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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DE WANA BALLOU,

Plaintiff and Appellant,

v.

EBAY INC.,

Defendant and  
Respondent.

B283565

(Los Angeles County  
Super. Ct. No. BC627598)

APPEAL from a judgment (order of dismissal) of the  
Superior Court of Los Angeles County, David Sotelo, Judge.  
Affirmed.

De Wana Ballou, in pro. per., for Plaintiff and Appellant.

Holland & Knight, Kyong M. Kim, and David I. Holtzman  
for Defendant and Respondent.

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Plaintiff De Wana Ballou appeals from an order of dismissal entered after the trial court sustained without leave to amend defendant eBay Inc.'s demurrer to the first amended complaint. We affirm.

### **BACKGROUND**

In July 2016, Ballou, acting in propria persona,<sup>1</sup> filed this action against eBay, asserting causes of action for negligence, strict liability, fraud and libel. In December 2016, the trial court sustained eBay's demurrer to the complaint without leave to amend as to all causes of action except the negligence cause of action, to which the court sustained the demurrer with leave to amend. Ballou did not include the original complaint in her Appellant's Appendix, and she does not challenge on appeal the trial court's dismissal of her causes of action for strict liability, fraud and libel.

On December 27, 2016, Ballou filed two first amended complaints, one using a Judicial Council complaint form and the other on pleading paper, both asserting a single cause of action for negligence against eBay. We will consider the two versions of the first amended complaint together in determining if Ballou stated a cause of action against eBay.

In the first amended complaint she drafted on pleading paper, Ballou set forth the elements of negligence and included the following allegations in support of her negligence cause of action. At a time not identified in the first amended complaint, she listed for sale on eBay three "authentic" works of art: a \$46 million Picasso, a \$48 million Miró, and a \$210 million Renoir. Her listings generated eight buyers for the Picasso, five for the

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<sup>1</sup> Ballou represented herself throughout these proceedings.

Miró, and four for the Renoir. She did not specify the prices these buyers offered to pay. On March 4, 2015, she received multiple “threatening phone calls from what seemed to be Ebay [*sic*] Inc. demanding to know the exact location of [the] Picasso, Miró, and Renoir authentic art work or [she would] get blocked from Ebay [*sic*] Inc.” Ballou returned the calls and informed eBay “the auctions are posting accurately; there is nothing to worry about; the location is appropriately disclos[ed].” As a result of “an active security breach” in the form of a “hack scandal” that eBay was aware of but failed to inform Ballou about, her auctions “began chaotically relisting; Best Offer prices to enter escrow changing, pictures missing, pictures not zooming, text relocating.” Although Ballou had complied with all of eBay’s policies and had an “ ‘Above Standard’ ” seller performance rating, eBay “unreasonably suspended” her account, “publishing on its website the words ‘No longer A Registered User’ everywhere” Ballou’s name appeared on the site. According to Ballou, the phrase “ ‘No longer A Registered User’ instantly and permanently implies selling fakes.”

In the same version of the first amended complaint, Ballou asserted eBay was negligent in (1) “Failing to maintain the global e-commerce website in a reasonably safe condition when the defendant knew, or in exercise of reasonable care should have known, that the website created an unreasonable risk of foreseeable harm to buyers, sellers and the Plaintiff De Wana Ballou”; (2) “Failing to warn Plaintiff De Wana Ballou of the dangers actively occurring on its global e-commerce website in a reasonable and safe manner”; (3) “Allowing Plaintiff De Wana Ballou’s Ebay [*sic*] Inc. applicable policy compliant account to be wrongfully and unreasonably suspended permanently”; (4)

“Failing to install software to recover mistakenly suspended policy compliant accounts”; and (5) “Failing to otherwise exercise due care with respect to creating a safer fair and enjoyable trading experience for the Plaintiff De Wana Ballou and other buyers and sellers.” In her prayer for relief, Ballou seeks \$304 million in general damages, plus the \$23.50 fee she paid to eBay to list the artwork, \$1.52 billion in damages for pain and suffering, and punitive damages in an amount 110 times her compensatory damages (to punish eBay for 14 years of unreasonably suspending accounts). Examples of the 20 categories of foreseeable harm she claims eBay caused her are loss of her reputation worldwide, loss of the reputation of her artwork, loss of 20 years of research, loss of her livelihood, loss of consortium, and hypertension.

On the Judicial Council form first amended complaint, Ballou checked the box for “General Negligence,” as the only cause of action she was asserting against eBay. She did not check the box for “Intentional Tort,” which was one of the other choices.<sup>2</sup> She indicated she seeks compensatory and punitive damages for eBay’s alleged “gross negligence.” In explaining her theory of liability, she acknowledged in the form first amended complaint that a claim for negligent infliction of emotional distress is not independent from a negligence cause of action.

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<sup>2</sup> On appeal, Ballou contends she set forth a cause of action for intentional infliction of emotional distress in her first amended complaint, and eBay ignored it in its demurrer. As explained below, we reject Ballou’s contention she set forth a cause of action for intentional infliction of emotional distress, and we further conclude she has not demonstrated she can amend to state such a cause of action.

She further stated: “Plaintiff alleges Ebay [*sic*] Inc. breached its reasonable duty of care by outrageously failing to advise Plaintiff of an active security breach (actual cause) which trigger[ed] a malicious unreasonable permanent suspension to Plaintiff De Wana Ballou’s applicable policy compliant Ebay [*sic*] Inc. account (proximate cause).”

Ballou attached more than 30 pages of exhibits to the version of the first amended complaint she filed on pleading paper, including (1) part of a March 10, 2015 Internet article indicating 200 million eBay accounts were hacked, giving the hackers access to personal data (birth dates, passwords, etc.), (2) excerpts from a September 18, 2012 eBay community online chat regarding the meaning of the phrase “seller not a registered user of eBay,” (3) a few of Ballou’s medical records, dated before and after the incident (her suspension from eBay), and (4) documents relating to her auction listings, the artwork, and her eBay account.

On January 27, 2017, eBay filed a demurrer to the first amended complaint, contending the first amended complaint fails to state facts sufficient to constitute a cause of action. More specifically, eBay argued the first amended complaint fails to allege (1) wrongful conduct by eBay, (2) facts establishing a legal duty, (3) “facts supporting the existence of a security breach that purportedly resulted in [Ballou]’s account suspension,” and (4) “recoverable damages arising from the security breach.”<sup>3</sup>

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<sup>3</sup> Ballou asserts eBay’s demurrer must be stricken and its counsel disqualified due to “attorney impropriety.” The attorney filed a meet and confer declaration, as required under Code of Civil Procedure section 430.41 prior to filing a demurrer. Apparently not familiar with this statutory requirement, Ballou

Ballou filed a 25-page written opposition to eBay's demurrer to the first amended complaint. She included vague references about a "hack block scandal" at eBay and the misuse of her personal data, but did not disclose any specifics about the "scandal" or explain how it led to the suspension of her account or the misuse of her personal data. In arguing she had stated a cause of action for negligence, she referenced law relating not only to negligence but also intentional infliction of emotional distress. She did not indicate she wanted to amend her complaint further.

At the May 2, 2017 hearing on eBay's demurrer to the first amended complaint, the trial court provided the parties with a tentative ruling and then heard argument. The court adopted the tentative ruling as its order sustaining the demurrer without leave to amend. The court found Ballou did not state a valid cause of action for negligence because she did not allege facts showing duty, breach, or causation. The court also found Ballou's "allegations facially disclose an obvious unclean hands affirmative defense," while acknowledging that eBay had not raised such a defense. The court explained: "The allegations make it absolutely clear that [Ballou] engaged in suspicious selling activity and that [Ballou]'s own suspicious conduct caused the suspension and the resulting harm of which [she] now complains."

On May 18, 2017, the trial court signed and entered an order of dismissal. Ballou timely appealed.

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inappropriately faults the attorney for making herself a witness while acting as counsel.

## DISCUSSION

### Standard of Review

In reviewing the trial court's order sustaining the demurrer, "we examine the complaint de novo." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) " 'We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it 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. [Citation.]" (*City of Dinuba v. County of Tulare, supra*, at p. 865.)

### Ballou's Contentions on Appeal

In both versions of her first amended complaint, Ballou indicated she is asserting one cause of action against eBay for negligence. On appeal, however, she does not argue her first amended complaint alleges facts supporting a negligence cause of action. She appears to concede in her appellate briefing that she cannot allege the essential elements of a negligence cause of action. Thus, she disregards the negligence cause of action and contends on appeal that her first amended complaints set forth facts constituting a cause of action for intentional infliction of emotional distress. She asserts no amendment is necessary (or

requested) for her to state a cause of action for intentional infliction of emotional distress. She argues she is entitled to judgment on the pleadings because eBay failed to respond to her (unpleaded) cause of action for intentional infliction of emotional distress, and the time to respond has now expired.

As explained below, we find Ballou has not alleged facts sufficient to state a cause of action for negligence or intentional infliction of emotional distress against eBay. She has not requested leave to amend, and we do not find a reasonable probability she can cure the defects in her first amended complaint by amendment. Accordingly, we affirm the judgment because the trial court properly sustained eBay's demurrer without leave to amend.

### **Negligence**

“ ‘The elements of a cause of action for negligence are well established. They are “(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.” ’ ” (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

A fundamental problem with Ballou's first amended complaint for negligence is she did not plead a causal connection between (1) the alleged “hack scandal” at eBay, (2) the suspension of her eBay account, and (3) the damages she claims. Even assuming Ballou could establish eBay owed her a legal duty to protect her personal data, and breached that duty by failing to prevent a security breach, Ballou cannot establish a causal connection between the breach and any alleged harm to her.

Ballou did not allege which items of her personal data, if any, were accessed by a hacker. Nor did she allege how such items were misused. An explanation of how the alleged glitches



in her auction listings were related to the hack is missing from the first amended complaint and her appellate briefing. Also missing is an explanation of any link between the glitches and the suspension of her eBay account. The allegations in her first amended complaint indicate eBay contacted her because it did not believe she had access to the “authentic” Picasso, Miró, and Renoir artwork she had listed for sale for a total of \$304 million. Ballou did not reveal in her first amended complaint what duty, law, or policy eBay violated in suspending her account after hearing her response to its inquiry about the artwork.

Ballou also failed to plead facts indicating the suspension of her eBay account was the proximate cause of the billions of dollars in damages she claims. There is no allegation she was aware of a potential buyer who would have paid even a fraction of the price for which she listed the artwork. Assuming the artwork is “authentic”—a fact she claims she can prove—her allegation that the reputation of the artwork has been destroyed by her being branded “no longer a registered user” on eBay is unreasonable.

As discussed above, Ballou declined to request leave to amend her defective negligence cause of action. There is no indication she would be able to allege facts establishing a causal connection between the alleged hack, the suspension of her account, and her alleged damages. Her appellate briefing makes clear she has abandoned her negligence cause of action and focuses her appeal on an unpleaded cause of action for intentional infliction of emotional distress.

### **Intentional Infliction of Emotional Distress**

“The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and

outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' ” (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

The allegations in the first amended complaint do not indicate eBay engaged in conduct with the intent of causing Ballou emotional distress. Notwithstanding that, she has requested no further amendment, and contends the first amended complaint states a cause of action for intentional infliction of emotional distress. We disagree with her contention.

Ballou alleged in the first amended complaint that eBay was *negligent* in failing to prevent the online hacking of its users' accounts. She did not allege eBay *intentionally* caused the hack. Her allegations indicate eBay suspended her account because it did not believe she had access to the “authentic” artwork she had listed for sale, not because it desired to inflict emotional distress upon her. Even if Ballou could amend to include allegations showing eBay engaged in (outrageous) conduct with the intention of inflicting emotional distress upon her—which we see no reasonable possibility of her doing—she cannot cure the defect of no causal connection between eBay's conduct and her alleged emotional distress damages. As set forth in more detail above, Ballou did not allege and there is no indication she would be able to allege facts establishing a causal connection between the

alleged hack, the suspension of her account, and any harm to her.<sup>4</sup>

The trial court did not err in sustaining eBay's demurrer without leave to amend and dismissing Ballou's first amended complaint.

### **DISPOSITION**

The judgment is affirmed. eBay is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.

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<sup>4</sup> Ballou challenges the trial court's finding regarding unclean hands. We need not address this affirmative defense because Ballou has not stated a valid cause of action, and the trial court properly dismissed her action for that reason.