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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MARTHA L. WELBORNE, Plaintiff and Appellant, v. SFE INVESTMENT COUNSEL, INC., Defendant and Respondent.	B281957 (Los Angeles County Super. Ct. No. BC552464)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Doyle, Judge. Affirmed.

Pick & Boydston, Brian D. Boydston for Plaintiff and Appellant.

Gartenberg Gelfand Hayton, Edward Gartenberg, Milena Dolukhanyan for Defendant and Respondent.

Plaintiff Martha L. Welborne (Welborne) appeals the February 21, 2017 judgment of dismissal entered after the trial court sustained respondent SFE Investment Counsel, Inc.'s (SFEIC) demurrer to Welborne's second amended complaint without leave to amend. Welborne contends she sufficiently pleaded that SFEIC had aided and abetted a breach of fiduciary duty by Stern Fisher Edwards, Inc. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

1. Factual allegations

On review of an order sustaining a demurrer without leave to amend, we take as true the well-pleaded factual allegations of the complaint. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193.) In her second amended complaint (SAC), Welborne alleged the following.[1] In or about 2004, defendant Ryman-Carroll Foundation (Ryman) obtained a line of credit of approximately $550,000, collateralized by its assets. Ryman then used a portion of this money to provide loans totaling $415,000 to defendant Moira Byrne Foster Foundation (MBFF). Defendant Mark Foster (Foster) was an officer and director of Ryman and a director and president of MBFF at the time of this loan. Ryman later paid off its line of credit by drawing against a margin account in its name. That margin account was transferred to Stern Fisher Edwards, Inc. (Stern Fisher) in 2006.

Stern Fisher and SFEIC served as "investment counsel and broker/dealer" for Welborne and others. In 2012 Stern Fisher and SFEIC became aware that Foster had misappropriated funds from certain clients,

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[1] Although Welborne alleged two claims for relief against SFEIC in her SAC, she conceded in her opposition to the demurrer filed by SFEIC that her claim for breach of fiduciary duty by SFEIC (third cause of action) was not viable. This statement of facts focuses on those related to the fourth cause of action, that alleging SFEIC aided and abetted a breach of fiduciary duty by Stern Fisher.

including two limited liability companies of which he was manager, and of his financial distress, including multiple judgments against him. They were also aware that the Financial Industry Regulating Authority (FINRA) was conducting an examination of Stern Fisher and of Foster. SFEIC arranged for Foster to be terminated as the manager of those limited liability companies, obtaining approval from their partners for it to become manager.

In mid-2012, Stern Fisher and Ryman terminated their business arrangements with Foster. Stern Fisher continued to maintain Welborne's accounts, and "[d]uring the entire period that [Welborne's] accounts were under such supervision . . . SFEIC was involved in investigations relating to thefts by Foster of money from Foster's clients, including [Ryman], which also maintained investment accounts" with SFEIC and Stern Fisher.

Welborne did not know Foster had stolen money from the limited liability companies as she was not a member. SFEIC did not tell her Foster had done so. Welborne remained a Stern Fisher client for another year, until mid-2013.

In June 2013, Ryman demanded that Foster pay it $490,108 to satisfy the then balance on Ryman's promissory note and to enable Ryman to pay off its margin account. Ryman and others threatened to sue Foster if he did not promptly make the payment.[2]

"[I]n July of 2013, Foster was flat broke, and everyone knew it." The defendants, including SFEIC, knew or could have discovered, that Foster had no assets with which to pay the $490,108 he agreed to pay to settle the dispute with Ryman and others.

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[2] The total amount Ryman claimed Foster had misappropriated from its accounts while Foster was a broker at Stern Fisher and SFEIC was $1.6 million.

Foster "found" the $490,108 to repay Ryman in Welborne's accounts at Stern Fisher. Still "acting as [Welborne's] investment advisor,[3] Foster directed Stern Fisher to transfer all the funds in both [of her] accounts to two other accounts" at another brokerage firm; from there he arranged for transfer of Welborne's funds to a law firm representing Ryman to meet Foster's obligation to settle his dispute with Ryman.[4] Welborne had no knowledge of any of these issues and did not authorize the transfers.

Stern Fisher and SFEIC settled other claims resulting from Foster's misconduct totaling $1.6 million, but they never told Welborne about Fisher's thefts. SFEIC never instituted "adequate safety and compliance measures to ensure the integrity" of Stern Fisher's conduct.

2. Proceedings related to the SAC

Welborne filed her original complaint on July 22, 2014. SFEIC's demurrer to it was sustained with leave to amend. Shortly thereafter, the action was stayed while Welborne arbitrated her claims against Stern Fisher and one of its employees. Proceedings in the trial court resumed on May 25, 2016, upon conclusion of the arbitration.[5] On September 6, 2016, Welborne

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[3] The SAC does not allege how Foster continued to have any authority over Welborne's accounts at Stern Fisher following the termination of his relationship with Stern Fisher in 2012.

[4] The SAC does not explain the difference between the payment of $490,108 to satisfy a note owed by Ryman and the $495,000 which Welborne alleges was taken from her IRA to settle Ryman's claim against Foster.

[5] Welborne includes in her briefing on appeal facts that do not appear in the SAC (or elsewhere) in the record on appeal. Instead, these facts may have been adduced in the course of the arbitration. As SFEIC points out, any such "facts" cannot be considered on this appeal. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [in reviewing a ruling on a demurrer, we assume the truth of properly pleaded factual allegations, facts that can be

filed a first amended complaint (FAC). In the FAC, she asserted two causes of action against SFEIC, for "Aiding and Abetting Conversion" and "Aiding and Abetting Breach of Fiduciary Duty." The trial court sustained SFEIC's demurrers to these claims, again with leave to amend. On November 21, 2016, Welborne filed her SAC; its third and fourth causes of action set out allegations against SFEIC. The third cause of action now alleged that SFEIC (and Foster) had breached a fiduciary duty owed to her. The fourth cause of action alleged "Aiding and Abetting Breach of Fiduciary Duty" against SFEIC and Ryman.

The SAC contained allegations of knowledge by SFEIC and others of "management problems with investment entities organized and overseen by Foster," and that Foster and SFEIC had entered into an "Administrative Services Agreement" on March 21, 2012, which SFEIC terminated by letter in early May 2012, as of May 31, 2012. Welborne also alleged that by the end of May 2012, Foster was told his "registration as a broker with Stern Fisher" would terminate, and he must vacate his office at Stern Fisher. FINRA wrote to Foster, with copy to Stern Fisher on May 16, 2012 about "an examination of Stern Fisher that had been ongoing with respect to various Foster investment entities." That investigation was alleged to have continued through the date of filing of the SAC.

In July 2012, SFEIC wrote to Foster to terminate agreements which they had entered into in 2009 concerning the limited liability companies. In September 2012, Stern Fisher tendered a liability claim to its insurer, stating that Foster had "'engaged in dishonest and/or fraudulent acts in the

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inferred from those expressly pleaded, and matters of which judicial notice has been taken].) In this case, there is no indication the trial court took judicial notice of the facts adduced in the arbitration and not also alleged in the SAC.

misappropriation of client funds. . . .'" In December 2012, on behalf of SFEIC, Stern Fisher wrote to Foster to confirm that the amount of his indebtedness to SFEIC was $1,689,513. (This amount was later reduced to $1,347,627.) SFEIC also filed a civil action against Foster in which it made reference to Foster's inability to satisfy multiple monetary claims against him.

The Fourth Cause of Action for "Aiding and Abetting Breach of Fiduciary Duty" now alleged that SFEIC, Stern Fisher and one of its employees had breached fiduciary duties they owed to Welborne, and, if they did not owe her such duties directly, then they may "be held liable for aiding and abetting another party's breach of its fiduciary duty."

Welborne now alleged that SFEIC and the other defendants had actual knowledge of the fiduciary duties Foster owed to her with respect to her accounts. They each knew or should have known that Foster was "violating his fiduciary duties" to Welborne by "moving her IRA [and other] accounts from Stern Fisher and SFEIC and then liquidating them to fund Foster's share of the [amount due to Ryman]. In acting and failing to act as alleged . . . , SFEIC [and the others] actively and affirmatively assisted in Foster's conversion of [Welborne's] IRA . . . and helped conceal it. . . . [I]n 2012, Stern Fisher knew that Foster had been stealing Foster and Stern Fisher['s] clients' money . . . , but failed to provide such material information to [Welborne] despite the fact that [she] remained a Stern Fisher client, that as [her] agent Stern Fisher owed [her] a fiduciary duty, and as Stern Fisher's agent, SFEIC owed [her] that same fiduciary duty."

"SFEIC substantially assisted and aided and abetted Stern Fisher's breach of its fiduciary duties to [Welborne] by failing to inform [her] that Stern Fisher was aware of Foster's thefts of other Stern Fisher clients' money

. . . but was concealing that fact from [her] and failing to inform [her] of the same."

Finally, "SFEIC and [Ryman] substantially assisted and aided and abetted Foster's breaches of fiduciary duties for their own financial gain by (1) . . . pressuring Foster to make payment of funds they knew he did not legally possess, and by transferring [Welborne's [] IRA accounts out of the safekeeping of Stern Fisher and SFEIC, and (2) by omission in the form of failing to inform [Welborne] of Foster's other financial misdeeds, specifically of Foster's theft of client funds from [other investors.]" Welborne sought actual damages of $495,000, and punitive damages.

As the trial court noted in its ruling on the demurrer to the SAC, the apparent intent of Welborne's SAC was to allege a new theory. Thus, rather than aiding and abetting *Foster's* malfeasance and breaches of fiduciary duty as alleged in earlier versions of the complaint, Welborne now alleged that "SFEIC aided and abett[ed] *Stern Fisher's* breach of fiduciary duty by failing to warn [Welborne] that Foster had been stealing money from other Stern Fisher and Foster clients." (Emphasis added.)

SFEIC again demurred.[6] Following a hearing on February 8, 2017, the trial court sustained SFEIC's demurrer to Welborne's fourth cause of action without leave to amend.

Welborne filed a timely appeal.[7]

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[6] The trial court also granted SFEIC's motion to strike, which is not in the record on appeal. From the trial court's ruling, it appears it was directed to the third cause of action, which alleged breach of fiduciary duty by SFEIC. As indicated, *ante*, in footnote 1, Welborne had conceded her third cause of action lacked merit.

[7] Ryman, MBFF, Stern Fisher and Foster are not parties to this appeal.

CONTENTION

Welborne contends she sufficiently pled her claim that SFEIC aided and abetted the breach by Stern Fisher of the fiduciary duty it owed to Welborne to withstand SFEIC's demurrer to the fourth cause of action of the SAC.[8] In support of this contention, she argues that SFEIC is liable as an aider and abettor based on its allegation that Stern Fisher was aware of Foster's thefts but had "'fail[ed] to inform [Welborne] of the same."'[9]

STANDARD OF REVIEW

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the "reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828.) The appellate court does not, however, assume the truth of contentions, deductions or conclusions of law. (*Moore v.*

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[8] SFEIC demurred both generally and specially to the fourth cause of action of the SAC. (See, Code of Civ. Proc., §§ 430.10, subd. (e) [general demurrer] and subd. (f) [special demurrer].) Appellant has not included the trial court's minute order containing its ruling on the demurer to the SAC in the record on appeal, nor does she include any notice of ruling thereon. Instead, Welborne includes only the tentative ruling. We therefore do not know whether the trial court made any ruling with respect to the special demurrers, although we presume it did so as Code of Civil Procedure section 472d requires that it state "the specific ground or grounds upon which the decision or order is based . . . ." As, on appeal, the parties focus their arguments on whether the fourth cause of action to the SAC stated a viable cause of action for aiding and abetting a breach of fiduciary duty (a general demurrer contention), we address only that issue in the body of this opinion.

[9] Welborne also appears to argue in her opening brief on appeal that SFEIC had an independent fiduciary duty to warn her. However, Welborne abandoned that contention in her opposition to SFEIC's demurrer to the SAC. As she cannot make that contention for the first time on appeal, we do not consider it. (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1192.)

Regents of University of California (1990) 51 Cal.3d 120, 125.) The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.) However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)" (*Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110, 116 (*Wiseman*).) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790 (*Montclair*).)

DISCUSSION

Giving the fourth cause of action a reasonable interpretation, Welborne alleges that SFEIC was aware by mid-2012 of Foster's misappropriation of substantial sums from other clients of his, was aware of an investigation by FINRA of Foster's activities in relation to Stern Fisher, knew that Foster was in extreme financial distress, and knew that Stern Fisher had terminated its arrangement with Foster.[10] Further, by June 2013, SFEIC was aware that it, Stern Fisher and certain former clients of Foster's had demanded that Foster repay those clients $490,000 forthwith or he would be sued to recover

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[10] Welborne does not specifically allege the nature of the business of SFEIC, Foster or of Stern Fisher in her SAC. Based on the arguments of the parties, we infer that Foster was an investment advisor, that Stern Fisher was a securities brokerage firm, and that SFEIC provided investment services (of an unknown nature). Although no party has pleaded or explained FINRA, we take judicial notice that it is a private corporation authorized by the United States Securities and Exchange Commission to act a self-regulator of financial institutions. (See, SEC, Release No. 34-56145; File No. SR-NASD-2007-023) dated July 26, 2007; Evid. Code, §§ 452, subd. (c) & 459, subd. (a).)

it. Welborne also relies on the circumstance that beginning at an unknown date and continuing until SFEIC terminated it, there had been a written agreement between it and Foster for certain purposes. (The agreement is not in the record, nor are its terms alleged.) And, in July 2013, while Foster was "flat broke," and still acting as Welborne's investment advisor, he directed Stern Fisher to transfer $490,108.16 from her accounts at Stern Fisher that was ultimately used to pay the settlement amount to which Foster had agreed to forestall the threatened action by Ryman against him.

The crux of Welborne's contention that SFEIC is liable as an aider and abettor of the alleged breach of fiduciary duty by Stern Fisher is based on the circumstances that SFEIC knew of Foster's prior conduct and knew that Stern Fisher, which was also aware of that conduct, had not warned Welborne prior to Foster transferring the funds from her IRA to pay the amount of his settlement. Based on these circumstances, Welborne argues that SFEIC had an obligation to tell her directly of Foster's thefts because it knew that Stern Fisher had not done so.

"The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff;[11] (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014)

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[11] Although breach of fiduciary duty by *Stern Fisher* is an essential element of Welborne's cause of action against *SFEIC*, the SAC contains no such cause of action. The only cause of action for breach of fiduciary duty is alleged against *Foster*. The fourth cause of action makes reference to such a breach by Stern Fisher "as described above," but no such cause of action precedes (or follows) this reference. This is an additional defect in the fourth cause of action.

No. 3610; *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478.) Some cases suggest a complaint must allege a fifth element—that the aider and abettor had the specific intent to facilitate the wrongful conduct. (Directions for Use for CACI No. 3610, p. 633, citing *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95.)" (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 (*Nasrawi*); see also *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 93 (*Schulz*); *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144; *Nasrawi*, *supra*, at p. 345.)

"'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. [Citation.] "As a general rule, one owes no duty to control the conduct of another . . . ." [Citations.]'" (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 (*Austin B.*), citing *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) To be found liable for aiding and abetting an intentional tort, the defendant must be "'aware that the other's conduct constitutes a breach of duty and provide[] substantial assistance or encouragement to the other to so act.'" (*Austin B. supra,* at p. 879.)

In *Lomita Land and Water Co. v. Robinson* (1908) 154 Cal. 36, the California Supreme Court explained this requirement in the course of affirming a judgment against two defendants for aiding and abetting a fraudulent land sale scheme engineered by two others. The court stated, "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained." (*Id.* at p. 47; accord, *Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th 1138, 1145-1146.) "[A]iding and abetting . . . necessarily requires a defendant to reach a conscious decision to

participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749; accord, *Casey v. U.S. Bank Nat. Assn.*, *supra*, at p. 1146.)

We focus on the third of the elements necessary to sustain Welborne's claim for relief, that requiring substantial assistance or encouragement by a defendant in support of the third party's breach. Welborne contends that failing to disclose and failing to warn are sufficient to meet this prong of the required elements of the cause of action, relying solely on *Nasrawi, supra,* 231 Cal.App.4th at pages 343-344.

Welborne's reliance on *Nasrawi* is misplaced. There, the auditor defendants had not merely remained silent in the face of defalcations by others, as is alleged with respect to SFEIC here. Instead, there, the actuary defendants "knowingly and falsely represent[ed] to trust fund beneficiaries . . . that the [third party's] practices were actuarially sound." (*Nasrawi*, *supra*, 231 Cal.App.4th at p. 344.) Thus, *Nasrawi* does not support Welborne's claim that the absence of action in the present case is sufficient to impose liability on SFEIC.

Instead, as SFEIC argues, *Nasrawi* is consistent with other cases which establish that liability under such a theory requires the factual allegation that "'"[the defendant] *substantial*[*ly*] *assist*[*s*] *or encourages* [the third] party to so act . . . ." [Citations.]'" (E.g., *Schulz v. Neovi Data Corp.*, *supra*, 152 Cal.App.4th at p. 93, emphasis added.) Mere knowledge that a tort was or is being committed and failing to prevent it or give notice to its "victim" are not sufficient to sustain an allegation of aiding and abetting liability. On demurrer, there also must be an allegation of how the defendant affirmatively assisted or encouraged the third party to breach the fiduciary duty owed by that party to the plaintiff. (*Goonewardene v. ADP, LLC* (2016)

5 Cal.App.5th 154, 189; accord, *Austin B.*, *supra*, 149 Cal.App.4th 860.) Mere silence cannot be a basis for SCEIF's liability. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 562.) The required allegations do not appear in the SAC.

Welborne has had three opportunities to properly plead her claim, but has not done so. Nor has she indicated how she would amend to cure this continued deficiency. There is thus no basis upon which to allow her a fourth opportunity. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [a plaintiff must show how it can amend and how that amendment will overcome the defect in its prior pleadings].)

Accordingly, the trial court properly sustained SFEIC's demurrer without leave to amend.

DISPOSITION

The February 21, 2017 judgment is affirmed. Plaintiff shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
GOODMAN

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ

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