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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN S. KARLS,

Plaintiff and Appellant,

v.

WACHOVIA TRUST COMPANY OF
CALIFORNIA et al.,

Defendants and Respondents.

A126669

(San Francisco County
Super. Ct. No. CGC-09-487535)

JOHN S. KARLS,

Plaintiff and Appellant,

v.

WELLS FARGO & COMPANY,

Defendant and Respondent.

A126671

(San Francisco County
Super. Ct. No. CGC-09-486175)

In these two consolidated appeals, plaintiff John S. Karls appeals from the orders of the trial court sustaining a demurrer of defendants Wachovia Trust Company of California et al., (Wachovia), and a motion for judgment on the pleading brought by defendant Wells Fargo & Company (Wells Fargo). We affirm.

ALLEGATIONS OF THE COMPLAINT AND PROCEDURAL BACKGROUND

On May 1, 2009, plaintiff filed his first amended complaint (FAC) against defendant Wells Fargo.

On June 15, 2009, plaintiff filed a virtually identical FAC against Wachovia and 17 affiliates of Wachovia.

The FAC's state a single claim for conversion, alleging that defendants made use of confidential and proprietary "intellectual property" belonging to plaintiff. The FAC's describe this property, in general, as "a 'Product' defined as 'an idea' the plaintiff invented for which 'with development and implementation' third parties would be willing to provide a financial reward" More precisely, "the property was the idea that two different groups of companies could claim a tax advantage from combining the separate income taxes that each would otherwise pay on a portion of their income into a single tax for which both could claim benefit." To secure this advantage, the parties would create a "joint structure [that] would be subject to income tax in two different jurisdictions, one of which would grant a credit (or tax reduction) for the tax paid to the other jurisdiction."

By some means not alleged in the FAC's, defendants came upon plaintiff's idea and used it to obtain foreign tax credits. Plaintiff seeks compensatory damages in the amount of tax credit that defendants have been and will be able to claim as a result of their use of plaintiff's idea, as well as punitive damages equal to three times the amount of compensatory damages. Attached to both FAC's is a copy of a newspaper article published by the Wall Street Journal on June 30, 2006. The article describes how plaintiff's alleged idea had been used by Barclays Capital Limited in various deals with nine other financial institutions.

On June 2, 2009, Wells Fargo filed an answer to the FAC.

On July 15, 2009, Wachovia filed a demurrer to the FAC, and Wells Fargo filed a motion for judgment on the pleadings. The defendants argued the FAC's were barred by the applicable statute of limitations and that they failed to properly state a cause of action for conversion.

On August 20, 2009, the trial court granted the defendants' motions without leave to amend. These consolidated appeals followed.

DISCUSSION

I. Standard of Review

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, the reviewing court assumes the truth of all facts properly pleaded by the

plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We do not assume the truth of “ “contentions, deductions or conclusions of fact or law. . . .” [Citation.] . . .” [Citation.]” (*Evans, supra*, at p. 6.) We may also consider exhibits attached to the complaint. (*Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.) We review the trial court’s action de novo and exercise our own independent judgment whether a cause of action has been stated under any legal theory. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)¹ We review the court’s refusal to allow leave to amend under the abuse of discretion standard. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

II. Principles of Appellate Review

We first observe it is a fundamental principle of appellate review that “A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Because error is never presumed, it is every appellant’s duty to demonstrate error *in the record* the appellant produces before the reviewing court. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704.)

We note that plaintiff’s opening brief fails to provide citations to the record on appeal. “It is incumbent upon the parties to an appeal to cite the particular portion of the record supporting each assertion made. It should be apparent that a reviewing court has no duty to search through the record to find evidence in support of a party’s position.” (*Williams v. Williams* (1971) 14 Cal.App.3d 560, 565.) To that end, California Rules of Court, rule 8.204(a)(1)(C), provides that a brief must “Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” While the size of the record in this case is relatively modest, it does not excuse

¹ We also review de novo a trial court’s judgment on an order granting a motion for judgment on the pleadings. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.)

plaintiff's failure to provide proper citations. Despite these deficiencies we will consider plaintiff's arguments on their merits.

III. The Complaint Fails to State a Claim for Conversion

A. Elements of conversion

Conversion is generally described as the wrongful exercise of dominion over the personal property of another. (*Gruber v. Pacific States Sav. & Loan Co.* (1939) 13 Cal.2d 144, 148.) The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

B. The tort of conversion does not apply to ideas

Defendants assert the FAC's are subject to dismissal because they are based on conversion of an idea only, and because they do not allege how defendants have substantially interfered with plaintiff's dominion over his own idea. We agree plaintiff has not stated a claim for conversion because such claim cannot be asserted for the misappropriation of an idea.

Traditionally, a claim for conversion arose out of the wrongful control of tangible property capable of identification and taken into actual possession. (*Payne v. Elliot* (1880) 54 Cal. 339, 340.) While over time the tangibility requirement has been relaxed somewhat, " "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible. [Citations.] And Dean Prosser has cautioned against scuttling conversion's tangibility requirement altogether, recommending instead the use of other remedies to protect intangible interests. [Citation.]' " (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119–120, citing *Thrifty-Tel., Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1565.)

In *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779 (*Melchior*), an author brought an action against the assignee of the film production company to which he had optioned his rights to *Lost in Space*, a motion picture based on

his story. (*Id.* at pp. 783–784.) He alleged causes of action for breach of contract, declaratory relief and accounting, conversion, and unjust enrichment. (*Id.* at p. 785.) The Court of Appeal held the plaintiff could not state a claim for conversion of the idea upon which the movie was based, stating: “The tort of conversion does not apply to ideas. [Citations.] Moreover, the courts have held that copyright protection does, in fact, extend to ideas. [Citation.] [The plaintiff] thus has no cause of action for conversion based upon defendant’s use of his ideas.” (*Id.* at p. 793.)

Similarly, in *Dielsi v. Falk* (C.D.Cal. 1996) 916 F.Supp. 985 (*Dielsi*), the plaintiff sought to state a cause of action for conversion based upon the defendants having converted his script to produce an episode of the *Columbo* television series. The court first noted that, “Generally, the copying and distribution of literary intangible property does not state a claim for conversion.” (*Id.* at p. 992.) This is because conversion requires interference with tangible rather than intangible property. Interference with intangible property, such as a script, would generally constitute plagiarism or misappropriation, rather than conversion. (*Ibid.*)

Plaintiff contends the subject of his lawsuit is properly brought as a claim for conversion because it “is too complicated to be comprehended ‘separate and apart from the paper on which it is written or the physical substance in which it is embodied.’ ”² By this assertion, he seeks to distinguish his claim from the claims that were dismissed in *Melchior* and *Dielsi*. He contends his tax-saving concept, like Leonardo da Vinci’s painting *The Mona Lisa*, is an “intangible idea” that cannot be understood without reference to the tangible written presentation that he prepared prior to defendant’s alleged conversion.

We find plaintiff’s analogy to *The Mona Lisa* to be inapt. Plaintiff’s FAC’s explicitly identify the property at issue as an “idea.” Yet under *Melchior*, an idea does not qualify as property subject to conversion. This holds true even if the idea is reduced

² The FAC’s state that plaintiff’s product “had to be ‘in the form of a written presentation, stating the accounting or tax benefit intended to be achieved, the transaction steps to be implemented, and the accounting or tax technical analysis’ accompanied by diagrams.”

to a writing. For example, it has been held that one cannot suffer conversion of the blueprints of a boat where the gravamen of the action was based on the boat architect's creative idea or design:³ "It is apparent that the plaintiffs in the instant action were not seeking to recover the value of the particular items of personal property in defendants' possession but were seeking to recover damages for the value of a creative design allegedly appropriated by defendants. Plaintiffs made no attempt whatever to establish that the personal property in defendants' possession, consisting of one set of plaintiffs' plans, was of any value in itself. It may be inferred from the evidence that the value of one set of plans would be equal to the printing costs. Plaintiffs likewise made no attempt to show that they suffered any detriment from the loss of the one set of plans. The gravamen of plaintiffs' cause of action was the allegedly wrongful appropriation by defendants of a creative idea or design. The trial court was obviously correct in holding that the case should be submitted to the jury solely on the theory of copyright infringement and not on the conversion count." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 279 (*Oakes*).

In sum, while an action for conversion may be entirely appropriate in the context of paintings and other tangible mediums of artistic expression, under the rationales of *Oakes* and *Melchior* the tort is not available to plaintiffs suing for infringement on their intellectual property rights, regardless of whether the concepts at issue have been memorialized in a writing.

C. The FAC's do not allege substantial interference

As noted above, the tort of conversion also requires a plaintiff to allege that his or her property rights have been substantially interfered with. Defendants correctly observe there can be no substantial interference with plaintiff's right to his own written presentation because he still retains the presentation and the ideas behind it.

³ Plaintiff's reliance on Evidence Code section 412, for the proposition that defendants have failed to present the best evidence as to whether the "written presentation" specified in his FAC's comprises personal property that could be the subject of a conversion action, is misplaced. Courts considering demurrers and motions for judgment on the pleadings already assume that all factual allegations in the complaint are true.

The gist of a conversion action is “the wrongful interference with the owner’s right of dominion and possession of his property.” (*Chatterton v. Boone* (1947) 81 Cal.App.2d 943, 946.) To state a claim for conversion, a plaintiff must allege an intention on a defendant’s part to “ ‘convert the owner’s property, or to exercise some act of ownership over it, or to prevent the owner’s taking possession of his property. [Citation.]’ [Citations.]” (*Simonian v. Patterson* (1994) 27 Cal.App.4th 773, 782.)

Even if plaintiff had identified a form of “property” susceptible to conversion, the FAC’s contain no allegations as to how defendants substantially interfered with his own use or possession of the property in issue. His complaints essentially relate that his corporate tax strategy was utilized by defendants, but nothing more. He never alleges how any of the defendants substantially interfered with his own use or possession of this corporate tax-reduction concept. Failure to allege substantial interference with possession or right to possession permits rejection of the conversion claim. (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 550.)

Before leaving this discussion of conversion, we must address a suggestion made by appellant during oral argument that this claim is really one of misappropriation of trade secrets. Appellant’s FAC’s only refer to the tort “conversion,” and his opening and reply briefs focus only on the cause of action for conversion. Furthermore, the cases he cites involve the application of conversion to particular facts. Because appellant failed to exercise the opportunity to raise this issue in the trial court, and failed to brief it, he cannot raise it for the first time during oral argument. (See *Estate of Westerman* (1968) 68 Cal.2d 267, 279.)

D. Federal copyright preemption

Continuing with his artwork analogies, plaintiff likens his written presentation to an original and copies of a Rembrandt etching stolen by the Nazis during the Holocaust. He claims he has possessory rights to all copies of his report, including the ones defendants allegedly converted. The trial court correctly perceived that to the extent plaintiff argued defendants had wrongfully reproduced his written reports, the FAC’s

were properly understood as alleging claims based on the federal Copyright Act (17 U.S.C. § 101–1332).

Literary works are subject to copyright protection. (17 U.S.C. § 102(a).) Section 106 of the Copyright Act confers upon copyright owners the exclusive rights to reproduce, to distribute, and to display original works of authorship, and to prepare works derived from the originals. (17 U.S.C. § 106.) Section 106 also gives copyright owners the exclusive right to authorize such reproduction, distribution, display, and preparation. (*Ibid.*)

Federal courts enjoy exclusive jurisdiction over disputes concerning copyright law. (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1338; 17 U.S.C. § 301(a).) State law copyright claims are thus preempted. “[F]or preemption to occur under the Act, two conditions must be met: first, the subject of the claim must be a work fixed in a tangible medium of expression and come within the subject matter or scope of copyright protection as described in section 102 and 103 of 17 United States Code, and second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106.” (*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1919.) “If the act of reproduction, performance, distribution or display will *in itself* infringe the state-created right, then such right is preempted.” (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520.) “ ‘To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights. The state claim must have an extra element which changes the nature of the action.’ [Citations.]” (*Laws v. Sony Music Entertainment, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1143.)

Relying on *Gladstone v. Hillel* (1988) 203 Cal.App.3d 977 (*Gladstone*), plaintiff claims his lawsuit contains the “extra element” that negates federal copyright preemption. We are not persuaded.

In *Gladstone*, the defendants had taken the plaintiff’s unique jewelry molds, claiming they were collateral for the plaintiff’s alleged debt, and changed the locks to the his jewelry workshop. (*Gladstone, supra*, 203 Cal.App.3d 977, 984–985.) The plaintiff successfully sued for equitable relief to recover possession of his molds, and for damages

based on theories of conversion and fraud. (*Id.* at p. 981.) The appellate court found the conversion claim was not preempted by the Copyright Act: “Under the extra element test, it is clear that federal copyright law does not preempt state causes of action alleging fraud or conversion—the two theories pleaded in the complaint. Fraud involves ‘the extra element of misrepresentation.’ [Citation.] Conversion entails the ‘wrongful possession of the tangible embodiment of a work.’ [Citations.]” (*Gladstone, supra*, at p. 987.)

We have already concluded plaintiff has not stated a proper claim for conversion. We also agree with the trial court that plaintiff’s claims fall squarely within the confines of the federal Copyright Act. In the FAC’s, plaintiff attempted to assert a conversion claim based on the allegation that he had reduced a creative idea to a tangible writing that others wrongfully used, reproduced or distributed. Because the report was an original work of authorship, fixed in a tangible medium, and manifesting plaintiff’s creativity, the conditions for preemption are satisfied. (See *Melchior, supra*, 106 Cal.App.4th 779, 791–792; and *Dielsi, supra*, 916 F.Supp. 985, 992.)

IV. Statute of Limitations

As noted above, the Wall Street Journal article attached to both of plaintiff’s FAC’s was published on June 30, 2006. The initial complaints in these actions were filed on March 16, 2009, and April 20, 2009, more than two years after the article was published. The trial court concluded the appropriate statute of limitations is California’s two-year limit on actions involving interference with intangible, incorporeal rights, including intellectual property rights such as copyrights. (Code Civ. Proc., § 339, subd. (1).)

Plaintiff concedes that if his conversion theory involves intangible property, the two-year statute of limitations period will apply. He maintains, however, that the three-year statute of limitations for actions for tangible property under Code of Civil Procedure section 338, subdivision (c) applies and therefore his claim is not barred.⁴ We disagree.

⁴ This subdivision provides for a three-year limitations period for “An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. . . .” (Code Civ. Proc., § 338, subd. (c).)

In *Italiani v. Metro-Goldwyn-Mayer Corp.* (1941) 45 Cal.App.2d 464, the appellate court upheld dismissal of a complaint against a motion picture corporation where the cause of action arose out an alleged plagiarism of a movie plot. The ground for the dismissal was the expiration of the two-year statute of limitations under Code of Civil Procedure section 339, subdivision (1) for actions based on interference with intangible property rights. (*Italiani*, at pp. 466–467; see also *Simplicity Pattern Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 900, 906, overruled on other grounds in *Navistar Internat. Transportation Corp. v. State Bd. of Equalization* (1994) 8 Cal.4th 868, 877, fn. 4, and *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1206–1207.)

Plaintiff claims his corporate tax strategy was not just an intangible idea, but also took the form of a written presentation and thus was tangible property that would be subject to the three-year limitations period. We have already determined plaintiff’s complaint does not state a claim for conversion because it is based on an intangible idea. Thus, the action is governed by the two-year limitation period provided in Code of Civil Procedure section 339, subdivision (1). Accordingly, the FAC’s are also subject to dismissal because the lawsuits were initiated after the two-year limitation period expired.

V. Denial of Leave to Amend

As we have concluded that plaintiff’s conversion claim fails for multiple reasons, we find the trial court did not abuse its discretion in denying leave to amend the FAC’s.

DISPOSITION

The judgments are affirmed.

Dondero, J.

We concur:

Margulies, Acting P. J.

Rivera, J.*

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* Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.