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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHERMAN VICKERS,

Plaintiff and Appellant,

v.

IWF MDR HOTEL, et al.,

Defendants and Respondents.

B277316

(Los Angeles County
Super. Ct. No. BC593803)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila Corral Lyons, Judge. Affirmed.

Sherman Vickers, in pro. per., for Plaintiff and Appellant.

Murchison & Cumming and Paul W. Burke, for Defendants and Respondents.

Sherman Vickers appeals the judgment entered in favor of Defendants IWF MDR Hotel, IWF MDR Hotel LLC, and Invest West Financial Corp. after the trial court sustained defendant's demurrer to the Third Amended Complaint without leave to amend. Because the complaint failed to state a cause of action against any of these defendants, and because Vickers has not alleged he could amend the complaint to do so, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Sherman Vickers sued respondents (IWF) along with other defendants in a lawsuit arising out of his occupancy of a slip in Marina del Rey where he lived on his boat. He filed the original verified complaint in this matter in September 2015, alleging two causes of action, the first for conversion and the second for fraud. He named a single defendant, Marina del Rey Marina LLC (MDRM).

Before the defendant filed a responsive pleading, Vickers filed a verified first amended complaint in November 2015. In that complaint, he named seven defendants, including the three IWF defendants who are respondents here. He asserted four causes of action: conversion; fraud; intentional infliction of emotional distress; and breach of the implied covenant of quiet enjoyment. The only allegation against IWF was a single paragraph alleging all defendants were agents of each other; Vickers attributed all of the specific actions of which he complained to other defendants.

Two days after filing the first amended complaint, Vickers filed a verified second amended complaint, alleging the same causes of action against the same defendants. IWF filed a demurrer and motion to strike both complaints in December

2015; at a case management conference in February 2016, the parties stipulated that the second amended complaint was the operative complaint. The court heard the demurrer and motion in March 2016, and sustained the demurrers with leave to amend, finding there were no charging allegations against the IWF defendants.

Vickers filed his verified Third Amended Complaint in April 2016, alleging conversion, intentional infliction of emotional distress, and breach of the implied covenant of quiet enjoyment; he omitted the fraud cause of action, although he had been given leave to amend all causes of action. Identifying IWF to include all three entities, he added IWF to certain paragraphs, paragraphs which in the previous three iterations of the complaint alleged that other defendants were the actors alleged to have caused his damages.

The first cause of action, for conversion, alleged that defendants Almar and MDRM interfered with his rights to access and possess his property, and converted it to their own use. These paragraphs contain no reference to IWF, and no allegations that IWF took any action with respect to the alleged conversion.

The second cause of action, for intentional infliction of emotional distress, alleges that IWF had knowledge that Vickers was disabled, but alleged that the actions which caused emotional distress were taken by MDMR and Almar.¹ Vickers alleged that those two defendants, and IWF, acting “individually

¹ Vickers alleged he “felt hopeless against Defendants (Almar; MDRM; IWF) unwarranted conduct,” but attributed specific conduct only to Almar and MDRM.

or in concert, directly or through agents, have engaged in a pattern or practices” causing emotional distress. The actions alleged to have been taken in this regard were, largely, the same actions Vickers alleged were taken only by MDMR and Almar in the conversion cause of action. As to IWF, Vickers alleged that they told him not to touch his boat, prevented access to his boat, and threatened to call the Sheriffs. He identified no individual who took these actions on behalf of the IWF entities. The remaining allegations, inconsistent with the allegations in the conversion cause of action in the Third Amended Complaint, and in all prior pleadings, allege that IWF participated in taking his property. Nonetheless, he alleged only Almar and MDRM caused his emotional distress and acted with malice.

The final cause of action, for breach of the implied covenant of quiet enjoyment, added IWF to the defendants who, in the prior iterations of the complaint, were alleged to have been involved in renovations which interfered with Vicker’s use of the property.

IWF filed a demurrer and motion to strike the Third Amended Complaint in May 2016. The trial court heard argument in June, and sustained the demurrer without leave to amend.

The trial court found that the earlier verified complaints, which alleged that Almar and MDRM took the actions complained of, conflicted with the new allegations adding IWF as an actor. The court determined the new allegations were improper sham pleadings which should be disregarded. Analyzing each of the three causes of action, the trial court concluded the conversion cause of action could be stated only against Almar and MDRM. With respect to the intentional

infliction of emotional distress claim, the trial court found that only one action, denial of access to the boat, could be considered as against IWF, and concluded that was legally insufficient to state a claim. Finally, as breach of the implied covenant can be alleged only against a lessor, and the court found the addition of IWF as a lessor to be a sham pleading, the court sustained the demurrer as to that claim as well. The court entered the judgment of dismissal on June 20, 2016.

DISCUSSION

We review the acts of the trial court sustaining a demurrer de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1470.) “[W]e review the trial court’s sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court’s denial of leave to amend.” (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.) We assume the truth of the properly pleaded factual allegations in the complaint but do not assume the truth of the contentions, deductions or conclusions of law. (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1411; see also *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) “[L]eave to amend should not be granted where . . . amendment would be futile.” (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.)

Although, as Respondents correctly argue, the briefs fail in many respects to comply with relevant Rules of Court, we will exercise our discretion to disregard those failings so that we may

conduct a de novo review of the complaint to examine whether the trial court correctly determined that the complaint failed to state a cause of action.² We conclude that Vickers has failed to state any claim against IWF.

A. The Third Amended Complaint Fails to State A Cause of Action Against The IWF Parties

This version of the complaint contains allegations inconsistent internally, as well as with prior iterations of the claims. Vickers fails to explain these inconsistencies, as he should. (*Deveney v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 423-424 [party must explain facts added that are inconsistent with prior pleadings].) Even if we disregard the inconsistencies, however, an examination of the allegations demonstrates the complaint does not allege facts sufficient to state a cause of action. (Code of Civ. Proc., §430.10, subd. (e).)

1. Conversion

As to the cause of action for conversion, Vickers does not assert that IWF played any role in the taking of his property. This has been the case in each of the four pleadings he has filed.

2. Intentional Infliction of Emotional Distress

The cause of action for intentional infliction of emotional distress, by contrast, identifies three actions taken by IWF, but does not identify any person who acted for the corporate entities.

² In his briefing on appeal, Vickers raises a number of issues not relevant to the determination of IWF's demurrer to the Third Amended Complaint. We address only these issues necessary to our determination.

A corporation can undertake physical acts only through its individual officers and employees. (See *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 620 [corporations and government entities act only through individuals].)

Notwithstanding this failure to specify any person who acted, the trial court properly found that these actions were not sufficient to state a claim for intentional infliction of emotional distress.

“A cause of action for intentional infliction of emotional distress exists when there is ““(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 plaintiffs’ suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.”” [Citations.] A defendant’s conduct is “outrageous” when it is so ““extreme as to exceed all bounds of that usually tolerated in a civilized community.”” [Citation.] And the defendant’s conduct must be ““intended to inflict injury or engaged in with the realization that injury will result.”” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051, quoting *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) The actions alleged here, asking Vickers to stay away from his boat for a limited period of time, were neither extreme nor outrageous.

Even were the actions alleged outside the bounds of what should be tolerated, and thus of a nature to inflict emotional distress, Vickers specifically alleges causation only as to ALMAR and MDRM; he makes no assertion that the actions taken by IWF

caused the injuries of which he complains. He has failed to state a cause of action against these defendants.

3. Implied Covenant of Quiet Enjoyment

This cause of action can be asserted only against a lessor. (Civ. Code, § 1927; *Multani v. Knight* (2019) 23 Cal.App.5th 837, 855 [covenant of quiet enjoyment arises from the lease and is owed by landlord].) Vickers fails, however, to allege that any of the IWF entities were his lessor, or to identify on which of the two parcels identified in the pleadings his slip was located.

Documents produced by Vickers at the trial court demonstrate that in August 2014, the month the demolition started, IWF MDR Hotel, LP, gave up its leasehold interest in one of the two parcels identified in the complaint; there is no reference to the other entities being leaseholders at any time. As Vickers has failed to allege that entity was his lessor after August 2014, he has failed to state a claim against any of the IWF entities in this cause of action; the information contained in the documents demonstrates he cannot do so in good faith.

B. Vickers Has Not Asserted That He Can Amend the Complaint

Where, as in this case, the trial court sustained the demurrer without leave to amend, we must decide whether amendment of the complaint, sufficient to cure the defect, is possible. The burden of showing that such an amendment can be made is on the plaintiff. (*Arce v. Childrens Hospital Los Angeles, supra*, 211 Cal.App.4th at p.1471.) The fact that in this case, plaintiff has made unexplained amendments, inconsistent with his prior verified pleadings, and has failed to argue that he can allege additional, but consistent facts, demonstrates that the trial

court did not abuse its discretion in denying leave to amend.
(*Id.*, at p. 1468, fn. 7.)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.