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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GREGORY W. GALE, Plaintiff and Appellant, v. WILLIAM DAVIS et al., Defendants and Respondents.	A132002 (Napa County Super. Ct. No. 26-47716)

Plaintiff Gregory W. Gale sued defendants William and Connie Davis (hereafter collectively and severally Davis) for damages arising from the affairs of Regale Corporation (Regale) in which the parties were shareholders. The case did not get beyond the pleading stage and was dismissed on a motion to strike. We conclude that Gale has abandoned most of the theories of liability he has raised in the case. On his claim for breach of the covenant of good faith and fair dealing that was dismissed with prejudice by the trial court in ruling on a motion for judgment on the pleading, we conclude that it was directed at conduct that Gale states is not relevant to this appeal and is a derivative claim for harm inflicted upon Regale. As it is a derivative claim, Gale does not have standing to pursue this cause of action. Thus, we affirm the judgment of dismissal.

I. BACKGROUND

Gale was the founder, chairman, chief executive officer and 20 percent shareholder of Regale Corporation. Davis, one of over 200 investors in Regale, eventually owned over three and a half percent of its stock. In 2001, Davis sued Gale for fraud and other malfeasance in connection with Gale's handling of Regale's corporate affairs. That lawsuit was settled in March 2003. Under the terms of the settlement, Gale was afforded a year to make certain payments to Davis to purchase Davis's shares in the company. When Gale failed to make all the required payments, in May 2004, Davis obtained a judgment against Gale for $509,993.22. Davis renewed the judgment in 2009, and subjected Gale to a judgment debtor's examination. Shortly thereafter, in May 2009, Gale filed this lawsuit.

Gale's complaint alleged that Davis wanted to take over Regale and, in order to do so, Davis interfered with Gale's ability to raise money for the corporation that would have allowed Gale to purchase Davis's stock and thereby fulfill his obligations under the settlement agreement.

The complaint asserted four causes of action. The first cause of action alleged breach of the covenant of good faith and fair dealing under the settlement agreement. The second, third, and fourth causes of action were for intentional interference with prospective economic advantage, and intentional and negligent interference with contractual relations, respectively. These tort causes of action were based on Gale's relationships with "third parties," but as the complaint was drafted those "third parties" referred only to a single individual, Skip Berg. Paragraph 17 in the second cause of action alleged that Gale "had an economic relationship with Skip Berg (the 'third parties') . . . ."

In anticipation of trial, Davis filed a series of motions in limine. Motion in limine number three sought to exclude evidence of Davis's interference with any contracts other than Gale's contracts with "Skip Berg entities" on the ground that evidence of Gale's contracts with other entities "would be 'outside' the pleadings." Motion in limine ten was based on the four-year statute of limitations on the breach of contract cause of action (Code Civ. Proc., § 337), and sought to exclude evidence of any alleged breach of the settlement agreement before May of 2005. Motion in limine 11 was based on the two-year statute of limitations on the tort causes of action (Code Civ. Proc., § 339), and sought to exclude evidence of any alleged tortious conduct before May 2007.

In opposition to motion in limine three seeking to confine the evidence to conduct involving the Berg entities, Gale submitted testimony from his deposition describing Davis's conduct with other third parties. Gale testified that from 2002 through 2005 he brought 14 potential investors or partners to Regale, and that "several of those arrangements or potential investments were either directly thwarted by the activities of the Davises or their agents or indirectly by them." In January 2009, Gale learned that one of the potential investments Davis disrupted would have been provided by Ionian Capital. Ionian wanted assurances that Davis would not pursue legal action against Regale, which Davis refused to provide. In November 2004, Gale learned that Davis also thwarted potential investments in Regale by others. After November 2004, Gale did not learn of any deals Davis disrupted other than the one with Ionian.

One of Ionian's principals said that Ionian had assured Gale around the spring of 2005 that it was prepared to invest $20 million in Regale. She testified that statements made by Davis about his litigation with Regale and lack of confidence in the company were a "primary factor in Ionian's decision not to go forward with raising the $20 million." She said, "Davis made it impossible for us to go forward. We cannot have litigation. We cannot have dissension in the group."

In opposition to motions in limine ten and 11 based on the statutes of limitation, Gale argued, with apparent reference to his first knowledge of Davis's interference with the Ionian investment, that the statutes did not begin to run until early 2009, when "[t]he principal wrongful conduct at issue in this case" was discovered. Davis replied that Gale had failed to plead delayed discovery of his causes of action.

When the case came on for trial in October 2010, it was agreed that Gale would prepare an amended complaint. Gale filed a proposed first amended complaint, and Davis challenged certain of the amendments.

Davis agreed to the addition of paragraphs (7a to 7d), which Davis considered necessary for Gale to plead delayed discovery of his causes of action. But he successfully objected to an amendment (paragraph 8), which would have specified injury caused by Davis other than Gale's and Regale's insolvency. The amendment would have stated that Davis's conduct deprived Gale of the value of his future salary at Regale, and caused him to become personally liable on his guarantee of approximately $2 million of Regale's debts. Davis also successfully objected to an amendment (paragraph 17) defining " 'third parties' " for purposes of the tort causes of action. The amendment would have included new entities (identified in new paragraphs 7a to 7d) as "third parties," along with Skip Berg.

Davis demurred and moved for judgment on the pleadings on the first amended complaint, supported by a request for judicial notice. His demurrer argued that all of the causes of action accrued before entry of the May 2004 judgment against Gale and were barred by statutes of limitations. Davis further argued in the demurrer and motion for judgment on the pleadings that Gale lacked standing to assert the causes of action because they belonged to Regale and could only be asserted in a derivative action. Davis also argued in the motion for judgment on the pleadings that the cause of action for breach of the covenant of good faith and fair dealing was an unavailing collateral attack on the May 2004 judgment that failed because the judgment was not caused by extrinsic fraud, i.e., fraud that prevented Gale from fully participating in the case. The request for judicial notice included pleadings showing that Gale was represented by counsel in Napa County Superior Court No. 26-13929 (the prior action) in which the judgment was entered, and consented to the judgment's entry.

In opposition to the demurrer, Gale confirmed that his cause of action for breach of the covenant of good faith and fair dealing was based on conduct before entry of judgment in the prior action, but argued that Davis's statute of limitations defenses were jury issues. According to Gale, "the gravamen of this action" was Davis's conduct involving Ionian. Gale advised the court that he would be filing a separate complaint on that cause of action because the court had erroneously refused to allow him to amend the complaint to expand the cause of action for interference with economic advantage to include Ionian. The record shows that, a week after filing his opposition to the demurrer, Gale filed a new action, Napa Superior Court No. 26-55083 (the new action), alleging interference with economic advantage based on Davis's dealing with Ionian.

Gale's opposition to the demurrer also acknowledged that he had no case against Davis for interfering with any potential investments other than those by Ionian. As for the allegations in the first amended complaint that Davis made false statements to other potential investors, Gale conceded that "there is no evidence (and certainly no allegation) that any of those companies would have invested but for the false statements, and therefore there was no basis for a lawsuit." Gale added: "[T]here is no evidence establishing that any of those potential investors would have consummated a deal absent Defendant's false statements. The statements are evidence of Defendants' animus toward Mr. Gale, but they are not actionable because they caused no injury." As for the allegations that Davis had dissuaded investments by individuals and entities described in paragraph 7d, Gale explained: "Defendants acted with malice by obstructing deals that would otherwise have been made during a settlement conference presided over by Judge Snowden [in the prior action] in August 2004[1] and a deal that would otherwise have been made by Regale and Bob Halperin in November 2004. . . . None of that conduct was actionable, however, as Defendants were within their legal rights to threaten litigation (in August 2004) and to demand a premium for their shares (in November 2004). Whether fortunately or not, the simple fact of acting maliciously to harm the interests of another in an ultimately misguided effort to advance one's own, is not actionable . . . ." Gale also recognized that "[n]either instance of malicious conduct is or was actionable. Defendants' statement (through their counsel) to Judge Snowden are plainly not actionable since they were made in a judicial proceeding and Defendants' demand for a premium buy-out was within their rights (albeit misguided, and clear evidence of animus)."

In opposition to the motion for judgment on the pleadings, Gale asserted that he was not seeking to vacate the 2004 judgment, and that the judgment was in any event only part of the damages he suffered because of Davis's wrongdoing. He denied that his

[1] Although judgment was entered against Gale in the prior action in May 2004, litigation in the case apparently continued over Davis's request for appointment of a receiver for Regale.

claims were derivative to those of Regale, arguing that he was "directly" and "uniquely" impacted by Davis's conduct. He indicated that, if necessary, the complaint could be amended to plead that a demand on Regale to sue on its own behalf would be futile because the company had no directors and Davis claimed to control it.

The court granted the motion for judgment on pleadings as to the cause of action for breach of the covenant of good faith and fair dealing without leave to amend because that cause of action was essentially a claim for equitable relief from the 2004 judgment, and Gale failed to plead extrinsic fraud warranting such relief. The court further concluded that Gale "lacks standing to assert his claims because they [were] based on alleged wrongs against the corporation, rather than against [Gale] personally." The court recognized that Gale argued he could plead that demand upon Regale to sue would be futile, and gave him ten days' leave to amend his remaining causes of action. The court found that if Gale was able to adequately plead standing as to the tort causes of action, his allegations regarding delayed discovery of Davis's statement to Ionian were sufficient to put the claims at issue.

Gale's second amended complaint asserted a single cause of action for intentional interference with prospective economic advantage based on Davis's alleged disruption of a deal among Gale, Regale, and Ionian. The second amended complaint alleged that the March 2003 settlement agreement required Gale to purchase Davis's Regale stock for a payment of $118,140 within 90 days, and $472,584 within 375 days, of the agreement's effective date. If Gale failed to make any payment required under the agreement, "[Davis] could move to enter judgment in the underlying case and [Gale] would not be permitted to oppose that motion." The second amended complaint alleged that Ionian would have purchased newly issued stock in Regale for $20 million had Davis not made false and malicious statements about Regale and its management. Ionian would have paid parts of the $20 million: to Gale to enable him to purchase Davis's stock as required by the settlement agreement, and to pay deferred salary Regale owed him; to Berg to repay a loan to Regale that Gale had guaranteed; and to tax authorities for past due taxes owed by Regale and guaranteed by Gale. In exchange, Gale would have agreed "to continue acting as an officer of Regale, assigning his patentable and other inventions to Regale and using his unique knowledge and skill to continue the conception, preparation, and implementation of product designs that was necessary to Regale's success."

Davis demurred and moved to strike the second amended complaint. Davis argued in the motion to strike that the new allegations violated the order granting leave to amend, because the order authorized amendment of the existing tort causes of action only to plead standing, including demand futility, but not the assertion of an entirely new cause of action. In the trial court, Gale stated that he had "voluntarily" eliminated his third and fourth causes of action for interference with contractual relations. In his briefs on appeal, Gale states that he "was not able . . . to plead demand futility, not least because [he] did not consider the claims to be claims of Regale (which was, in any event, defunct)."

The court granted the motion to strike without leave to amend. The order noted that the court had previously ruled that Gale lacked standing to sue for wrongs against Regale, and had granted leave to amend to allow him to address the standing issue by adding allegations of demand futility. The order stated: "Instead of amending with allegations of demand futility, plaintiff instead attempts to amend with an entirely new claim based on a wrong against him personally. The court's granting of leave to amend was only as to the cause of action plaintiff already pled, not to an entirely new claim. . . . Nor would the court be inclined to allow leave for such an amendment as there has clearly been a prejudicial delay in raising this new claim. [¶] With the amended complaint stricken, there are no remaining claims and the matter is properly dismissed." Gale timely appealed from the order granting the motion to strike. Such an order is appealable as a final judgment where, as here, it removes the only cause of action alleged and leaves no issues to be determined. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:246.2, p. 2-119 (rev. # 1, 2011).)

II. DISCUSSION

A. The Interference Causes of Action

The record shows that Gale voluntarily abandoned his causes of action for interference with contractual relations when he omitted them from his second amended complaint. Accordingly, we will not consider the efficacy of those causes of action.

In this court, he also has abandoned his cause of action for intentional interference with a prospective economic advantage as alleged in the second amended complaint. It was based exclusively upon Davis's conduct directed at Ionian Capital. However, as Gale states in his reply brief, "Defendants . . . assert[] that the Court was correct in precluding an amendment that specifically mentioned Defendants' interference with the economic relationship between Plaintiff and Ionian Capital. . . . This is a complete red herring, as this appeal has nothing to do with Ionian Capital. As specifically approved by Defendants, Plaintiff asserted his Ionian-related claims in a separate action, currently pending in Napa Superior Court. . . . The *only* issue on appeal is whether Plaintiff may amend his pleading (*once*) to allege standing based on injury he directly suffered because of Defendant's interference with Plaintiff's economic relationships with other third parties. Ionian Capital has nothing whatever to do with this appeal."

Gale has thus completely changed his theory concerning interference with a prospective economic advantage from one involving interference with Ionian Capital to one involving interference with others. But he cannot properly assert this new and different theory on appeal. " 'As a general rule an appellate court will consider only such points as were raised in the trial court, and this rule precludes a party from asserting, on appeal, claims to relief not asserted or asked for in the court below.' " (*Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1844; see also, e.g., *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9 ["appellants may not raise a factually novel legal theory of liability on appeal"]; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 623 ["appellant cannot challenge a judgment on the basis of a new cause of action it did not advance below"].)

The judgment for Davis on the tort causes of action must therefore be affirmed.

B. <u>The Breach of Covenant Claim</u>

Gale's remaining cause of action is his claim for breach of the covenant of good faith and fair dealing that was dismissed with prejudice when the court ruled on Davis's motion for judgment on the pleadings directed at the first amended complaint. Gale argues that the court incorrectly characterized this cause of action as an impermissible attack on the judgment in the earlier action. No matter. The dismissal is affirmed for two reasons.

First, if Ionian is irrelevant to this appeal, as Gale states in his reply brief, this claim fails along with his interference claims because Davis's dealings with Ionian were the only basis for the alleged breach of the covenant of good faith and fair dealing. Moreover, those dealings were apparently the only breach that could have been alleged consistent with the statute of limitations. As Gale was arguing as late as his appellant's opening brief, "Defendants' wrongful conduct was the sole cause for the failure of a contemplated deal among Ionian Capital, Regale, and Mr. Gale that would have paid Gale substantial sums and allowed him to perform under the Settlement Agreement."

Second, even if Gale were still seeking to allege that Davis wrongfully prevented Regale from selling stock to Ionian, the claim would be a derivative one that he had no standing to pursue. An action is derivative if the gravamen of the complaint alleges injury to the corporation. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) Gale says that he is seeking to recover only "for the injury caused directly — and uniquely — to him." But the gravamen here is injury to Regale, not Gale. Gale alleged in the first amended complaint that he suffered injury when he and Regale became insolvent because Regale could not raise sufficient capital to purchase Davis's stock. Davis's interference with the Ionian transaction thus directly harmed Regale, and only incidentally harmed Gale insofar as his fortunes were tied up with Regale as an officer, shareholder and creditor of the corporation. Gale was presumably the only person who had obligations under a settlement agreement that Regale was prepared to satisfy, and he may well have been the only person who guaranteed Regale's debts and worked for Regale without being paid. But "[t]he test is not whether [Gale's] damages were unique, as [Gale's] argument suggests; an individual cause of action exists only if the damages were not *incidental* to an injury to the corporation." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124, emphasis in original.) Gale's harm is derivative to the harm to Regale allegedly caused by Davis's actions. Any injury allegedly inflicted by Davis was upon the "whole body of its stock," and not on Gale's shares alone. (See *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1222.)

C. Denial of Leave to Amend

Finally, Gale claims the court abused its discretion when it denied him leave to amend to establish standing to sue. Leave to amend should be granted if there is a reasonable probability that a defect in a complaint can be cured, but the plaintiff has the burden of establishing that probability (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719) and Gale has not met that burden here.

As Gale acknowledges in his opening brief, the amendments he proffered in the trial court involved disruption of a transaction with Ionian Capital. But, again, his reply brief states that dealings with Ionian Capital are not at issue. The issue as Gale framed in the reply brief is "whether the Superior Court acted within its discretion in denying [Gale] leave to amend his complaint to allege in his second cause of action [for interference with prospective economic advantage] that [Davis's] wrongful conduct interfered not only with an economic relationship between third parties and Regale Corp. but also an economic relationship between third parties and Gale himself."

There are a number of reasons why there was no abuse of discretion in denying leave to amend. First, Gale cannot assert a new theory of liability for the first time on appeal. Second, Gale told the trial court that Davis's communications involving third parties other than Ionian Capital were not actionable. Third, Gale testified in his deposition that, after November 2004, he did not learn of any deals Davis disrupted other than the one with Ionian Capital. Thus, Gale could not plead delayed discovery of any cause of action involving other third parties that would not be barred by the two-year statute of limitations on the tort cause of action. (Code Civ. Proc., § 339.)

III. CONCLUSION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.