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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANIEL ERIC ENGEL, Plaintiff and Appellant, v. FRED R. RABIE et al., Defendants and Respondents.	B288518 (Los Angeles County Super. Ct. No. LC105560)

APPEAL from a judgment of the Superior Court of Los Angeles County, Virginia Kenny and Huey P. Cotton, Judges. Affirmed.

Daniel Eric Engel, in pro. per., for Plaintiff and Appellant.

Foley & Lardner, Eileen R. Ridley, Nicholas J. Fox and Kimberly A. Klinsport for Defendants and Respondents Rogelio Uy, Artica Uy, and The Grand Summit Holdings LLC.

No appearance for Defendants and Respondents Fred R. Rabie and Faranak Rabie.

Daniel Eric Engel, in propria persona, filed a first amended complaint (the operative complaint) against numerous defendants who own apartment buildings near his residence. The trial court sustained without leave to amend defendants' demurrers and dismissed the action with prejudice. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Engel owns and lives in a single family residence on Amestoy Avenue in Lake Balboa, California. The complaint alleged that defendants own and operate seven 8-unit apartment buildings near his home that constitute a public nuisance. The defendants are as follows: Fred R. Rabie and Faranak Rabie (Rabie defendants, owners of the Rabie Property at 17055 Vanowen Street); Rogelio Uy, Artica Uy, Grand Summit Holdings (owners of the Grand Summit Properties at 17037, 17043 and 17049 Vanowen Street), and Fred Leeds Family Enterprises, LLC (manager of the Grand Summit Properties) (collectively, Grand Summit defendants); and Dany Hersko, Sharon Hersko, 17031 Vanowen LLC, Lazar Hersko, LT Valley, LLC (Hersko

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[1] This appeal is from a judgment of dismissal following the sustaining of a demurrer without leave to amend; therefore, our summary of the facts is taken from the pleadings and facts that have been judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

defendants, owners and managers of the Hersko Properties at 17019, 17025 and 17031 Vanowen Street).[2]

The complaint alleged two causes of action: breach of restrictive covenant and nuisance. The cause of action for breach of restrictive covenant was based on a Declaration of Restrictions recorded by the development company for the tract of land on which the apartment buildings at issue were built. Engel's home is built on a different tract of land.

Engel alleged that on June 30, 1949, the Birmingham Development Co. recorded a Declaration of Restrictions (restrictive covenant) that applied to various lots in Tract 15441 in Los Angeles County. The Rabie Property, Hersko Properties, and Grand Summit Properties are on Tract 15441 and thus are subject to the restrictive covenant, which contains the following provision regarding nuisances: "No noxious or offensive trade or activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood." The lots for the seven apartment buildings at issue were sold on August 5, 1952. The certificate of occupancy for the Rabie Property apartment building was issued on September 3, 1953.

Engel's residence is on lot 64 of Tract 12222. The permit to build his residence was issued on July 12, 1946, and the certificate of

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[2] The Rabie defendants have not filed a brief. The Hersko defendants have been dismissed from the case and are no longer parties to this appeal.

occupancy was issued on May 7, 1947. Engel alleged that, because his house and the other houses in Tract 12222 were built and occupied before the buildings in Tract 15441 were constructed, the houses in Tract 12222 "constituted the 'neighborhood' referred to in the [restrictive covenant]." He alleged that the use of the word "neighborhood" in the restrictive covenant imposed a duty on Tract 15441 lot owners "to benefit and protect the entire neighborhood, of which Plaintiff's Residence is a part."

Engel alleged that there is insufficient parking for the residents and invitees of the apartment buildings and that they park on his street and repair vehicles on the street, leading to "a huge spike in the amount of noise" and "a serious traffic hazard." Engel further alleged that the "relatively poor condition" of the apartment buildings "has attracted tenants who come from . . . lower economic strata than the owners of the single-family residences in the neighborhood," resulting in the transformation of "a relatively 'nice' neighborhood with expensive houses, to another, which is not nearly as nice." Engel alleged that the failure of defendants to restrict their tenants from parking in the neighborhood violates the restrictive covenant.[3]

The second cause of action alleged that defendants' "occupation, use, and maintenance" of the apartment buildings constitute a nuisance within the meaning of Civil Code section 3479 because they are "offensive" and "seriously and substantially interfere[] with the

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[3] The specific allegations will be discussed in further detail below.

comfortable enjoyment of the properties located on Amestoy Avenue and Hartland Street," including his home. Engel alleged that he has asked defendants to abate the nuisance by asking their tenants not to park on Amestoy Avenue and Hartland Street, but defendants have refused. He alleged that his property has diminished in value by approximately $250,000 as a result of the alleged nuisance and will continue to diminish if it is not abated. Engel sought injunctive relief to prevent the residents and invitees of the apartment buildings from parking on the street, damages of $500,000, and punitive damages.

Defendants filed demurrers. The trial court sustained the demurrers without leave to amend, dismissed the complaint with prejudice, and entered judgment in favor of all defendants.

DISCUSSION

I. *Standard of Review*

"We review the ruling sustaining the demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. [Citation.] We give the complaint a reasonable interpretation, assuming that all properly pleaded material facts are true, but not assuming the truth of contentions, deductions, or conclusions of law. [Citation.]" (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 740 (*Kan*).)

When the trial court sustains a demurrer without leave to amend, "'[t]he plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] 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." [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] 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. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]' [Citation.]" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491 (*Rossberg*).)

II. *Enforcement of Restrictive Covenant*

Although Engel's home is in Tract 12222 and not in Tract 15441, he contends that he is entitled to seek enforcement of the restrictive covenant applicable to Tract 15441 as a third party beneficiary of the contract. This allegation is contradicted by the express language of the restrictive covenant.

"A person who is not a party to a contract may nevertheless enforce it if the contract was made expressly for his benefit. (Civ. Code, § 1559.) For a third party to qualify as a beneficiary of a contract, the contracting parties must have intended to benefit that third party and their intent must be evident in the terms of the contract. [Citation.]"[4] (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1193.)

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[4] The statute provides in full: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the

"'Ascertaining this intent is a question of ordinary contract interpretation. [Citation.] Thus, "[t]he circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." [Citation.]

"'Under long-standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." ([] § 1636.) Although "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.*, § 1639), "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (*id.*, § 1647). "However broad may be the terms of a contract, it extends only to those things . . . which it appears that the parties intended to contract." [Citation.]' [Citation.]" (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 7–8 (*Iqbal*).)

Engel's contention that he is a third party beneficiary of the restrictive covenant for Tract 15441 is based on the use of the word "neighborhood" in the provision on nuisance: "No noxious or offensive trade or activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the *neighborhood*." He contends that the Birmingham Development Co.'s use of the term "neighborhood," rather than, for example, "other parcels

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parties thereto rescind it." (Civ. Code, § 1559.) Unspecified statutory references will be to the Civil Code.

in the tract," indicates the intent to benefit him because his home was part of the neighborhood when the restrictive covenant was recorded.

Engel's argument poses an interpretation to which the restrictive covenant is not reasonably susceptible, because it is contradicted by the unambiguous plain language of the restrictive covenant. It states that "the power to enforce said conditions, restrictions and charges, is to reside in the person or persons owning any real property situated in said Tract." The covenant also states that "[i]f the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant, and either to prevent him or them from so doing, or to recover damages or other dues from such violation."

The covenant thus expressly indicates that it is intended to benefit only those who own real property in the tract. The use of the term "neighborhood" does not evince an intent to allow third parties who do not own property in Tract 15441 to enforce the terms of the restrictive covenant. Such an interpretation would violate the express language of the covenant. "'"A putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit" it. [Citation.]'" (*Iqbal*, *supra*, 10 Cal.App.5th at p. 7.) Because the

covenant was intended to benefit only property owners in Tract 15441, Engel does not have any right to enforce its terms.[5]

Nor has Engel satisfied his burden of showing how he can amend the complaint to state a cause of action for enforcement of the covenant. (*Rossberg*, *supra*, 219 Cal.App.4th at p. 1491.) He contends that he can amend the complaint to add the allegation that the owner of the house across the street from him thinks of Engel's home as "part of the same neighborhood." The neighbor's opinion regarding the neighborhood does not change the express language of the covenant.

III. *Nuisance*

Engel contends that the allegations of the complaint are sufficient to state a cause of action for public nuisance. We disagree.

"A nuisance is broadly defined as '[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . .' ([] § 3479.) A public nuisance is 'one which affects

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[5] Engel further contends that the use of the same language in the restrictive covenant for his home in Tract 12222 establishes that the developers "knew that their individual tracts were going to be part of a larger neighborhood" and intended these to be "quiet residential neighborhoods." The use of the same language in the covenant for Tract 12222 does not establish that Engel is entitled to enforce the covenant for Tract 15441. As discussed above, this would violate the express language in the covenant that it is intended to benefit only those who own property in the tract. (See *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891 ["it is not enough that the third party would incidentally have benefited from performance"].)

at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' (§ 3480.) A private party can maintain an action based on a public nuisance 'if it is specially injurious to himself, but not otherwise.' (§ 3493.) The damage suffered must be different in kind and not merely in degree from that suffered by other members of the public. [Citations.]" (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040, fn. omitted (*Koll-Irvine*).) "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right. [Citation.]" (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79 (*ConAgra*).) In order to establish a public nuisance claim, "[a] plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm. [Citations.]" (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359 (*Citizens*).)

"The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' [Citations.] Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.' [Citations.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 (*Melton*).) "'Nothing which is done or maintained

under the express authority of a statute can be deemed a nuisance.' ([] § 3482.)" (*Citizens*, *supra*, 8 Cal.App.5th at p. 359.)

Engel's complaint fails to state a public nuisance cause of action for several reasons. First, he does not allege that the alleged public nuisance is "specially injurious to himself, but not otherwise." (§ 3493.) Nor does the complaint allege facts showing that the alleged interference with the use of Engel's property is "both substantial and unreasonable." (*Melton*, *supra*, 183 Cal.App.4th at p. 542.)

The complaint alleged that tenants and invitees of the seven apartment buildings park on his street and that a number of the vehicles parked on the street are non-functioning "junkers" and "banged-up" commercial vehicles, often "filled with gardening debris." Engel alleged that it is "annoying" for him "to have a constant stream of strangers coming and going in front [of] his home," and that the numerous parked cars prevent him from parking in front of his home and cause "a serious traffic hazard." He alleged that one of his neighbors cannot park in her driveway "because her view of oncoming traffic is obscured by the vehicles parked in front of her house." He further alleged that "[t]he addition of so many persons who, 1) do not appear to belong in the neighborhood, 2) are for all practical purposes strangers to [him] and others who own homes on Amestoy Avenue and Hartland Street, and 3) most certainly act like strangers, makes [him] extremely uncomfortable and unnerved."

A public nuisance action may be brought by a private person "if it is specially injurious to himself, but not otherwise." (§ 3493.) There are no allegations in the complaint to indicate that the alleged nuisance is

"different in kind" from any harm allegedly suffered by other members of the public. (*Koll-Irvine*, *supra*, 24 Cal.App.4th at p. 1040.) Instead, as illustrated by his allegation that his neighbor has difficulty with the view from her driveway, his allegations regarding the number of vehicles parked on the streets and the number of "strangers" around his residence presumably concern everyone who lives on his street. (See *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1349 ["alleged fear of injury to pedestrians caused by . . . fences would be suffered by all members of the public and therefore would not alone constitute a special injury to appellants actionable for public nuisance"].)

A public nuisance "'is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted. [Citation.]' [Citation.]" (*ConAgra*, *supra*, 17 Cal.App.5th at p. 112.) The facts that Engel cannot park in front of his residence and that many of the parked vehicles are "junkers" are not sufficient to allege that the defendants' ownership of apartment buildings near Engel's home has created "a substantial and unreasonable interference with a public right." (*Id.* at p. 79.) Difficulty finding a parking space does not outweigh the social utility of the defendants' ownership of apartment buildings. Nor do the allegations that Engel is uncomfortable with people who "do not appear to belong in the neighborhood" and that those people are "strangers" suffice to assert that the defendants' apartment buildings cause significant harm and that their social utility is outweighed by the gravity of the alleged harm. (*Id.* at p. 112.)

Engel's allegations about noise and traffic from the tenants and invitees of the apartment buildings are vague and do not sufficiently allege that defendants' ownership of the apartment buildings constitute a public nuisance. "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: "'Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability . . . is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.'" [Citation.]" (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 263 (*Mendez*).) The alleged noise is from people who are "parking their vehicles or getting into their vehicles and driving off." Engel does not allege that anyone is engaging in illegal behavior or conduct that creates an unreasonable amount of noise or traffic. The "harm or risk" from the sounds of people parking

and driving on Engel's street is not greater than Engel should be required to bear. (*Ibid.*) The complaint therefore fails to allege facts showing that defendants are knowingly creating "a substantial and unreasonable interference with a public right" by owning and operating apartment buildings in the neighborhood. (*ConAgra*, *supra*, 17 Cal.App.5th at p. 79.)

Engel also relies on his allegations that defendants should change their leases to prohibit their tenants from parking in the neighborhood, lower their rents, or restrict the number of tenants in their buildings. However, these contentions do not support a nuisance cause of action. Engel's speculations about the conduct of defendants' business are not sufficient to allege that the current operation of the apartment buildings constitutes an unreasonable and substantial interference with a public right.

Nor does Engel's allegation that his neighbors "are just as annoyed and bothered" by the apartments' tenants parking on the street state a cause of action for nuisance. The "unanimous opinion of all who have witnessed the situation . . . that it is clearly a nuisance" is merely a conclusory statement and does not support Engel's nuisance cause of action.[6]

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[6] At oral argument, Engel referred to an argument first made in his reply brief that his claim is more appropriately characterized as a claim for private nuisance, not public nuisance. We denied Engel's motion for leave to file a late reply brief. Even if he had successfully filed a reply brief, "'points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier [citation].' [Citation.] The same rules apply to a party appearing in

Giving the complaint "a reasonable interpretation," (*Kan, supra*, 230 Cal.App.4th at p. 740) the complaint alleges that numerous "tenants who come from a lower economic strata" than the owners of the single-family residences in the neighborhood" park "junkers" or commercial vehicles on the streets around Engel's home, which has turned the "nice neighborhood" into "a parking lot for a low-income housing development." These people "appear out of place for the neighborhood," make noise parking and driving their vehicles, and sometimes repair their vehicles on the street. It is "annoying" for Engel "to have a constant stream of strangers coming and going in front [of] his home," and he is unable to park vehicles in front of his residence.

"A nuisance must be substantial and unreasonable to qualify as a public nuisance and be enjoinable. [Citation.]" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 492.) Engel seeks to prevent the residents and invitees of the apartment building from parking on the public streets and to prevent "strangers" from walking in front of his home. This conduct is not enjoinable. Engel does not allege facts showing that the apartment buildings constitute a public nuisance, and he does not

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propria persona as to any other party. [Citation.]" (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204–205.) Even were we to consider Engel's claim, the allegations in the complaint are insufficient to state a cause of action for private nuisance. Like public nuisance, private nuisance requires the plaintiff to prove that the invasion of his interest in the use of his land must be both substantial and unreasonable. (*Mendez*, *supra*, 3 Cal.App.5th at pp. 262-263.) As discussed above, the allegations are vague and conclusory and insufficient to state this claim.

indicate how the complaint could be amended to state a nuisance cause of action.[7]

DISPOSITION

The judgment is affirmed. Grand Summit defendants are entitled to costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.

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[7] Engel has withdrawn a claim, made for the first time on appeal, that he can state a cause of action under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.).