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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KIMBERLY ALLEN STITH,

Plaintiff and Appellant,

v.

RONALD COLELLA,

Defendant and Respondent.

B228052

(Los Angeles County
Super. Ct. No. PC040281)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Melvin D. Sandvig, Judge. Affirmed in part and reversed in part.

Kimberly Allen Stith, in pro. per., for Plaintiff and Appellant.

Richard G. Becker for Defendant and Respondent.

Plaintiff Kimberly Allen Stith (Stith) appeals judgment entered after the trial court sustained defendant Ronald Colella's demurrer to Stith's second amended complaint (SAC). We reverse in part, finding that the trial court abused its discretion in failing to give plaintiff leave to amend his complaint to state claims for abuse of a dependent adult, conversion of certain items of personal property, intentional infliction of emotional distress, and punitive damages. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Plaintiff's SAC

This is the second appeal in this matter. In *Stith v. Colella* ((Feb. 26, 2009, B206650) [nonpub. opn.]), we reversed the trial court's judgment sustaining defendant Ronald Colella's demurrer to plaintiff's first amended complaint on the grounds it contained "kernels of potentially viable" causes of action for conversion and emotional distress.

Plaintiff's SAC¹ filed on December 22, 2009 states five causes of action: (1) conversion, (2) negligence, (3) negligent personal injury, (4) negligent or intentional infliction of emotional distress, and (5) malice and oppression against Ronald Colella and Ronald Colella's wife Toni Colella (who is plaintiff's mother).² The SAC alleges that plaintiff lives in Granada Hills, and defendant rented property at the same address from plaintiff.

In 1974, plaintiff alleged that the parties resided on Hesby Street in Sherman Oaks, that defendant physically and emotionally abused plaintiff, and that Toni Colella did nothing to stop defendant. Plaintiff's maternal great-grandfather F.M. Queen (Queen),

¹ For purposes of demurrer, we take all well-pleaded allegations of the SAC as true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

² The SAC only refers to "DEFENDANT," in numerous places, but we assume plaintiff means defendant Ronald Colella because plaintiff consistently refers to defendant Toni Colella either by name or by the designation "co-defendant." Therefore, we refer to Ronald Colella as defendant because plaintiff's claims are exclusively directed at his conduct. We refer to defendant Toni Colella by name.

who owned the Hesby Street house, learned of the abuse, evicted both defendants, and demanded that Toni Colella obtain psychological counseling. Queen subsequently sold the house.

In 1977, defendant was given plaintiff's property to hold; this property had been given to plaintiff by Queen and consisted of a cemetery plot located in Newhall, valued at approximately \$5,000 to \$10,000. Plaintiff is the perpetual leaseholder of this plot. In 1997, plaintiff was diagnosed with stress-related physical and psychological disorders. Defendant was aware of plaintiff's condition.

Commencing in February 2001, because plaintiff is unable to maintain employment, he began to generate income for himself by selling his personal property consisting of rare auto parts and other collectibles over the internet. In March 2004, plaintiff decided to sell the cemetery plot located in Newhall, and demanded the plot from defendant; defendant refused to return the plot. In May 2004, defendant sold plaintiff's 1964 Pontiac LeMans convertible for \$3,500 without plaintiff's consent.

In December 2004, plaintiff suffered a "cerebral event," causing the loss of use of his left hand, arm, and leg. On several occasions, plaintiff has awakened at night to find defendant standing in plaintiff's doorway staring and swearing at plaintiff, making derogatory remarks about plaintiff, and wishing plaintiff dead.

Defendant began to go into plaintiff's bedroom and took \$300 of plaintiff's money. Plaintiff put locks on his door because plaintiff was in fear of defendant.

Plaintiff demanded return of his property, but defendant refused, screaming at plaintiff, "I'll take care of it, you'll do as I say. I don't want to hear any more about it!"

In October 2005, Toni Colella renewed the lease with the owner of the property located in Granada Hills, plaintiff's grandmother Carmen Quinton. The new lease states that plaintiff is to receive \$5,000 for moving and storage expenses, to be received from Toni Colella and defendant, after Quinton's death. In March 2006, Quinton died.

In March 2006, plaintiff was suffering from periodontal disease, and in need of legal counsel regarding Quinton's estate; plaintiff again demanded the cemetery plot from

defendant. Defendant became outraged and screamed obscenities at plaintiff, claiming the property belonged to defendant.

In January 2007, after defendant discovered that plaintiff had exposed defendant's abusive conduct to extended family members, and that plaintiff intended to seek legal advice about defendant's conduct and Quinton's estate, defendant shut off the utilities to plaintiff's portion of the house and threw out plaintiff's food.

In March 2007, defendant vacated the home, and in the process of moving out, took, destroyed, or threw away plaintiff's property consisting of items of extreme sentimental value (photographs of plaintiff, photographs of plaintiff's child, greeting cards), household items, furniture, musical instruments, and collectibles of value (rare auto parts, antiques, toys, art), all of which had a value of \$25,000. Plaintiff made a final demand to defendant for return of his property, to which defendant responded with an obscenity.

The conversion claim of plaintiff's SAC asserted that the property taken, destroyed, or thrown away by defendant had a value of approximately \$45,000.

Plaintiff's negligence claims stated that defendant had a duty of care over plaintiff's property and that defendant negligently exercised that duty of care. As a result of defendant's negligence, plaintiff has suffered aggravation of his physical problems and mental anguish, and has incurred expenses for medical care, treatment, and medicine, and has lost income and continues to lose income. Plaintiff demanded \$1 million in damages for such physical injury.

Plaintiff's emotional distress claims alleged that defendant acted in an extreme and outrageous manner in imposing upon plaintiff rage, fear, threats, property loss, income loss, food and utility deprivation, and poverty. As a result, plaintiff suffers from severe emotional distress.

Plaintiff alleged that defendant acted maliciously and intentionally with reckless disregard for plaintiff.

2. *Defendant's Demurrer and Motion to Strike*

Defendant demurred, arguing that: (1) plaintiff's allegations of abuse did not state plaintiff's age at the time the abuse occurred, and were time-barred; (2) plaintiff's conversion claim was vague and ambiguous because it failed to allege with specificity the agreement to hold the cemetery plot; (3) plaintiff's negligence claims were vague, ambiguous, and uncertain because they failed to allege any duty defendant owed to plaintiff; (4) it was impossible to discern from the negligence allegations the alleged damages and injuries defendant was charged with; (5) plaintiff's inconsistent allegations of negligent and intentional infliction of emotional distress were improper in the same cause of action; and (6) a cause of action for "MALICE AND OPPRESSION" is defective because it was not pleaded in conjunction with a recognized cause of action.

Defendant concurrently filed a motion to strike the entire SAC because plaintiff's SAC, filed on December 22, 2009, was not filed within the 20 days ordered by the court on November 24, 2009 after it denied defendant's demurer to plaintiff's "Amendments to Complaint" (actually plaintiff's second amended complaint).

Plaintiff's opposition to defendant's motions stated that (1) as a dependent adult (Welf. & Inst. Code, § 15610.23, subd. (a)) and a cohabitant (Fam. Code, § 6211), plaintiff could state a claim for abuse based upon defendant's abusive conduct; (2) his complaint was timely filed within three years (Code Civ. Pro., §§ 338, 340.15, subd. (a)) of defendant's conduct.³ Plaintiff sought a continuance of the demurrer, scheduled concurrently with the case management conference of May 3, 2010, based upon the fact he had been forced to move and had not had access to his property or records.

At the hearing held May 3, 2010, the court stated that although plaintiff had been given four "bite[s] at the apple" with plaintiff's complaint, first amended complaint, first amended complaint with amendments, and second amended complaint, the SAC did not state any claims. Defendant complained that plaintiff's opposition papers to defendant's

³ Plaintiff's original complaint was filed February 28, 2007.

demurrer and motion to strike had been filed on April 29, 2010, four days before the May 3, 2010 hearing date. On the merits, the court stated plaintiff had failed to allege a duty in his negligence claims, improperly combined negligent and intentional infliction of emotional distress, failed to state facts sufficient to constitute a conversion claim because plaintiff did not allege how defendant came to hold the cemetery plot for plaintiff, and had failed to specifically identify the property allegedly converted. Lastly, the court pointed out that there is no cause of action for “malice or oppression.”

Plaintiff responded that he had been declared physically disabled by the federal government and was partially blind. Plaintiff promised the court his filings would be timely and noted that he had requested a continuance, which the court had denied. Plaintiff asserted his SAC had been served December 15, 2009. Plaintiff stated that if he were required to itemize every item of property allegedly converted, the SAC “would read like the telephone book.” The trial court granted defendant’s motions, finding the SAC was untimely filed, and entered judgment for defendant.

DISCUSSION

I. STANDARD OF REVIEW

On appeal from a judgment of dismissal following an order sustaining a demurrer, “we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose.” (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that can be reasonably inferred from those pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) We review the trial court’s denial of leave to amend for an abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) “When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]” (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506.) “The reviewing court must reverse the judgment if (1) the complaint, liberally construed,

has stated a cause of action under any possible legal theory; or (2) the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.)

Code of Civil Procedure section 436 gives the trial court discretion to strike all or any part of a pleading not filed in conformity with the laws of this state. An order striking a pleading pursuant to Code of Civil Procedure section 435 is reviewed for abuse of discretion. (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.) Abuse of discretion is shown where the trial court’s ruling is arbitrary, capricious, or the court acts in a patently absurd manner. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

II. ANALYSIS

A. The Trial Court Abused its Discretion in Striking the Late-Filed SAC

Here, given that the SAC was filed in December 2009 and the hearing on defendants’ demurrer was held in May 2010, providing the defendant sufficient time to prepare his demurrer, the trial court abused its discretion in striking the SAC on the basis it was not filed within 20 days of the November 24, 2009 hearing.

B. Abuse of Elder or Dependent Adult

To the extent the allegations of plaintiff’s SAC attempted to state a claim for abuse of a dependent adult, the elements of plaintiff’s claims are determined by statute, namely, the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) (Welf. & Inst. Code, § 15600 et seq.). The Elder Abuse Act was enacted to provide for the “private, civil enforcement of laws against elder abuse and neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.)

The court in *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, reviewed the cases applying the foregoing legal principles to determine the pleading requirements sufficient to state a cause of action for a violation of the Elder Abuse Act. The plaintiff must allege facts establishing that the defendant: “(1) had

responsibility for meeting the basic needs of the elder or dependent adult,” including nutrition, hydration, hygiene, or medical care; “(2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs”; and “(3) denied or withheld goods or services necessary to meet the elder or dependent adult’s basic needs, either with knowledge that injury was substantially certain . . . or with conscious disregard of the high probability of such injury” (*Id.* at pp. 406–407.) The plaintiff must also allege that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering, and the causal link between the neglect and injury must be specifically alleged. (*Id.* at p. 407.)

Plaintiff’s SAC does not meet these pleading requirements, but leave should have been granted to amend to state a claim if plaintiff can truthfully make the foregoing allegations. Plaintiff must allege that (1) he is a dependent adult and defendant had the responsibility for his care; (2) defendant knew of conditions making plaintiff unable to care for his own basic needs; and (3) defendant denied necessary goods and services to plaintiff. Plaintiff’s SAC currently makes allegations that imply defendant has denied him goods and services and that he is a dependent adult, but has failed to particularly allege defendant’s duty to care for plaintiff, defendant’s knowledge of plaintiff’s inability to meet his own basic needs, and the specific causation and damages incurred; plaintiff has also failed to identify those claims for abuse of a dependent adult that are timely filed based upon the facts asserted in the SAC. Plaintiff should be given leave to amend his SAC to state such facts.

C. Conversion

“‘Conversion is the wrongful exercise of dominion over the property of another.’” (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451.) The elements of a claim for conversion are (1) “the plaintiff’s ownership or right to possession of the property at the time of the conversion,” (2) “the defendant’s conversion by a wrongful act or disposition of property rights,” and (3) damages. (*Ibid.*) “It is not necessary that there be a manual taking of the property,” only “an assumption of control or ownership over the

property, or that the alleged converter has applied the property to his [or her] own use.” (*Id.* at pp. 451–452.)

Here, plaintiff has alleged that defendant has wrongfully taken title to a cemetery plot and wrongfully taken possession of numerous items of personal property, including items of sentimental and pecuniary value that belonged to plaintiff. In order to state a claim, plaintiff is not required to enumerate every single item defendant is alleged to have taken. Rather, a complaint will be upheld against demurrer if it pleads facts sufficient to put defendant on notice of the issues sufficient to enable defendant to prepare a defense. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549–550.) Thus, plaintiff only need plead facts necessary to ““““acquaint a defendant with the nature, source, and extent of his claims.”””” (*Id.* at p. 550.) Here, plaintiff has alleged that defendant has taken and wrongfully disposed of numerous items of plaintiff’s personal property, including household items, personal items, and collectible items.

With respect to the cemetery plot, the transfer of a cemetery lot does not convey title but merely an interest to be used exclusively for the purpose of burial. (*Pomona etc. Assn. v. Bd. of Suprs.* (1942) 49 Cal.App.2d 626, 630; *Hollywood Cemetery Assn. v. Powell* (1930) 210 Cal. 121, 127 [holders of cemetery plots are not holders in fee].) Thus, a cemetery plot is in the nature of a license for the use of realty and as such is not personal property subject to a conversion. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295 [tort of conversion applies to personal property not real property].) Plaintiff’s cause of action for conversion of the plot therefore fails.⁴

⁴ Although plaintiff cannot state a cause of action for conversion, that does not mean plaintiff has no rights in the cemetery plot. With respect to a cemetery plot, “[a]ll plots conveyed to individuals are presumed to be the sole and separate property of the owner named in the instrument of conveyance.” (Health & Saf. Code, § 8600.) “The spouse of an owner of any plot containing more than one internment space has a vested right of interment . . . in the plot.” (Health & Saf. Code, § 8601.) In addition, cemetery property held in joint tenancy automatically belongs to the surviving owner: “a conveyance to two or more persons as joint tenants [gives] each joint tenant . . . a vested right of interment in the plot conveyed.” (Health & Saf. Code, § 8625.) If the plot is a

D. Negligence

“The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff’s injury. [Citation.]’ [Citation.]” (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.) Plaintiff has not alleged any duty defendant owed to him, other than those duties that may be owed under the Elder Abuse Act. Thus, the court’s sustaining of defendant’s demurrer to plaintiff’s negligence claim was proper.

E. Negligent or Intentional Infliction of Emotional Distress

To recover on a claim for intentional infliction of emotional distress, the plaintiff must demonstrate (1) outrageous conduct by the defendant, (2) directed at the plaintiff with the intent of causing extreme emotional distress, (3) causing severe emotional distress to the plaintiff, and (4) plaintiff’s severe or extreme emotional distress. (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Outrageous conduct is conduct which exceeds the bounds of that usually tolerated in civilized society. Such conduct must be directed at the plaintiff or occur in the plaintiff’s presence. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Here, plaintiff has pleaded facts sufficient to constitute extreme and outrageous conduct in defendant’s continued pattern over a period of years of disregarding plaintiff’s physical and emotional well-being and plaintiff’s property rights: Plaintiff has alleged that defendant behaved outrageously in selling plaintiff’s personal property without his permission; deprived plaintiff of the use

family plot (see Health & Saf. Code, § 8650, subd. (a)), a complicated procedure is specified to determine who (from an array of spouses, parents, children, in-laws, and heirs) is entitled to use the remaining spaces. (Health & Saf. Code, §§ 8651–8653.) From the facts pleaded here, we cannot determine the nature of the cemetery plot at issue, although from plaintiff’s statements at oral argument it appears that the plot at issue contains more than one interment space, and thus may or may not be held in joint tenancy or a family plot. Plaintiff may or may not, under the foregoing statutes, have a right to interment in the plot, but the actions of defendant Collela cannot divest plaintiff of that right under the foregoing statutes.

of the necessities of life by depriving plaintiff of utilities, food, and shelter; and defendant engaged in a repeated pattern of severely verbally abusing plaintiff.

Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) Damages for emotional distress are recoverable only if the defendant has breached a duty to the plaintiff. This independent duty may be imposed by law, assumed by the defendant, or exist by virtue of a special relationship between the parties. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984–985.) Here, because plaintiff cannot state a claim for negligence, his claim for negligent infliction of emotional distress also fails.

F. Statute of Limitations

Defendant argues that plaintiff's claims in the SAC for negligence, conversion of the cemetery plot, conversion of plaintiff's car, and emotional distress are barred by the applicable statutes of limitations, and do not relate back to the filing of the original complaint. In particular, defendant contends the original complaint was filed February 28, 2007, and plaintiff's SAC added new allegations that do not relate back: (1) defendant's allegedly wrongful sale of plaintiff's vehicle in May 2004, which was more than three years prior to the filing of the SAC in December 2009, and (2) the conversion of the cemetery plot, which was given to plaintiff in 1977, and which plaintiff demanded on unspecified dates that defendant return to plaintiff.

A claim for conversion must be brought within three years of the date of the conversion. (Code Civ. Proc., § 338, subd. (c)(1).) The statute begins to run at the time of the wrongful taking of the property, unless the defendant "fraudulently conceals the relevant facts or where the defendant fails to disclose such facts in violation of [a] fiduciary duty [owed] to the plaintiff." (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.) An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not relate back to an earlier, timely-filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment: "(1) rests on the same general set of facts[;]

(2) involves the same injury[;] and (3) refers to the same instrumentality” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408–409, italics omitted.)

However, the statute of limitations is an affirmative defense on which the defendant has the burden of proof, and the defendant must adduce facts necessary to benefit from a statute of limitations. (*Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519, 1533.) Here, plaintiff’s original complaint is not part of the record on appeal; defendant has not sought to augment the record to include plaintiff’s complaint. Thus, we cannot determine whether the allegations of the SAC added a new claim regarding plaintiff’s car that would not relate back to the filing of the original complaint, and we reject defendant’s statute of limitations defense. As we have concluded the cemetery plot cannot be the subject of a conversion and plaintiff has not stated a cause of action for negligence, we need not address the statute of limitations issue with respect to those claims.

G. Malice and Oppression

Plaintiff’s claim for “malice and oppression” is an attempt to state a request for punitive damages based upon defendant’s intentional conduct that was undertaken with malice, fraud, and oppression. Civil Code section 3294 permits an award of punitive damages “for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” (Civ. Code, § 3294, subd. (a).) Punitive damages are awardable on a plaintiff’s elder abuse, conversion, and intentional infliction of emotional distress claims. (See Civ. Code, § 3294, subd. (a); Welf. & Inst. Code, § 15657.5, subd. (b).)

DISPOSITION

The judgment of the superior court is reversed with respect to plaintiff's abuse of dependent adult, conversion of certain items of personal property (excluding the cemetery plot), and intentional infliction of emotional distress claims; plaintiff shall be permitted to amend his complaint to state those claims, as well as a request for punitive damages. In all other respects, the judgment is affirmed, and the matter is remanded for proceedings in accordance with this opinion. Appellant is to recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

MALLANO, P. J.

Rothschild, J., concurring and dissenting:

I concur in the majority's determination that the superior court abused its discretion by striking the (December 2009) second amended complaint as untimely. I also concur in the majority's determinations that the demurrer should have been overruled as to the claim for conversion of personal property and that the demurrer was correctly sustained as to the claims for conversion of the cemetery plot, negligence, and negligent infliction of emotional distress. I respectfully dissent, however, from the majority's opinion concerning the claims for abuse of a dependent adult and intentional infliction of emotional distress.

Plaintiff has already amended his complaint no less than twice. On appeal, plaintiff does not contend that he asked the trial court to grant him leave to amend again, does not contend that the trial court should have granted him leave to amend, does not ask us to grant him leave to amend, and does not attempt to carry (let alone succeed in carrying) his burden of showing that he could cure the defects in his complaint if granted leave to amend. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Moreover, plaintiff's opposition to the demurrer affirmatively demonstrates that in the trial court he did not seek leave to amend and, on the contrary, contended only that the second amended complaint was sufficient. Leave to amend consequently is not an issue on appeal, and we should not instruct the trial court to grant plaintiff leave to amend with respect to any of his claims.

I also disagree with the majority's conclusion that defendant's alleged conduct is sufficiently "outrageous" to state a claim for intentional infliction of emotional distress.

I would therefore reverse as to only the claim for conversion of personal property.

ROTHSCHILD, J.