Valley has no right to present those numbers now. To do so is akin to suing for the value of an item, winning, then learning the item is worth more than what the jury awarded and suing for the difference.

5. *Windsor is in Privity With the Other Ajinomoto Defendants*

Pine Valley insists that Windsor is not in privity with the remaining Ajinomoto parties because Windsor did not come into existence until much later. We are not persuaded.

As this court has explained, “[i]n the context of a res judicata determination, privity “refers ‘to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations]’” [Citation.]” (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 689–690 (*Consumer Advocacy Group.*) “[T]he determination of privity depends upon the fairness of binding [a party] with the result obtained in earlier proceedings in which it did not participate. [Citation.] “Whether someone is in privity with the actual parties requires close examination of the circumstances of each case.”” [Citation.] “This requirement of identity of parties or privity is a requirement of due process of law.’ [Citation.]” (*Ibid.*)

Based on appellant’s judicial admissions, there is privity in this case. Windsor represents nothing more than the alter ego of the other two Ajinomoto defendants. In its complaint in the second case, Pine Valley avers that any separateness of Windsor from the other Ajinomoto entities “has ceased to exist” and that Windsor is a “mere shell instrumentality and conduit” for the

others. Finally, Pine Valley claims “[a]dherence to the fiction of the separate existence . . . would sanction a fraud.”

We accept as true all material allegations in the complaint. By pleading that Windsor is the alter ego, that is, the same, as the other Ajinomoto entities, Pine Valley is judicially estopped from denying that privity exists. By virtue of its being the same entity as the other respondents, the relationship between Windsor and Ajinomoto is “sufficiently close” to find privity and justify a res judicata finding. Our Supreme Court said it well a long time ago in *Bernhard v. Bank of America Nat’l Trust & Sav. Assn.* (1942) 19 Cal.2d 807, 813: “[i]t would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.”

6. The Cases Appellant Relies On Do not Aid It

Pine Valley relies on two cases, neither of which supports its position.

Allied Fire Protection v. Diede Construction, Inc. (2005) 127 Cal.App.4th 150, 155 involved federal and state law. The court did not apply California’s primary right theory. The case involved two very different causes of action, not one as in this case. Finally, unlike this case, there were allegations respondents had prevented appellant from learning any facts. In our case, there was no concealment of facts. Pine Valley alleged its own delayed discovery during the first suit.

The second decision appellant relies on, *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210 (*Planning and Conservation League*), was a

CEQA case³ involving challenges to two environmental impact reports [EIR's]. The two EIR's represented separate attempts to satisfy CEQA's requirements. They were separate instances of purported noncompliance.

“Here, . . . Friends's⁴ action and the underlying actions involve distinct episodes of purported noncompliance regarding ‘the same general subject matter’ [citation], namely, the public's statutory right to an adequate EIR concerning the Kern-Castaic transfer [citation]. After Friends's petition challenged Castaic's defective 1999 EIR, the trial court in Friends's action ordered it decertified and retained jurisdiction until Castaic certified an EIR that complied with CEQA. Friends was permitted to challenge Castaic's 2004 EIR by motion or supplemental petition in the original action, *or* by petition in a new action [citation], but it took neither of these alternatives. As the 1999 EIR and 2004 EIR are factually distinct attempts to satisfy CEQA's mandates and Friends was not required to litigate the 2004 EIR in its original action, we conclude that Friends's action and the underlying actions involved different causes of action.” (*Planning and Conservation League, supra*, 180 Cal.App.4th at p. 228.)

Res judicata serves as a bar to all causes of action that were litigated or that could have been litigated in the first action. (*Nevada v. United States* (1983) 463 U.S. 110, 130; *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.) The reason for the rule that all claims that could have been brought are barred under res

³ California Environmental Quality Act, Public Resources Code sections 21000 et seq.

⁴ “Friends” refers to an organization that figures prominently in the facts of *Planning and Conservation League, supra*, 180 Cal.App.4th at p. 228.

judicata is so “[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions.” (*Aerojet-General Corp. v. Am. Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 402.) In Pine Valley’s appeal, we are dealing with negligence: appellant’s failure to amend its complaint, its failure to file a supplemental complaint, its failure to move to amend to conform to proof. Despite those omissions, Pine Valley succeeded in presenting to the jury damages on account of its other customers. That it may not have included the maximum amount possible does not justify a second action. The trial court properly sustained the demurrers, without leave to amend.

7. Sanctions

Respondents ask the court to impose substantial sanctions against appellant (but not its counsel) for taking a frivolous appeal and for procedural misconduct.

“Code of Civil Procedure section 907 provides that “[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.” California Rules of Court, rule 8.276[(a)](1) allows the court to impose sanctions on a party or an attorney for the taking of a frivolous appeal or appealing solely to cause delay. An appeal is frivolous “only when it is prosecuted for an improper motive—to harass respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]” [Citation.] The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs

(The Rutter Group 2006) ¶¶ 11:102 to 11:103, p. 11-34 (rev. # 1, 2006).) “While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together ‘with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.’ [Citations.]” (*Id.* at ¶ 11:104, p. 11-34) [Citation.]” (*Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 191.)

The following behavior of appellant’s counsel is a matter of concern:

1) Pine Valley and its attorneys did not cite and discuss *Cadence Design Systems, supra*, 29 Cal.4th 215, a key case on point against their position. When respondents called it to their attention, they filed a late reply brief that, although it exceeded the word limit (Cal. Rules of Court, rule 8.520, subd. (c)(1)), dissembled and failed to come to grips with the issue. We view this as a failure to act with competence, in violation of Cal. Rules of Professional Conduct. (Rules Prof. Conduct, rule 3-110(B).)

2) On two occasions, Pine Valley’s attorneys misrepresented facts to this court. In March 2017, they obtained from the court an extension of time to file an opening brief. Later, they asked respondents’ counsel for another extension to file their opening brief. Respondents refused to stipulate. Nevertheless, on May 11, 2012, Pine Valley’s attorneys filed a request for extension of time in which they checked a box indicating that they had obtained an earlier extension by stipulation. This was inaccurate. Then on June 5, 2017, appellant’s counsel submitted another application for extension of time to file appellant’s opening brief, again stating that he had received one extension by stipulation.

While it is entirely possible that Pine Valley's counsel did not read the Judicial Council form carefully, the fact remains that he told two untruths, under oath. We view this as a breach of the Rules of Professional Conduct (Rule 5-200, subd. (B).)

3) Although this court denied appellant's request to take judicial notice of certain facts. Pine Valley went ahead and inserted portions of this barred "evidence" into its reply brief by way of footnotes 3, 4, and 5. We view this as poor Appellate practice.

Conduct like this tends to erode confidence in the Bar and give the profession a bad name. That said, we are denying the motion. It is apparent that these transgressions and rule violations stem from counsel, not appellant, yet respondents have not asked to impose sanctions on counsel. We choose not to punish Pine Valley for the misconduct of its lawyers.

DISPOSITION

The judgment is affirmed. Respondent's motion for sanctions is denied. Respondent is entitled to costs on appeal.

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MOHR, J.*

We concur:

EPSTEIN, P. J.

MANELLA, J.

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