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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HAROLD J. RUCKER,
Plaintiff and Appellant,

v.

CITY OF HAYWARD et al.,
Defendants and Respondents.

A133332

(Alameda County
Super. Ct. No. RG 10505300)

Harold J. Rucker sued the City of Hayward, and its employees Stacy Sorensen, Jill Hadden, and Toshikazu Yoshihata, alleging defendants unlawfully and maliciously removed a shrub from property on which he resided. Rucker’s first amended complaint asserted trespass, negligent and intentional infliction of emotional distress, and violation of constitutional rights. Defendants demurred, arguing Rucker did not own the property or shrub and therefore lacked standing to sue. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

Marva L. Hickman owns real property located on Wauchula Way in Hayward, California. Since 1986, Hickman and Rucker “have been Business Associated/Domestic Partners.” In 2003, Hickman granted Rucker a “parol lease for life” to the Wauchula Way property. In 2007, Rucker became the trustee of the living trust of Marva L.

¹ Because this is an appeal from a dismissal following the sustaining of a demurrer without leave to amend, the facts are those alleged in the operative pleadings.

Hickman, which authorizes him to manage all of Hickman's assets, real and personal, and to initiate and settle claims. Rucker has, at all relevant times, resided at and been entitled to possess the Wauchula Way property.

On April 24, 2009, the city received an anonymous complaint about a 25-year-old ornamental shrub on the Wauchula Way property. The city issued a notice stating this was a repeat complaint, the shrub was blocking the pedestrian right of way on the sidewalk and creating a safety hazard, and needed to be "pulled back completely from the sidewalk area or be removed." Rucker addressed the "foliage obstructing a three[-]inch edge of the sidewalk for approximately two feet by pruning and compressing the trimmed foliage with vinyl netting." He believed no violation remained justifying the shrub's removal.

During a conversation with city employee Stacey Sorensen on May 24, 2009, Rucker learned the city still intended to remove the shrub. He told Sorensen he believed local vandals were the source of the repeated, unfounded complaints about the shrub and asked her to investigate further before taking any action. Sorensen, however, stated "in a[n] insulting and arrogant voice that, 'The bush will come down! A crew will be out next week to cut down the bush!'"

On June 9, 2009, despite Rucker's efforts, Sorensen directed Jill Hadden, another city employee, to hire workers to enter the Wauchula Way property and remove the shrub. When Rucker confronted Hadden and asked her for papers authorizing removal, Hadden did not produce any, but called in Hayward Police for support. Officer Yoshihata arrived. He told Hadden to "[g]et the crew ready" and then spoke on the phone with Sorensen. He reported to Rucker what Sorensen told him: "'[y]ou had your opportunity for a hearing and you did not show up.'" Rucker protested this was false—that he was not notified of a hearing—and asked Yoshihata to tell him what was wrong with the shrub. Yoshihata responded it was leaning " 'slightly to the left.'" "

When shown nearby properties with shrubs egregiously encroaching on the sidewalk, Yoshihata said the other shrubs were not the issue. The shrub was removed.

On June 17, 2009, Rucker submitted a claim for injuries to the city. On September 28, 2009, the city rejected the claim. Rucker then filed suit against the city, Sorensen, Hadden, and Yoshihata.

Defendants demurred to Rucker's initial complaint on May 20, 2010. The trial court sustained the demurrer on the ground Rucker had not sufficiently pleaded standing to sue, but granted leave to amend.

Rucker's first amended complaint, filed July 13, 2010, strengthened the standing allegations and contained four discernable causes of action. First, Rucker alleged trespass against Hadden. Second, Rucker alleged negligent infliction of emotional distress against Yoshihata. He asserted the police officer breached a duty of care to prevent a trespass and destruction of private property, thereby causing severe emotional distress. Third, Rucker alleged intentional infliction of emotional distress against Sorensen for emphatically telling him the shrub would be felled and for making that decision maliciously and without cause, and against Hadden and Yoshihata for going along with Sorensen's decision in reckless disregard of Rucker's well being. Fourth, Rucker sought injunctive relief and damages under the Federal Civil Rights statute, title 42 United States Code section 1983, against Soresnsen, Hadden, and Yoshihata. Citing the Fourth and Fourteenth amendments to the Federal Constitution, Rucker claims defendants unreasonably seized and destroyed his property without due process after applying city ordinances in a discriminatory fashion.

Defendants demurred to Rucker's first amended complaint on July 21, 2010. Defendants asserted Rucker still had not pleaded standing and had failed to sufficiently

allege each of his four causes of action.² The trial court issued a written order sustaining the demurrer without leave to amend on September 20, 2010. While “sympathetic to Plaintiff’s concerns that a bush was improperly (and, perhaps, unnecessarily) destroyed,” the trial court held Rucker, as a mere tenant and occupant of the Wauchula Way property, lacked standing to sue. Based on this order, the trial court entered a judgment of dismissal against Rucker on August 9, 2011. Rucker filed a timely notice of appeal on September 28, 2011.

Meanwhile, on May 14, 2010, within days of defendants’ first demurrer contesting Rucker’s standing, Rucker’s partner, and owner of the Wauchula Way property, Hickman, filed her own lawsuit. In a complaint largely mirroring Rucker’s initial complaint, Hickman alleged a single cause of action for deprivation of civil rights under title 42 United States Code section 1983. Defendants did not demur, but filed an answer. In April 2011, Hickman dismissed her lawsuit with prejudice following attempts at settlement.³

DISCUSSION

“ ‘A demurrer tests the legal sufficiency of the complaint.’ [Citation.] On review of an order sustaining a demurrer without leave to amend, our initial standard of review is de novo, ‘i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.’ [Citation.] In analyzing the complaint, we ‘give[]

² The city did not demur on governmental immunity grounds and does make any immunity arguments on appeal. (See *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1389 [taking silence on immunity as a concession at demurrer stage].)

³ Although the city briefly mentioned Hickman’s case in the trial court and in its brief on appeal, it did not seek judicial notice of her complaint, nor did it provide any specifics about the case. We therefore, on our own motion, take judicial notice of the complaint and dismissal. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Gillis v. Dental Bd. of California* (2012) 206 Cal.App.4th 311, 315, fn 3), which we may consider in reviewing a dismissal following an order sustaining a demurrer without leave to amend. (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

the complaint a reasonable interpretation, and treat[] the demurrer as admitting all material facts properly pleaded.’ [Citation.]” (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665.) We review the decision to deny leave to amend “for abuse of discretion. [Citation.] We will reverse for abuse of discretion if we determine that there is a reasonable possibility the plaintiff can cure the pleading by amendment.” (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.)

“*Standing*”

“Only a real party in interest has standing to prosecute an action, except as otherwise provided by statute. (Code Civ. Proc., § 367.) A party who is not the real party in interest lacks standing to sue. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004) ‘A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.’ (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605) A complaint filed by someone other than the real party in interest is subject to general demurrer on the ground that it fails to state a cause of action. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796) The purpose of this section is to protect a defendant from harassment by other claimants on the same demand. (*Keru Investments, Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, 1424)” (*Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 920-921.⁴)

The trial court and defendants viewed Rucker’s lack of ownership of the Wauchula Way property as a complete bar to all four causes of action in Rucker’s lawsuit. This no-ownership-means-no-ability-to-sue argument remains defendants’ sole

⁴ In *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 989-997, the court concluded the term “standing,” although frequently used, is a misnomer under California law, and the issue is actually whether the plaintiff is a “real party in interest.”

“standing” argument and their primary argument on appeal. Whether Rucker can sue to vindicate his claims is “a threshold issue” and therefore an issue that must be resolved before considering other matters related to the merits of Rucker’s claims. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) His ability to pursue relief must also be considered as to each cause of action. (*Ibid.*)

Looking first at the cause of action for trespass, “[t]he usual action is by an owner, but neither ownership nor actual possession is essential.” (5 Witkin, Cal. Procedure, § 632, p. 65, citing *Rogers v. Duhart* (1893) 97 Cal. 500 [trespass action by lessee who had not yet taken possession]; *Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [“The propriety of an action for damages to property by one who is not in possession or entitled to possession at the time of its injury has been recognized in this state under varying factual circumstances.”], overruled on another ground in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497; *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 148 [“It has been recognized in many instances that one who is not the owner of the property nonetheless may be the real party in interest if that person’s interests in the property are injured or damaged.”]; *Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [“trespass is designed to protect *possessory*—not necessarily ownership—interests in land from unlawful interference. [Citations.] The proper plaintiff . . . is the person in actual possession; no averment or showing of title is necessary”]; cf. *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 906 [“In order to state a cause of action for injury to real property, plaintiff’s ownership, *lawful possession, or right to possession*, of the property must be alleged.”], italics added.)⁵ Thus, a lessee may be able to sue for trespass. (See *Bailey v. Outdoor Media Group* (2007) 155 Cal.App.4th 778, 781.) “[A] party may rely upon his possession as against a mere trespasser.” (*Kellogg v. King* (1896) 114 Cal. 378, 383.)

⁵ *Del Mar* does not hold, as defendants argue, that *only* ownership can allow for an injury to property claim.

Rucker has alleged he was in possession of the Wauchula Way property at the time of the shrub removal, and in some cases, that might be sufficient to allow him to pursue a trespass claim. Here, it is not.

As noted, an articulated purpose of section 367's requirement that the real party in interest bring an action " 'is to protect a defendant from a multiplicity of suits and the further annoyance and vexation at the hands of other claimants *to the same demand.*' " (*Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117, 1140.)⁶ In this case, Hickman, the owner, also filed a complaint based on the same factual allegations made by Rucker. That Hickman only alleged one cause of action, for violation of her civil rights under section 1983, and did not also separately allege a cause of action for trespass, as well, does not detract from the fact that she made the *same demand*—for damages based on the allegedly wrongful removal of the shrub on her property. Hickman unquestionably could seek damages for that allegedly wrongful removal and damage to her property, and whether labeled a civil rights claim for wrongful destruction of property without due process, or a cause of action for trespass on and injury to property, the demand she made, and the one Rucker seeks to make here are the same.

Accordingly, in this case, Hickman is the real party in interest and she timely pursued and resolved claims based on the removal of the shrub on her property. Rucker thus cannot confront the city a second time with the same damages demand. (*Standard Fire Ins. Co. v. Spectrum Community Assn.*, *supra*, 141 App.4th at p. 1140.) He therefore cannot pursue the asserted causes of action for trespass and for a due process violation, since both are based on the removal of the shrub and injury to Hickman's property. These two causes of action were therefore properly dismissed.

⁶ The court in *Jasmine Networks, Inc. v. Superior Court*, *supra*, 180 Cal.App.4th at pages 995-996, questioned this justification, but acknowledged its articulation in the case law.

In contrast, Rucker's emotional distress causes of action assert damages uniquely personal to him. (See *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 590 [focus is not on harm to plaintiff spouse]; *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530, 533 [dealing separately with emotional distress claims of wife and deceased husband]; see also *Thing v. La Chusa* (1989) 48 Cal.3d 644, 648 [emotional distress torts protect individual interests].) We therefore conclude he has "standing" to assert them. However, as we will discuss, these causes of action fail for other reasons.

Negligent Infliction of Emotional Distress

"Negligent infliction of emotional distress is a form of the tort of negligence, to which the elements of duty, breach of duty, causation and damages apply. The existence of a duty is a question of law." (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129.) Rucker brought this cause of action solely against Officer Yoshihata, who responded to a call for support to Hadden and her team during the bush removal.

"[P]olice officers and other public security officers, like other persons, generally may not be held liable in damages for failing to take affirmative steps to come to the aid of, or prevent an injury to, another person. 'As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1129.)

Officer Yoshihata never formed a special relationship with Rucker and never misled Rucker into believing he was there to offer Rucker protection. Rather, Yoshihata came at Hadden's request to support her and her team. Rucker cites no case suggesting a duty would arise under these alleged facts. Accordingly, this cause of action was also properly dismissed.

Intentional Infliction of Emotional Distress

Rucker asserted a cause of action for intentional infliction of emotional distress against Sorensen, Hadden, and Yoshihata. To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show: (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 plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 (*Potter*).

To be considered outrageous, conduct must “ ‘ “be so extreme as to exceed all bounds of that usually tolerated in a civilized community.” [Citation.]’ [Citation.]” (*Potter, supra*, 6 Cal.4th at p. 1001.) Thus, liability does not arise from “ ‘ “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” ’ ’ ” (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.) The court determines, in the first instance, whether conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 87.)

“ ‘ “[P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.” ’ ’ ” (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108-1109 [comments taunting a shoplifter as she left store not actionable].) Thus, mere speech is often not actionable. (See *ibid.* [comments taunting a shoplifter as she left store not actionable]; *Chang v. Lederman, supra*, 172 Cal.App.4th at p. 87 [lawyer's letter directing non-client to move from residence was not actionable, even if it failed to inform non-client of potential right to continued possession].) However, here, Rucker has alleged not only speech, but high-handed conduct—that Sorensen and Hadden orchestrated and implemented, respectively, the unauthorized trespass and bush removal without cause and without sufficient due process.

Rucker has not cited any case holding such allegations rise to the level of stating a claim for intentional infliction of emotional distress. The most similar case our own research disclosed is *Dalusio v. Boone* (1969) 71 Cal.2d 484, 488 (*Dalusio*). In *Dalusio*:

“Shortly after defendant’s employees began removing [a] fence [encroaching on defendant’s land], plaintiff came upon the scene and asked defendant what was occurring. Upon being informed of defendant’s intentions, plaintiff, then 85 years old and ailing with a heart condition, requested defendant to order the work stopped. When defendant refused, a heated verbal exchange between plaintiff and defendant ensued during the course of which plaintiff became very excited and upset. . . . As a result of all this, plaintiff suffered emotional distress followed by physical illness.” (*Dalusio, supra*, 71 Cal.2d at p. 488.)

Dalusio held that the plaintiff’s trespass complaint “essentially stated a cause of action for the tort of intentional infliction of mental distress.” (*Dalusio*, at p. 488; see also *id.* at p. 490, fn. 6 [evidence sufficient to find tort occurred and damage award not excessive].)

The allegations in *Dalusio*, however, describe a more egregious situation than occurred here. Unlike in *Dalusio* there are no allegations Rucker was elderly and infirm, and suffered acute distress that lead to physical illness. While Rucker’s allegations describe highhanded, and even disdainful treatment, that should not be condoned, they do not describe conduct “so extreme” as to “exceed all bounds of that usually tolerated in a civilized community.” Accordingly, Rucker’s cause of action for intentional infliction of emotional distress was also properly dismissed.

Leave to Amend

Rucker had one opportunity to flesh out his allegations, and he attempted to do so in his first amended complaint. He has not articulated how he could cure any of the defects in his causes of action asserted in his amended complaint if given leave to further amend. Nor do we discern any such possibility. Accordingly, his causes of action were properly dismissed without leave to further amend.

DISPOSITION

The judgment of dismissal is affirmed. The city is entitled to costs on appeal.

Banke, J.

We concur:

Marchiano, P. J.

Dondero, J.