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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

DIVISION SIX SPORTS, INC., Plaintiff and Appellant, v. TARGET CORPORATION et al., Defendants and Respondents.	B285698 (Los Angeles County Super. Ct. No. BC619646)

APPEALS from judgments of the Superior Court of Los Angeles, Stephanie M. Bowick, Judge. Affirmed.

Law Offices of Mark E. Goodfriend and Mark E. Goodfriend for Plaintiff and Appellant.

Morrison & Foerster, David F. McDowell and Virginia M. Choi for Defendant and Respondent Target Corporation.

Lewis Brisbois Bisgaard & Smith, Craig Holden, Jeffry A. Miller, and Mason T. Smith for Defendant and Respondent Creative Artists Agency.

On appeal, plaintiff Division Six Sports, Inc. (Division Six) challenges a judgment of dismissal in favor of defendant Target Corporation (Target) following the trial court's sustaining of Target's demurrer to plaintiff 's third amended complaint, specifically Division Six's claim for interference with contract. Division Six concedes that the third amended complaint did not state a viable claim against Target and that the trial court did not err in sustaining the demurrer. It contends, however, that a fifth amended complaint attached as an appendix to its opening brief demonstrates an ability to amend the cause of action for interference with contract and that the trial court erred in not allowing Division Six to amend.

For the reasons detailed below, Division Six has failed to demonstrate any such error. First, the record is clear that Division Six dismissed its interference cause of action before the trial court ruled and that it did so voluntarily. Accordingly, Division Six did not preserve the challenge for appeal. Second, Division Six describes the claims in its fifth amended complaint as entirely new, and independent and separate from the claims in its third amended complaint. This admission is fatal because to assert such new matter as a basis for error, Division Six would have had to seek leave from the trial court to file the fifth amended complaint. It did not do so. It cannot remedy that failure merely by attaching its proposed amended complaint as an over-sized appendix to its opening appellate brief.

Division Six also challenges as excessive the costs awarded to defendant and respondent Creative Artists Agency (CAA) after the trial court sustained CAA's demurrer to Division Six's third amended complaint. Division Six did not challenge these costs in the trial court and has thus forfeited the issue on appeal. It also

fails to provide any analysis of the costs to support its claims of excessiveness.

BACKGROUND

On May 6, 2016, Division Six sued Shaun White, Shaun White Enterprises, Inc. (SWE), CAA, and Target. This timely appeal involves only CAA and Target.[1]

We provide context for our conclusions herein by summarizing Division Six's allegations in its latest pleading before the trial court (the third amended complaint). In 2010, Division Six and SWE entered into a license agreement that granted Division Six "an exclusive license to use White's approved name, likeness, photographs, image, voice, facsimile signature, copyrights, logos, trademarks, rights of publicity and other indicia associated with White." As part of the license agreement, SWE represented that the license agreement did not violate any of SWE's or White's contractual obligations. In contravention of this representation, SWE or White had obligations to Target, and the obligations required Division Six to alter its "sales strategy."

Also according to Division Six, SWE assured Division Six that White's agreement with Target "contained an 'antidumping/markdown' provision that would prevent Target from selling the SWSC [Shaun White Supply Co.] products at a lower price." After Division Six sold Target products related to

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[1] On January 23, 2019, this court dismissed a consolidated appeal (case No. B290380) as to Shaun White. In its opening brief, Division Six acknowledges that it abandoned its appeal against White.

White, Target marked down the products and sold them on sale in violation of the purported antidumping provision.

Division Six filed its original complaint on May 6, 2016; it included a cause of action for interference with contractual relations. According to Division Six, before a responsive pleading was filed, Division Six filed a first amended complaint. The trial court sustained Target's demurrer to the first amended complaint with leave to amend. The trial court permitted Division Six to "amend the complaint to allege facts as to why the interference claims are not time-barred." Subsequently, the trial court sustained Target's demurrer to the second amended complaint with leave to amend. Division Six filed a third amended complaint, which is the subject of this appeal.[2]

1. Third Amended Complaint

In its third amended complaint, Division Six alleged causes of action for breach of contract, breach of good faith and fair dealing, fraudulent inducement, misrepresentation, negligent misrepresentation, intentional interference with a prospective economic advantage, negligent interference with a prospective economic advantage, interference with a contractual relationship, and two counts of breach of contract.

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[2] Division Six filed a fourth amended complaint on November 8, 2018. That complaint asserted causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Neither Target nor CAA is identified as a defendant to either cause of action in the fourth amended complaint. As noted, this appeal is from the judgment following the order dismissing the third amended complaint.

The cause of action for intentional interference with a contract, identified as the eighth cause of action, included Target as a defendant. In that cause of action, Division Six alleged that White's and SWE's "Endorsement Deal with Target significantly restrict[s] or impair[s] SWE's ability to perform, in good faith, all of its obligations and duties under the terms, conditions and provisions of the Agreement" between SWE and Division Six. Division Six alleged that Target sold merchandise at a lower price than the minimum price promised to Division Six.

According to Division Six, "[t]he gravamen of the eighth cause of action for intentional interference with contract . . . was that Target interfered with D6's [Division Six's] business and relationship with SWE by marking down and 'dumping' products at low prices, in effect 'killing' the market for distribution by D6 [Division Six] to other retailers."

Although Division Six asserted other causes of action against Target in its third amended complaint, on appeal Division Six challenges *only* the denial of leave to amend its cause of action for interference with contract. Therefore, we need not summarize the allegations relevant to the other causes of action.

2. Target's Demurrer to the Third Amended Complaint

Target demurred to the third amended complaint. Target argued that the cause of action for intentional interference with a contract was barred by the statute of limitations.

In its written opposition to the demurrer, Division Six argued that "Target's actions of engaging in extreme markdown of 'SWSC products' effectively dumped Plaintiff 's goods into the market place and deprived Plaintiff of the benefit of its contractual relationship with SWE. Target's actions were

motivated, designed to and did eliminate Plaintiff 's ability to compete with SWE's products offered by Target. Target's actions are proscribed by the anti-dumping provisions of Target's Endorsement Agreement with SWE." Division Six did not discuss the statute of limitations.

At the hearing on Target's demurrer, Division Six's counsel indicated that it was pursuing only the breach of contract cause of action against Target—the tenth cause of action. It stated that it was dismissing the other causes of action against Target, including intentional interference with contract. The trial court confirmed counsel for Division Six's representations as follows: "So we are only talking about . . . breach of contract against Target[ ] cause of action number ten?" Division Six's counsel responded, "Correct, Your Honor." The court again inquired, asking: "And no other causes of action; right?" Division Six's counsel responded, "That is correct, Your Honor." Target's counsel later stated that the cause of action for intentional interference was "now out." Although by declaration of counsel Division Six sought leave to amend some causes of action in the third amended complaint, it did not seek leave to amend its cause of action for intentional interference with contract.

The trial court sustained Target's demurrer to the third amended complaint without leave to amend. The trial court found the statute of limitations barred Division Six's claim for intentional interference with a contract—albeit plaintiff had dismissed that claim. It also found "Plaintiff stated at the hearing that it now abandons all current allegations in the Third Amended Complaint against Target, conceding there was no anti-dumping or markdown control provision in the Endorsement Deal that prohibited Target from selling SWSC products at a

discount price." The trial court thus concluded that Division Six could not state a breach of contract claim based on the endorsement deal. As noted above, Division Six does not challenge this ruling on appeal. The trial court subsequently entered judgment in favor of Target.

On appeal, Division Six recognizes that it was "obvious to and known by D6 [Division Six] what Target had done in 2012, more than three years before this action was commenced on May 6, 2016." Thus, Division Six acknowledges that the cause of action in the third amended complaint for intentional interference with contract was barred by the statute of limitations.

3. Creative Artists Agency

CAA represented White in connection with the licensing agreement. The trial court sustained CAA's demurrer to the third amended complaint without leave to amend. Division Six unsuccessfully moved for a new trial, arguing that there was sufficient evidence to support a cause of action against CAA. In its motion for a new trial, Division Six identified no error in the trial court's sustaining the demurrer without leave to amend as to Target. On appeal, Division Six challenges only costs awarded to CAA in the amount of $17,660.45 as excessive. This was the full amount CAA requested, a request Division Six did not oppose below.

STANDARD OF REVIEW

Our review is from the judgment following the order dismissing the third amended complaint. We accept the "well-pleaded" factual allegations in the third amended complaint. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

" ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " (*Ibid.*)

An order sustaining a demurrer "must be upheld if the demurrer is sustainable on any of the grounds upon which it was based." (*Franchise Tax Board v. Firestone Tire & Rubber Co.* (1978) 87 Cal.App.3d 878, 883.) "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a).) Based on Code of Civil Procedure section 472c, subdivision (a), a plaintiff does not waive the right to argue on appeal it should have received leave to amend even if the plaintiff did not request leave to amend in the trial court. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 411.)

DISCUSSION

For the first time on appeal, Division Six proffers a fifth amended complaint, which includes a cause of action against Target for intentional interference with contractual relations. Division Six asserts that the "cause of action being asserted now [on appeal] . . . is completely different from the cause of action by the same name" in the operative pleading underlying the trial court's dismissal order. The fifth amended complaint attached to Division Six's opening appellate brief contains multiple causes of action. Because the only issue Division Six asserts on appeal is error in not letting it amend the interference cause of action in

the third amended complaint, we limit our discussion to that cause of action.

Division Six represents that its new interference cause of action would be based on agreements Division Six obtained in 2018, after it filed the original complaint in this litigation. Division Six seeks to allege for the first time that Target interfered with Division Six's relationship with SWE by entering into an agreement in 2012 with SWE. On appeal, Division Six states it had knowledge that SWE had breached its contract with Division Six but lacked knowledge that "Target induced SWE to" breach its contract with Division Six.

A. Division Six Abandoned Its Cause Of Action For Intentional Interference With Contract, Leaving Nothing To Review On Appeal

At the hearing on Target's demurrer to the third amended complaint, Division Six dismissed its cause of action against Target for intentional interference with contract. In its ruling, the trial court stated that Division Six "now abandons all current allegations in the Third Amended Complaint against Target, conceding there was no anti-dumping or markdown control provision in the Endorsement Deal that prohibited Target from selling SWSC products at a discount price."

An issue abandoned in the trial court cannot be raised on appeal.[3] (*Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 969

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[3] This court requested supplemental briefing on whether Division Six could appeal from the denial of leave to amend a cause of action that Division Six voluntarily dismissed. Division Six did not argue that the dismissal was not " ' "really voluntary," ' " which could have been an exception to the rule that voluntary dismissal of a complaint does not result in

["one cannot raise on appeal material issues which he abandons at the trial level as a matter of strategy and purely for his own advantage"].) "Having consented to the judgment of dismissal, [Division Six] may not appeal therefrom." (*Delagrange v. Sacramento Sav. & Loan Assn.* (1976) 65 Cal.App.3d 828, 831.)

B. Division Six Cannot File A Fifth Amended Complaint For The First Time On Appeal

Division Six concedes on appeal that "the TAC [third amended complaint] did not state a viable tort claim against Target," and the trial court did not err in sustaining the demurrer to the third amended complaint. Its only contention on appeal is that the trial court erred in not granting leave to amend the third amended complaint.

In its reply brief, Division Six states that "the entire" cause of action for intentional interference with contract alleged in the purported fifth amended complaint "is new." Division Six describes the cause of action in its purported fifth amended complaint as "separate," "independent," and arising from a different " 'primary right.' " According to Division Six, it learned new information after it filed this lawsuit.

Pleading new matter is not amending a prior complaint, but instead, constitutes a different or supplemental complaint.

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an appealable judgment. (See *Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 935.) That exception would not apply here anyway. Division Six dismissed its interference cause of action before the trial court ruled, and the record supports only one conclusion—that Division Six voluntarily dismissed that cause of action. The trial court also expressly confirmed that it was Division Six's decision to dismiss its interference cause of action.

(*O'Keefe v. Atascadero County Sanitation Dist.* (1971) 21 Cal.App.3d 719, 731, fn. 15 [alleging facts occurring after petition was filed would not 'amend' the complaint. Rather, it would constitute a 'supplemental' or different complaint in substitution of the original"].) To assert a "completely different" cause of action, Division Six had to obtain permission from the trial court to allege a new cause of action. (See *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329.) It did not do so. Had Division Six requested leave in the trial court to file a fifth amended complaint containing what Division Six has admitted was a new claim, this court would have been tasked with reviewing whether the trial court properly exercised its discretion when it denied leave to amend. (*Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 245.) Here, Division Six did not request leave to add a "completely different" claim. Given Division Six's admission that the fifth amended complaint did not merely amend claims in the third amended complaint, Division Six is precluded from asserting that the trial court erred in not granting leave to amend an entirely different complaint.

Although Division Six attached a purported fifth amended complaint to its opening brief on appeal, Division Six fails to show that the complaint was properly filed. An attachment to a brief may include materials in the appellate record. (Cal. Rules of Court, rule 8.204(d).) The purported fifth amended complaint cannot be part of the appellate record because Division Six did not file it in the trial court, let alone request permission to do so. Moreover, the attachments to a brief may not exceed 10 pages (*ibid*), and Division Six's proposed fifth amended complaint is 32 pages long. In sum, Division Six fails to cite legal authority

for the proposition that it can file a new complaint that is "completely different" for the first time on appeal let alone merely by attaching the new pleading as an appendix to an opening brief. As noted above, the authority is to the contrary.

C. Division Six Forfeited Its Challenge To CAA's Costs

In the trial court, CAA filed a memorandum of costs seeking $17,660.45 in costs. Division Six did not file a motion to tax costs. The trial court awarded CAA the requested costs.

On appeal for the first time, Division Six challenges the costs awarded to CAA. Its entire argument is as follows: "More than 90% of the costs are clearly unrecoverable under C.C.P. § 1033.5; see *Ladas v. California State Auto. Assn.* (2007) 19 Cal.App.4th 761" (*Ladas*). Division Six does not identify which of the costs it is challenging. Division Six's opening brief provides no analysis of why *Ladas* purportedly applies.

It does not apply. *Ladas* involved an appeal from the trial court's denial of a party's motion to tax costs." (*Ladas*, *supra*, 19 Cal.App. 4th at p. 766.) Here, Division Six did not file a motion to tax costs. By failing to file a motion to tax cost, Division Six is deemed to have consented to the correctness of the costs. (*Jimenez v. City of Oxnard* (1982) 134 Cal.App.3d 856, 859.) Division Six did not raise the issue in the trial court in any fashion and thus forfeited its challenge to the cost award on appeal. (*Litt v. Eisenhower Medical Center* (2015) 237 Cal.App.4th 1217, 1224.)

DISPOSITION

The judgment in favor of Target Corporation is affirmed. The judgment in favor of Creative Artists Agency is affirmed. Target Corporation and Creative Artists Agency are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

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