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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TOP GUN, LTD., et al.,

Plaintiffs and Appellants,

v.

VECTOR-US, INC., et al.,

Defendants and Respondents.

B268214

(Los Angeles County
Super. Ct. No. BC566342)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Franceschi Law Corporation and Ernest J. Franceschi, Jr. for Plaintiffs and Appellants.

Carothers DiSante & Freudenberger, David G. Hagopian and Jeffrey L. Sikkema for Defendant and Respondent Vector-US, Inc.

Joseph Lawrence, Interim City Attorney, Alan Seltzer, Interim Assistant City Attorney and Ivan O. Campbell, Deputy City Attorney for Defendant and Respondent City of Santa Monica.

Plaintiffs and appellants Top Gun, Ltd. (Top Gun), Proteus Air Services, Inc. (Proteus), SCS Aircraft Management, LLC (SCS), and Datom, Inc. (Datom) (collectively, Plaintiffs) appeal a judgment of dismissal after the trial court sustained demurrers to their first amended complaint without leave to amend. The demurring defendants and respondents are Vector-US, Inc. (Vector) and the City of Santa Monica (City).

Vector is a Delaware corporation which was hired by the City to collect landing fees at the City's municipal airport. For about a year, Vector's failure to pay taxes to the State of California resulted in its status as "FTB [Franchise Tax Board] forfeited." Vector subsequently paid the amounts due and was returned to good standing. Plaintiffs contend Vector's collection of landing fees for the City during the period that Vector's corporate powers were forfeited is actionable. The trial court concluded that because Vector cured its status by paying the taxes that were owed, there was no merit to Plaintiffs' theory that the landing fees were not lawfully imposed. The trial court also found there was no causal relationship between Vector's prior tax status and cognizable injury to Plaintiffs.

We affirm. We conclude that notwithstanding Vector's temporary "FTB forfeited" status, Plaintiffs received the full benefit of the bargain by using the airport, and Vector's tax status did not affect the City's ownership of the airport or the mandated fees that Plaintiffs owed for using the airport. Having received the bargained-for use of the airport at the bargained-for price, plaintiffs cannot show they suffered actual economic injury. Accordingly, Plaintiffs lack standing to sue under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200).

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pleadings.*

a. *Parties.*

(1) *Plaintiffs.*

Top Gun is the managing member of a limited liability company that owns and operates a twin engine Cessna aircraft. Proteus is a corporation that owns and operates a flight school at the City's airport, and operates certain aircraft. SCS is a limited liability company that owns and operates a Cirrus SR-22 aircraft. Datom is a corporation that owns and operates a twin engine Cessna.

(2) *Defendants.*

Vector is a Delaware corporation with its principal place of business in Virginia. Vector has developed software to facilitate billing and collecting landing fees from aircraft operators.

The City is a municipal corporation that operates the Santa Monica Airport (airport).

b. *Relevant allegations of the first amended complaint.*

In June 2011, Vector entered into a contract with the City to collect landing fees at the airport from all landing aircraft, which fee was set at the rate of \$5.48 per 1,000 lbs. Utilizing its software program for aircraft tracking, billing and collection, Vector issues invoices to aircraft operators and collects and processes payments.

(1) *First cause of action: restitution under the UCL.*

The first cause of action, directed against Vector, was brought by Proteus, SCS, and Datom, on behalf of themselves and a putative class. It alleged that Proteus, SCS, and Datom received and paid landing fee invoices between January 2, 2014,

and March 15, 2015. However, during that time period, Vector was not authorized to engage in business in California because its entity status was “FTB forfeited,” and therefore Vector could not lawfully collect landing fees for the City. Vector’s conduct was unlawful, unfair, and/or fraudulent, entitling Plaintiffs and the class to an order of disgorgement. (Bus. & Prof. Code, § 17203.)

(2) *Second cause of action: injunctive relief to bar collection of landing fees from aircraft owners that overfly the airport without landing.*

The second cause of action, also directed against Vector, was brought by Top Gun as a private attorney general. Top Gun alleged it had been billed for landing fees¹ although it did not land at the airport, and that Vector’s practice of billing and collecting landing fees for aircraft that are merely transiting the airport’s airspace is an unlawful, unfair, or deceptive business practice that is subject to injunctive relief under the UCL.

(3) *Third cause of action: negligence.*

The third cause of action, alleging negligence against Vector, was withdrawn in the court below and is not in issue on appeal.

¹ Copies of two invoices showing that Top Gun had twice been billed \$27.40 for the alleged overflights were attached as exhibits to the first amended complaint.

(4) *Fourth cause of action: imposition of constructive trust.*

The fourth cause of action is the sole claim against the City. Plaintiffs alleged the landing fees collected by Vector while it was “FTB forfeited” were unlawfully collected and remitted to the City, and that the City held those funds “as a constructive trustee for the benefit of the rightful owners, the Plaintiffs and the Class.”

2. *Demurrers by Vector and the City.*

a. *Vector’s demurrer.*

Vector demurred. It asserted the first cause of action failed to state a claim as a matter of law because by April 7, 2015, at the latest, Vector had cured its status through the State’s retroactive revivor process.² Further, Plaintiffs could not use Vector’s prior forfeited status to void the contract between Vector and the City. Also, Plaintiffs could not show that Vector’s tax status caused them any monetary loss; Plaintiffs received the benefit of the bargain, and Vector’s tax status did not relieve Plaintiffs of their duty to pay the mandatory landing fees.

Vector also contended the second cause of action, Top Gun’s claim it was charged landing fees for mere overflights, failed to state a claim for injunctive relief. Vector reasoned that Top Gun’s implicit theory was that if a company ever makes a billing error, no matter how small, infrequent, or readily corrected, “a customer may go to court and obtain an injunction against ever making a billing error in the future.” Vector pointed out that

² Vector disputed that it had any FTB tax obligations, but in January 2015 it paid the sums sought by the FTB, including \$1,118.74 for 2011 and lesser amounts for subsequent years.

each invoice contains its contact information and asserted that in the past, Top Gun “called Vector to successfully remedy landing fee concerns.”

b. *The City’s demurrer.*

The City demurred to the fourth cause of action, asserting that a constructive trust is merely a remedy, not an independent cause of action. Further, Plaintiffs were not entitled to the remedy of a constructive trust because they failed to plead fraud or some other wrongful act on the part of the City.

3. *Opposition to the demurrers.*

Plaintiffs filed a combined opposition to the demurrers. They argued, inter alia, that revivor only operates to restore the ability to exercise corporate power, such as to defend or bring a lawsuit, but “[r]evivor . . . has no effect on corporate actions taken during the period [of] suspension that violates the state’s criminal law, nor is revivor a defense to having violated a criminal statute.” Plaintiffs argued Revenue and Taxation Code section 19719 makes it a crime to engage in business or exercise corporate powers while FTB forfeited.³

³ Revenue and Taxation Code section 19719 states at subdivision (a): “Any person who attempts or purports to exercise the powers, rights, and privileges of a corporation that has been suspended pursuant to Section 23301 or who transacts or attempts to transact intrastate business in this state on behalf of a foreign corporation, the rights and privileges of which have been forfeited pursuant to the section, is punishable by a fine of not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000), or by imprisonment not exceeding one year, or both fine and imprisonment.”

4. *Trial court's ruling.*

On July 21, 2015, the trial court sustained the demurrers to the first amended complaint without leave to amend.

Preliminarily, the court granted Vector's request for judicial notice of its reinstatement by the FTB to good standing status.

The trial court rejected Plaintiffs' theory that the landing fees charged by Vector on behalf of the City were not lawfully imposed because at the time the fees were billed Vector was not in good standing. "Since Vector has cured its status with the state taxing authorities, there is no merit to this argument legally. The statute (Revenue and Taxation Code § 23301) and cases thereunder make clear that a cure to the lack of good standing status is retroactive."

The trial court also "reject[ed] plaintiffs' attempt to invoke a criminal enforcement provision of the Revenue and Taxation Code to deny Vector the right to obtain retroactive revivor. If the State or a competent subordinate criminal prosecutor had filed criminal charges against Vector during the period of its suspension, Revenue and Taxation Code § 19719 would have been relevant, but this Court holds that, as a criminal statute, § 19719 must be read narrowly and harmonized with the many cases . . . which repeatedly hold that retroactive revivor is provided to the taxpayer once the ultimate objective of revenue collection by the state has been satisfied. . . . [T]he plaintiffs' theory is 'a plea in abatement which is not favored in law, is to be strictly construed and must be supported by facts warranting the abatement at the time of the plea.' Vector's good standing at this time is indisputable, and it obtains this status nunc pro tunc back to the first day of its prior suspension. The contract(s) it made and performed during its suspension were voidable by the

[City], but the City did not seek to void them. They were never voidable at the command of a non-party to the contract, such as the several plaintiffs herein.”

The trial court also agreed with Vector that there was no causal relationship between Vector’s prior forfeited status and any cognizable injury to Plaintiffs.

With respect to the second cause of action for injunctive relief to prevent Vector from billing for overflights, the trial court found “there is no valid reason why an injunction should be sought or issued to provide recompense which can be fully addressed by a claim for legal damages.”

Finally, with respect to the claim against the City for imposition of a constructive trust, the trial court noted that a constructive trust is a remedy, not a cause of action. Further, “[i]f plaintiffs or any one of them paid a landing fee in error, they can ask the City or its agent for a refund (as Top Gun has successfully done). There is no reason to sue for a constructive trust.”

Plaintiffs filed a timely notice of appeal from the judgment of dismissal.

CONTENTIONS

Plaintiffs contend: revivor does not absolve a corporation of liability under the UCL for having unlawfully engaged in business while FTB forfeited; the trial court erred in ruling that because the City owns the airport and is entitled to collect landing fees, Vector’s unlawful collection of those fees did not cause plaintiffs any injury; and because the landing fee revenue was improperly collected, Plaintiffs have a viable cause of action for imposition of a constructive trust.

DISCUSSION

1. *Standard of appellate review.*

Our review of the trial court's order sustaining the demurrer without leave to amend is governed by well settled principles. “[O]ur standard of review is de novo, “i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.” [Citation.]’ [Citation.] ‘ “ ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.]” ’ [Citation.] ‘We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court’s stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]’ [Citation.]” (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

2. *First cause of action under the UCL: demurrer properly sustained without leave to amend due to lack of standing.*

As indicated, in sustaining the demurrer to the UCL claim without leave to amend, the trial court found there was no causal relationship between Vector’s prior forfeited status and cognizable injury to Plaintiffs. That ruling was proper.

The UCL prohibits, inter alia, “any unlawful, unfair or fraudulent business act or practice” (Bus. & Prof. Code, § 17200.) In order to give substance to this prohibition, a UCL action borrows violations of other laws and treats these violations, when committed pursuant to business activity, as

unlawful practices. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.)

Prior to “the enactment of Proposition 64 in November 2004, the UCL ‘did not predicate standing “on a showing of injury or damage” ’ and was thus ‘subject to abuse by attorneys who used it as the basis for legal “‘shakedown’ ” schemes’ and frivolous lawsuits. [Citations.] To address this problem, Proposition 64 amended section 17204 to accord standing only to certain specified public officials and to any person who ‘ “ ‘has suffered injury in fact and has lost money or property as a result of such unfair competition.’ ” ’ [Citations.] Thus, in the aftermath of Proposition 64, only plaintiffs who have suffered actual damage may pursue a private UCL action. A private plaintiff must make a twofold showing: *he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.*” (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590, italics added (*Peterson*)).

In *Peterson*, the UCL claim was predicated on allegations that defendant violated the Insurance Code by selling cell phone insurance without a license. (*Peterson, supra*, 164 Cal.App.4th at p. 1590.) The lower court sustained defendant’s demurrer to the UCL cause of action for lack of standing. (*Ibid.*)

The reviewing court affirmed. It reasoned that “plaintiffs here do not allege they paid more for the insurance due to defendant’s collecting a commission. They do not allege they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent. Absent such an allegation, plaintiffs have not shown they suffered actual economic injury. Rather, they received the benefit of their bargain, having obtained the bargained for insurance at the

bargained for price.” (*Peterson, supra*, 164 Cal.App.4th at p. 1591.)

Peterson is on point. Here, the City owns the airport and is entitled to charge user fees. (See Gov. Code, § 50474 [authorizing local agencies that maintain airports to exact charges, fees and tolls]; Santa Monica Mun. Code, § 10.04.06.100 [owners or operators of aircraft operating at airport shall pay a landing fee].) The first cause of action does not dispute that aircraft operators using the airport received full value for the landing fee invoices that they paid. There is no contention that had Plaintiffs known of Vector’s forfeited status, they would have refrained from flying into the airport. Notwithstanding Vector’s temporary “FTB forfeited” status, Plaintiffs received the full benefit of the bargain by using the airport, and Vector’s tax status did not affect the City’s ownership of the airport or the mandated fees that Plaintiffs owed for using the airport. Having received the bargained-for use of the airport at the bargained-for price, plaintiffs cannot show they suffered actual economic injury. (*Peterson, supra*, 164 Cal.App.4th at p. 1591.) Accordingly, Plaintiffs lack standing to bring a UCL claim.^{4 5}

⁴ Because the first cause of action is infirm for lack of standing under the UCL, it is unnecessary to address whether Vector’s revivor operated to retroactively absolve it of liability for having done business in California while FTB forfeited.

⁵ At oral argument, appellants cited the recently published decision in *Casiopea Bovet, LLC v. Chiang* (filed May 17, 2017; ordered published June 7, 2017, D070797) __ Cal.App.5th __. The decision does not involve standing under the UCL and therefore is inapposite.

3. *Second cause of action: no showing of error with respect to claim for injunctive relief.*

The second cause of action, by Top Gun, sought injunctive relief under the UCL to enjoin Vector from charging landing fees for aircraft that merely flew through the airport's airspace without landing at the airport.

The appellant's opening brief lists as an issue on appeal the following question: "2. Did the trial court err in dismissing Plaintiff's UCL claim for injunctive relief to prohibit Vector from billing and attempting to collect landing fees from aircraft that overfly the airport without landing?" However, the opening brief does not contain any further discussion of the issue.

De novo review does not relieve an appellant of the burden to demonstrate legal error on appeal. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) An appellant's failure to discuss an issue in its opening brief forfeits that issue on appeal. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.) Further, "[a]n appellant cannot salvage a forfeited argument by belatedly addressing the argument in its reply brief. [Citation.]" (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18.)

Therefore, the challenge to the court's ruling on the second cause of action has been forfeited.

4. *Fourth cause of action: no showing of entitlement to a constructive trust.*

a. *General principles.*

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary

trustee of the thing gained, for the benefit of the person who would otherwise have had it.’ (Civ. Code, § 2224.) ‘The case law explains that in order to create a constructive trust as defined in section 2224, three conditions must be satisfied: *the existence of a res (property or some interest in the property); the plaintiff’s right to that res; and the defendant’s acquisition of the res by some wrongful act.* [Citations.]’ [Citation.] A constructive trust ‘may be imposed in practically any case where there has been a wrongful acquisition or detention of property to which another is entitled, but the party attempting to establish the constructive trust must establish the claim by clear and convincing evidence.’ [Citation.] Funds may be recoverable under a constructive trust theory where the plaintiff can trace the funds to monies in the defendant’s possession. [Citation.]” (*Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1402, italics added (*Optional Capital*).)

b. *No merit to Plaintiffs’ contention that the City holds the landing fees in a constructive trust.*

Plaintiffs do not dispute that the City is entitled to impose landing fees for aircraft using its airport.⁶ Further, as already discussed, there is no allegation that Plaintiffs did not obtain the full benefit of the bargain when they paid landing fees for utilizing the airport. Also lacking is an allegation of any impropriety on the part of the City. The first amended complaint merely alleges that the City is in possession of the landing fees collected by Vector. In the absence of any allegation that the City

⁶ The appellant’s opening brief states, at page 18: “There is no question that the City has the right to impose and collect landing fees either directly or through a contractor.”

acquired the landing fees by some “wrongful act” (*Optional Capital, supra*, 222 Cal.App.4th at p. 1402), Plaintiffs failed to state facts showing they are entitled to recover the landing fees from the City under a constructive trust theory.

5. *No showing of entitlement to leave to amend.*

Plaintiffs contend that although leave to amend was not requested below, they should be granted leave to amend to plead a separate cause of action for unfair competition based on “the threat of exclusion from the airport that is printed on VECTOR’s invoices [which] amounts to an unfair/deceptive business practice intended to coerce payment through intimidation. Landing an aircraft at a public airport in the United States is a federal right which cannot be denied to anyone meeting the currently effective pilot certification, aircraft airworthiness and equipment requirements set forth in the *Federal Air Regulations*. Because air navigation and aircraft movement on airports is exclusively a federal concern, neither VECTOR [nor] the City can lawfully exclude an aircraft from the airport who does not pay the landing fee as is threatened on the VECTOR invoices.”

The failure to request leave to amend in the trial court ordinarily does not prevent a plaintiff from making such a request for the first time on appeal. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861.) Nonetheless, the argument is meritless. Plaintiffs do not cite any authority for their theory that Vector’s advising aircraft operators that failure to pay landing fees could result in denial of access to the airport is an unfair or deceptive business practice. Without “ ‘ ‘meaningful legal analysis supported by citations to authority,’ ” Plaintiffs have failed to properly tender the issue

for appellate review. (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 853.)

DISPOSITION

The judgment of dismissal is affirmed. Vector and the City shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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