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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

LUCILLE NICOLOSI, Plaintiff and Appellant, v. SUNTRUST BANK, Defendant and Respondent.	B277929 (Los Angeles County Super. Ct. No. BC562070)

APPEAL from judgment of the Superior Court of Los Angeles County, Rick Brown, Judge (Ret.). Affirmed.

Law Offices of Zelner & Karpel, Donald E. Karpel, for Plaintiff and Appellant.

McGlinchey Stafford, Brian A. Paino, for Defendant and Respondent.

Plaintiff and appellant Lucille Nicolosi appeals from a judgment on the pleadings in favor of defendant and respondent Suntrust Bank in this action arising out of a property inspection notice. Nicolosi contends the complaint states causes of action for invasion of privacy based on portraying her in a false light, defamation by innuendo, and negligence. She also contends that the trial court should have allowed her to amend her complaint to further allege causes of action for invasion of privacy, libel, and trespass. We conclude that the complaint does not state a cause of action for invasion of privacy based on a false light theory, defamation, or negligence. Nicolosi has failed to demonstrate that the trial court abused its discretion by denying leave to amend the complaint. We therefore affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

The Bank's Notice

John Moss, a church deacon, owns an unencumbered home in a gated community in Thousand Oaks. Moss and his family decided to live in Japan for a year, so he asked his close friend Arthur Wilkinson and his wife Lucille Nicolosi to "house sit." Wilkinson had been nominated to serve as the lead deacon at the church, but had not yet been confirmed. Nicolosi was a bible study group leader. Wilkinson and Nicolosi were residing at the Moss home by May 2013.

On May 24, 2013, an agent or employee of the Bank posted an adhesive sticker on the front door of the Moss home. The notice was visible to the community, including large, boldfaced type at the top that was visible from a distance. The notice stated:

> "'IMPORTANT NOTICE'
> Name: Lucille Nicolosi
> An independent property inspector visited your property on the date and time indicated below.
> Date: 5/24 Time: 5:30 PM
> The purpose of this visit was to determine the occupancy and security condition of your property. This inspection is permitted under your security instrument. It is important that you contact your mortgage company to discuss your account.
> Contact: Chase Fields
> Phone: 877-654-9211
> Thank you."

Moss's neighbor, Hemant Mistry, saw the notice and took a photograph. He sent an email to Moss stating that something was not right at his house, and Wilkinson and Nicolosi were responsible. He attached the photograph of the notice. He stated that he was concerned because it looked as though something funny was going on with Moss's property. Mistry believed Wilkinson and Nicolosi had done something wrong and were acting with malicious intent. By

emailing the photograph to Moss, Mistry was trying to protect Moss and his property.

Moss sent an email to Nicolosi with a copy of the photograph asking why the notice was posted on his door, whether there was anything that he needed to do, and whether there was a problem with his house that he needed to be aware of. On June 12, 2013, Nicolosi learned that the Bank had posted the notice without her authorization or consent on the front door of the Moss house in public view of the community.

Neighbors who walked and drove past the Moss house on a daily basis saw and read the notice. Three individuals caring for plants at the Moss home read the notice, as well as Moss's gardener and his son. Nicolosi and Wilkinson were publicly humiliated, lost friends, and their personal and professional relationships were damaged. Wilkinson was not confirmed as the lead deacon of the church. They felt personally violated, nauseated, embarrassed, depressed, angry, and were unable to eat or sleep.

Trial Court Proceedings

On October 29, 2014, Nicolosi and Wilkinson[1] filed a complaint against the Bank for invasion of privacy, negligence, negligent infliction of emotional distress, and libel. In addition to the above-stated facts, they alleged the

[1] Wilkinson is not a party to this appeal.

following. Nicolosi believed the notice demanded an inspection of the Moss home to determine the occupancy and security condition of the property. The notice conveyed to anyone who read it that the Moss home, which Nicolosi had somehow encumbered, was subject to a security agreement that permitted an inspection. Nicolosi and Wilkinson believed the information in the notice was false and misleading. The Bank knew Nicolosi and Wilkinson were not owners of the Moss property and had no financial interest in it. Despite this knowledge, the Bank posted the notice in a public place visible to the community and all the neighbors. The notice contained misleading and inaccurate information about the services rendered, because the Bank had no financial interest in the Moss property or entitlement to perform inspections upon it. "Chase Fields" was a fake name and not the name of the person who posted the notice. Nicolosi and Wilkinson also alleged that the Bank had a duty to keep their private information private, which the Bank violated by posting the notice. The Bank engaged in oppression, fraud or malice, and made the disclosure with a willful disregard of their rights.

Nicolosi and Wilkinson had visited physicians for treatment and required future care for permanent disabilities. They were prevented from attending to their usual occupations. They sought general damages, special damages for hospitalization, x-rays and medical expenses, and special damages for loss of earnings and earning capacity, punitive damages, interest, and costs.

On May 18, 2016, the Bank filed a motion for judgment on the pleadings. The Bank argued that the notice, even if inaccurate, did not contain private information. Nicolosi did not have a reasonable expectation of privacy under the circumstances, because she was a party to a security agreement which expressly allowed the Bank to inspect her property.

In conjunction with the motion, the Bank filed a request for judicial notice of two security deeds recorded in Forsyth County, Georgia. One security deed dated July 26, 2007, showed "Lucille Nicolosi" as the borrower on a promissory note for $439,600. The loan was secured by property in Cumming, Georgia. The deed stated that all notices must be in writing. The address for notices was the property address unless the borrower designated a substitute notice address by proper notice to the lender. Nicolosi was required to promptly notify the Bank of a change of address. The security deed allowed for inspections as follows: "Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause."

A second security deed dated August 31, 2007, secured an additional line of credit of $112,000 on the same property in Cumming, Georgia. The second deed contained similar provisions for written notice. It provided a right to enter to

the Bank as follows: "Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Security Deed."

Nicolosi opposed the motion on the grounds that the complaint stated causes of action for defamation by innuendo, invasion of privacy based on a false light theory because the notice implied she had fraudulently mortgaged the Moss home, and negligence based on the Bank's duty to use reasonable care. Alternatively, she argued that the court should grant leave to amend. The Bank filed a reply.

A hearing was held on the motion for judgment on the pleadings, but no reporter's transcript or settled statement is included in the record on appeal. The trial court granted the motion for judgment on the pleadings without leave to amend. On July 19, 2016, the court entered judgment in favor of the Bank. Nicolosi filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

"The same de novo standard of review applies to motions for judgment on the pleadings and to general demurrers. [Citation.] In both instances, we exercise our

independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed. [Citation.] The facts alleged in the pleading are deemed to be true, but contentions, deductions, and conclusions of law are not. [Citation.] In addition to the complaint, we also may consider matters subject to judicial notice. [Citation.]" (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162.)

Invasion of Privacy – False Light

Nicolosi contends that the complaint alleged a cause of action for invasion of privacy based on portraying her in a false light, because it implied she had taken out a mortgage on the property. The Bank asserts that the small group of people who were alleged to have viewed the notice did not constitute publication; the information was not false, because the notice accurately conveyed that Nicolosi had a mortgage; and the contents were not highly offensive to a reasonable person because they were posted in connection with a valid security agreement between Nicolosi and the Bank. We conclude that the complaint fails to state a cause of action for a false light invasion of privacy.

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light

in which the plaintiff would be placed.' (*Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) 'A "false light" claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such.' (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 636.)" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 (*Jackson*).) BAJI No. 7.22 sets forth the elements of a false light claim: (1) the defendant made a public disclosure of a fact about the plaintiff; (2) the fact disclosed was false and portrayed the plaintiff in a false light; (3) the false light in which the plaintiff was placed would be highly offensive to a reasonable person; (4) the defendant knew or acted in reckless disregard of the falsity of the publicized fact and the false light in which the plaintiff would be placed, or the defendant acted negligently in failing to learn whether the publicized fact placed the plaintiff in a false light; and (5) the public disclosure caused the plaintiff to sustain damages.

"Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 239.) ""'Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." [Citation.]' . . . Defamatory publications that are made 'by writing, printing, picture, effigy, or other fixed

representation to the eye,' are considered libel. (Civ. Code, § 45.) [¶] . . . [¶] Where a libelous statement 'is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damage . . . .'" (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 382, disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) "[F]alse statements charging the commission of crime or tending directly to injure a plaintiff in respect to his or her profession by imputing dishonesty or questionable professional conduct are defamatory per se." (*Id.* at p. 383.)

In the context of libel, statements are not considered false as a result of minor inaccuracies, as long as the substance of the charge is true. (*Jackson*, *supra*, 10 Cal.App.5th at pp. 1262–1263.) "In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication. [Citation.] 'To constitute a libel it is not necessary that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied; and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts, (*inducement*, *colloquium*, and *innuendo*) to show its meaning. In the last case, proper allegations and proofs of the facts necessary to make the meaning of the language apparent will be required.' [Citation.] In this connection the expression used as well as the 'whole scope and apparent object of the writer'

must be considered. [Citation.]" (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803 (*Forsher*).)

"If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel *per quod*." (*Barnes–Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386–387 (*Barnes–Hind*).)

"'"[I]n passing upon the sufficiency of such language as stating a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader. A defendant is liable for what is insinuated, as well as for what is stated explicitly. [Citation.]' [Citation]."

(*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547.)

"In determining the propriety of the trial court's ruling on the demurrer, this court's inquiry is not to determine if the communications may have an innocent meaning but rather to determine if the communication reasonably carries with it a defamatory meaning. [Citation.] Just as the court must refrain from a 'hair-splitting analysis' of what is said in an article to find an innocent meaning, so must it refrain from scrutinizing what is not said to find 'a defamatory meaning which the article does not convey to a lay reader.' [Citation.]" (*Forsher*, *supra*, 26 Cal.3d at p. 803.)

To constitute an invasion of privacy under this theory, the facts disclosed by the Bank must be false and portray Nicolosi in a false light which would be highly offensive to a reasonable person. The statements in this case do not meet this threshold. Nicolosi and the Bank agree the notice conveys to a reader that Nicolosi has a security agreement with the Bank, but it does not state the security interest. The notice posted on the Moss residence simply announced that a property inspector had visited her property to determine the condition of her property as permitted by her security instrument. The notice falls far short of objectively placing Nicolosi in a highly offensive false light. It does not suggest that Nicolosi applied for or received a mortgage on the Moss property. Although it was affixed to the door of the Moss home, the notice was addressed to Nicolosi and referred to "your property," not the Moss residence. Nicolosi

alleged that certain people who read the notice were aware she had no ownership interest in the Moss property. Under these circumstances, the readers could have reasonably assumed the notice referred to a different property owned by Nicolosi or the notice was addressed to Nicolosi as the current occupant of the premises. It would not be reasonable for them to have inferred from the notice that Nicolosi had fraudulently pledged the Moss property as collateral for a loan.

For the same reason, the complaint failed to state a cause of action for defamation by innuendo. "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," . . .); (2) support that interpretation by alleging *facts* showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' [Citation.] 'The office of an innuendo is to declare what the words *meant* to those to whom they were published.' [Citations.] 'In order to plead . . . ambiguous language into an actionable libel . . . it is incumbent upon the plaintiff also to plead an inducement, that is to say, circumstances which would indicate that the words *were understood* in a defamatory sense showing *that the situation or opinion of the readers was such that they derived a defamatory meaning*

from them. [Citation.]' [Citations.]" (*Barnes–Hind*, *supra*, 181 Cal.App.3d at p. 387.)

As discussed above, readers of the Bank's notice who knew that Nicolosi had no ownership interest in the Moss residence might reasonably assume that the notice referred to another property which she did own. The fact that the notice was affixed to the Moss house did not lead to an assumption that Nicolosi had mortgaged the Moss property fraudulently, and the fact that a neighbor concluded Nicolosi was engaged in wrongdoing based on the notice does not make it a reasonable inference.

Negligence

Nicolosi contends the Bank owed her a duty to service her mortgage correctly, keep her information private, and not disseminate inaccurate or misleading information that harmed her by placing her character in question or imply to third parties that she obtained a mortgage on property that she did not own. The trial court properly found no cause of action had been stated for negligence.

"To establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured and a breach of that duty which is the proximate cause of the resulting injury." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 114.) "As a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise

reasonable care in the circumstances . . . .'" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*), and citing Civ. Code, § 1714.) "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." (*Vasquez v. Residential Invs., Inc.*, (2004) 118 Cal.App.4th 269, 278.)

"Since the publication of the *Rowland* decision, its many judicial progeny have adopted the *Rowland* court's policy-driven, multifactor weighing process for determining whether in a particular case a defendant owed a tort duty to a given plaintiff. [Citation.] These nonexclusive factors (the *Rowland* factors) generally include: (1) The foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; (7) the consequences to the community of imposing a duty to exercise care with resulting potential liability for breach of that duty; and (8) the availability, cost, and prevalence of insurance for the risk involved." (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1091, fn. omitted.)

In this case, it was not foreseeable that a standard inspection notice would result in the type of physical and emotional harm that Nicolosi suffered. The connection between the Bank's conduct and the harm that Nicolosi

suffered was attenuated, because Nicolosi did not suffer the harm upon reading the notice herself. The notice could have been clearer to prevent confusion, but the moral blame assigned to the Bank's conduct in this case is relatively low. Nicolosi's security instruments required her to provide the Bank with her current address for notices and required the Bank to provide her notice prior to certain inspections of her property. The trial court properly found no cause of action had been stated as to negligence.

Leave to Amend

Nicolosi contends that the trial court abused its discretion by denying leave to amend the complaint to allege a cause of action for trespass and clarify causes of action for invasion of privacy and libel. Nicolosi failed to provide a reporter's transcript of the hearing on the demurrer or a suitable substitute, such as a settled statement under California Rules of Court, rule 8.137. Without a reporter's transcript, the record is inadequate to allow us to review the trial court's reasoning in denying leave to amend.

We review a trial court's decision denying a plaintiff leave to amend a complaint for abuse of discretion. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 439.) "The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. [Citations.] [¶] The reason for this follows from the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."' (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187.)

Without a record of the proceedings, we cannot review the arguments, concessions, or information presented to the trial court. As a consequence, there is no basis for a finding that the trial court abused its discretion on the issue of whether to allow amendment of the complaint. The record and the argument on appeal are insufficient to demonstrate that the court erred. As we presume the judgment is correct unless the record affirmatively demonstrates otherwise, no showing of an abuse of discretion has been made on appeal.

DISPOSITION

The judgment is affirmed. Respondent Suntrust Bank is awarded its costs on appeal.

KRIEGLER, Acting P. J.

I concur:

DUNNING, J.*

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

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BAKER, J., Dissenting

The notice defendant SunTrust Bank (SunTrust) affixed to the residence owned by John Moss (the moss Residence) was addressed solely to plaintiff Lucille Nicolosi (Nicolosi). It stated a property inspector visited "your property" on May 24 at 5:30 p.m. The notice further stated the purpose of the May 24 visit "was to determine the occupancy and security condition of your property" as "permitted under your security instrument."

Nicolosi's complaint alleges SunTrust or its agent posted the notice on the Moss Residence on May 24, 2013; Nicolosi was living at the Moss Residence at the time. Taking these facts as true, the "your property" referenced twice in the notice refers to the Moss Residence, not some other unnamed property in Georgia. (For the same reason, the notice falsely indicated an inspection of *the Moss Residence* was permitted under the terms of Nicolosi's security instrument.) The complaint accordingly suffices to state a claim for false light invasion of privacy. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256; 277; see also *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547.) I would reverse the judgment and allow that claim to proceed.

BAKER, J.