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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARIA GUADALUPE GALLO,

Plaintiff and Appellant,

v.

SOUTHERN CALIFORNIA EDISON
COMPANY,

Defendant and Respondent.

B232562

(Los Angeles County
Super. Ct. No. VC056336)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Reversed and remanded with directions.

John A. Bunnett for Plaintiff and Appellant.

Lee Tran & Liang, James M. Lee, and Daniel Yu for Defendant and Respondent.

This appeal arises out of the termination of a series of license agreements between Ramon Gallo (Gallo) and Southern California Edison Company (SCE). The licenses granted Gallo permission to use five of SCE's commercial real properties for the purpose of storing plant stock for his nursery business. Following SCE's termination of the licenses and removal of Gallo's plant stock and other personal property from its premises, Gallo filed a civil action against SCE alleging claims for wrongful eviction, invasion and disturbance of license, conversion, breach of the implied covenant of good faith and fair dealing, and negligence.¹ The trial court sustained SCE's demurrer to Gallo's second amended complaint without leave to amend and dismissed the action with prejudice. We conclude that the trial court properly sustained the demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing, but erred in sustaining the demurrers to each of the other causes of action alleged. We accordingly reverse the order of dismissal and remand the matter for further proceedings consistent with this opinion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. License Agreements with SCE

In 1983, Gallo began a nursery business. Over a period of 27 years, Gallo operated his business on five commercial real properties owned by SCE pursuant to a series of license agreements. The properties were located in the cities of Norwalk, El Monte, San Gabriel, Monterey Park, and Hacienda Heights. The parties routinely renewed each license agreement at the expiration of each five-year term. Prior to SCE's termination of the licenses in March 2010, Gallo's wholesale and retail nursery business had expanded to an area covering 80 acres of land and containing over \$10,000,000 in plant stock.

¹ During the pendency of the action, Gallo's wife and personal representative, Maria Guadalupe Gallo, substituted in as the real party in interest following Gallo's death.

The last series of license agreements between Gallo and SCE provided Gallo a license to use the property for a period of five years in exchange for payment to SCE. Either party could terminate the license at any time prior to the expiration date upon 30 days written notice. In the event of termination, Gallo expressly agreed that he would “peaceably quit, surrender, and prior to [the] termination date, restore the Property to a condition satisfactory to [SCE],” and that his “continued presence after termination shall be deemed a trespass.” Gallo acknowledged that he had the right to remove his personal property from the premises “at any time prior to the expiration or earlier termination” of the license, and that SCE had the right to remove Gallo’s personal property “[u]pon termination.” Gallo also acknowledged that SCE had “the right to enter upon the Property, at any time, for any purpose, and the right to conduct any activity on the Property.” Finally, Gallo agreed that SCE would “retain full possession of the Property,” and that Gallo “would not acquire any interest[,] temporary, permanent, irrevocable, possessory or otherwise,” by reason of the license.

According to Gallo, SCE orally represented that it would act in good faith if it ever sought to terminate any of the licenses and would allow Gallo a reasonable period of time to remove his business from the premises in the event of a termination. In reliance on these representations, Gallo expended significant time and labor in nurturing his plant stock, including investing millions of dollars in acquiring plant stock, installing sophisticated irrigation equipment on the properties, and constructing green houses and shade houses throughout the properties. Gallo also alleged that he occupied portions of the properties in a manner that was consistent with exclusive possession. Specifically, during the term of the licenses, SCE exercised no right to occupy or encumber the areas of the properties containing Gallo’s plant stock, irrigation equipment, green houses, or shade houses. SCE also lacked any access to offices and storage areas that Gallo maintained on the properties.

II. Lease Agreement with Los Angeles County

On June 18, 1996, Gallo entered into an agreement with the Los Angeles County Flood Control District to lease certain property located in the city of Norwalk (the “County property”). The County property was adjacent to the Norwalk property that Gallo had licensed from SCE. The lease agreement with the County granted Gallo exclusive possession of the County property for the purpose of storing plant stock for his nursery business, and the lease was in effect as of March 2010. Gallo accessed both the County property and SCE’s Norwalk property through a common gate which was locked to limit access to authorized persons.

III. Termination and Extension of License Agreements

On September 16, 2009, SCE provided Gallo with a 14-day notice of its intent to terminate the licenses, rather than the 30-day notice required by the license agreements. Although Gallo believed that he would require approximately one year to relocate his vast amount of plant stock, SCE refused to allow Gallo the time that he requested to remove his inventory from the properties. Instead, SCE proposed extension agreements that would extend Gallo’s date to vacate the properties and to remove his personal property from the premises to March 31, 2010. On November 9, 2009, Gallo and SCE entered into the extension agreements for each of the five licensed properties.

Each extension agreement set forth recitals stating that (1) “the term of the License expired and Gallo’s right to possession of the Premises ceased”; (2) Gallo “has requested further time within which to remove himself and his business from the properties”; (3) SCE “has agreed to extend the move out date for Gallo subject to the terms [of the license and extension agreements] . . . based on the express promises and representations of Gallo that he will vacate when promised”; and (4) “where the terms of this Agreement and the License conflict, the terms and conditions of the Agreement shall prevail.”

In the extension agreements, the parties expressly agreed that “Gallo’s right to possession and the date to vacate shall be extended and Gallo shall have until March 31, 2010 . . . to remove himself and his property, leaving the Premises in a

clean and undamaged condition.” Gallo agreed that, if he failed to vacate the properties by the extended termination date, he “shall then be a trespasser,” and “[n]o further notice, either written or oral[,] is required before SCE files an action for possession (hereinafter ‘Unlawful Detainer’).” Gallo acknowledged that, if he did not vacate the properties in the manner prescribed, SCE would “have no option but to file an Unlawful Detainer,” to which Gallo would “not file any response.” Gallo further acknowledged and agreed that should “he file any response to an Unlawful Detainer brought by SCE, other than a stipulation for possession agreed to by SCE, . . . such response would be without merit and simply filed for delay, justifying sanctions above any attorneys’ fees and costs incurred.”

The extension agreements also included the following provision on default: “Should Gallo fail to remove all property and clean the property before turning over possession, SCE may pursue Gallo, personally, for any costs [incurred] in the clean up and removal of Gallo’s property or for any other breach of this Agreement. At the option of SCE, anything left behind shall be considered abandoned. A failure to comply with the terms of the License, this Agreement or to pay any consideration required herein shall constitute an immediate default of the Agreement and Gallo’s right to possession shall cease immediately, without further Notice being required to serve on Gallo prior to filing an Unlawful Detainer.”

Both the license agreements and extension agreements were prepared by SCE. Gallo was a native of Mexico with a limited command of the English language and an inability to read English, and prior to entering into the agreements, he did not have the benefit of an interpreter. SCE also advised Gallo that he could not negotiate any of the terms of the agreements and that his only choice was to accept the terms proposed by SCE or forego the licenses. Due to the time and expense it would take to relocate his substantial amount of plant stock, Gallo believed that he had no reasonable alternative but to sign both the license and extension agreements as drafted by SCE.

On April 1, 2010, SCE “ousted” Gallo from each of the properties without filing an unlawful detainer action. SCE then posted guards on the properties to prevent Gallo

from accessing the premises to remove his plant stock. SCE also prevented Gallo from accessing the County property by locking the common gate to the County property and SCE's Norwalk property and posting guards on the Norwalk property. In addition, SCE bulldozed and destroyed the entire plant stock on SCE's Monterey Park property, and allowed third parties to misappropriate portions of the plant stock on SCE's other properties as well as the County property. SCE did not advise Gallo that he had a right to reclaim any of his plant stock until July 21, 2010. On September 16, 2010, SCE auctioned off Gallo's remaining plant stock, including plant stock on the County property, for the sum of \$2,500. During the time that SCE had possession, approximately 90 percent of Gallo's plant stock died or became unsalvageable.

IV. Civil Action Against SCE

On May 17, 2010, Gallo commenced a civil action against SCE. In his operative second amended complaint, Gallo alleged claims for wrongful eviction, invasion and disturbance of license, conversion, breach of the implied covenant of good faith and fair dealing, and negligence. The trial court sustained SCE's demurrer to the second amended complaint without leave to amend and granted SCE's motion to strike the punitive damages allegations as to the implied covenant claim. In sustaining the demurrer, the trial court concluded that, under the express terms of the extension agreements, SCE had the right to immediately evict Gallo in lieu of filing an unlawful detainer action in the event Gallo failed to vacate the properties by the termination date, and that Gallo had waived his right to any personal property left on the premises as of the termination date by agreeing that such property would be considered abandoned. Following the trial court's order dismissing his action, Gallo filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

On appeal, Gallo challenges the trial court's order sustaining the demurrer to his second amended complaint. In reviewing the sufficiency of a complaint against a demurrer, we treat the demurrer "as admitting all material facts properly pleaded," but we do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We liberally construe the pleading to achieve substantial justice between the parties, giving the complaint a reasonable interpretation and reading the allegations in context. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained, we must determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) When a demurrer is sustained without leave to amend, we must also decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Where the complaint can reasonably be amended to allege a valid cause of action, the judgment must be reversed. (*Ibid.*)

"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.]" (*Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 961; see also Civ. Code, § 1636.) We ascertain that intention by "focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Riverside Sheriffs Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1424.) "We consider the contract as a whole and interpret its language in context so as to give effect to each provision, rather than interpret contractual language in isolation. [Citation.]" (*Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 688.) "So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct

plaintiff's allegations as to the meaning of the agreement.” [Citation.]’ [Citations.]” (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1385.)

II. Wrongful Eviction

In his first cause of action for wrongful eviction, Gallo alleged that SCE unlawfully evicted him from each of the licensed properties by engaging in self-help measures rather than following the unlawful detainer procedure. SCE argues that Gallo's wrongful eviction claim fails because SCE was not required, by either statute or contract, to file an unlawful detainer action prior to removing Gallo or his personal property from its premises. SCE also asserts that Gallo's wrongful eviction claim cannot stand because, as a licensee, Gallo never acquired a possessory interest in any of the licensed properties. As explained below, we conclude that Gallo's second amended complaint stated a cause of action for wrongful eviction based on the allegations that SCE failed to comply with its contractual obligations in the extension agreements.

A. Unlawful Detainer Procedure

Code of Civil Procedure section 1161 sets forth the procedural mechanism for effecting a lawful eviction through an unlawful detainer proceeding. An unlawful detainer action “is a summary proceeding, the primary purpose of which is to obtain the possession of real property in the situations specified by statute.” (*Berry v. Society of Saint Pius X* (1999) 69 Cal.App.4th 354, 363.) The statutory remedy “is available in only three situations: to a lessor against a lessee for unlawfully holding over or for breach of a lease; to an owner against an employee, agent, or licensee whose relationship has terminated; and to a purchaser at an execution sale, a sale by foreclosure, or a sale under a power of sale in a mortgage or deed of trust against the former owner and possessor. [Citations.]” (*Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 450.)

Under Code of Civil Procedure sections 1159 and 1160, statutory remedies are also available to occupants of real property for forcible entry or detainer, which ““is a summary proceeding to recover possession of premises forcibly or unlawfully detained.”” (*Jordan v. Talbot* (1961) 55 Cal.2d 597, 604.) “For occupants in peaceful possession of

real property, these statutes offer protection from self-help, without regard to the parties' legal claims to title or possession.” (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1038 (*Spinks*)). As our Supreme Court has observed with respect to the statutes, “[r]egardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process.” (*Jordan v. Talbot, supra*, at p. 605; see also *Daluiso v. Boone* (1969) 71 Cal.2d 484, 493 [summary possession statutes are “intended to discourage self-help in the settlement of disputes over possession of land and to encourage resort to the courts in all such matters”].)

In this case, the parties dispute whether SCE was required to file an unlawful detainer action to lawfully remove Gallo from its properties. Gallo contends that, since the statute specifically includes licensees among the class of persons who are subject to removal by unlawful detainer, SCE was not entitled to engage in the very self-help measures that the statute was designed to preclude. SCE counters that a licensor is not limited to an unlawful detainer proceeding to remove a licensee with no possessory interest in the property, and may accomplish the removal “in any other lawful manner,” including self-help. (Code Civ. Proc., § 1161, subd. (1).) We need not decide, however, whether SCE was statutorily required to file an unlawful detainer action to effect a lawful eviction. Even assuming that SCE had no such statutory duty, the parties' extension agreements reflect that SCE contractually bound itself to bring an unlawful detainer action in the event Gallo failed to vacate the properties by the extended termination date, and that SCE's alleged failure to do so gives rise to a wrongful eviction claim.

The extension agreements drafted by SCE repeatedly referred to SCE's obligation to file an unlawful detainer action in response to any failure by Gallo to vacate the premises by the extended termination date of March 31, 2010. The agreements specifically stated that, “[i]n the event Gallo does not vacate in the manner prescribed by this Agreement by the Date to Vacate, then Gallo acknowledges that SCE will have no option but to file an Unlawful Detainer.” In exchange for granting Gallo the additional time to vacate, SCE obtained Gallo's agreement that he would “not file a response to the

Unlawful Detainer” and that sanctions would be warranted if Gallo filed any response “other than a stipulation for possession agreed to by SCE.” The agreements further provided that “[a] failure to comply with the terms of the License [or] this Agreement . . . shall constitute an immediate default of the Agreement . . . , without further Notice being required to serve on Gallo prior to [SCE] filing an Unlawful Detainer.”

SCE argues that it would be unreasonable to interpret the extension agreements as both granting Gallo further time to vacate the properties and requiring SCE to “jump through additional procedural hoops” if Gallo failed to do so. However, in drafting the extension agreements, SCE chose to include specific language stating that its only “option” in the event of a failure to vacate would be to file an unlawful detainer action. The references to the unlawful detainer procedure were not limited to a single paragraph or provision, but were included throughout the agreements in defining the parties’ respective rights and obligations. Because SCE contractually obligated itself to complying with the unlawful detainer procedure in evicting Gallo from the properties, it was not entitled to engage in self-help measures, such as posting guards and changing gate locks, to effect the eviction.

B. Gallo’s Possessory Interest

SCE also asserts that Gallo cannot state a cause of action for wrongful eviction because he cannot establish that he had a possessory interest in the licensed properties. Apart from the statutory remedies available for a forcible entry or detainer (Code Civ. Proc., §§ 1159, 1160), “a person in peaceable possession of real property may recover, in an action sounding in tort, damages for injuries to his person and goods caused by the forcible entry of one who is, or claims to be, the lawful owner or possessor” (*Daluiso v. Boone, supra*, 71 Cal.2d at p. 486.) The essential elements of a tort claim for wrongful entry or eviction are (1) the plaintiff’s peaceable possession, and (2) the defendant’s forcible entry. (*Spinks, supra*, 171 Cal.App.4th at p. 1040.) As is true of the statutory claim, “the forcibly entering defendant’s title or right of possession is no defense to such action.” (*Daluiso v. Boone, supra*, at p. 486.)

As SCE correctly points out, a license to use real property generally does not grant the licensee any right to possession of the property. Rather, “[a] ‘license’ is a personal, revocable and generally nonassignable privilege conferred . . . to do a particular act (or acts) upon the land of another. It is a nonpossessory right to use the property as specified between the parties.’ [Citations.] ‘Unlike a tenancy, a license does not convey a possessory interest in land.’ [Citation.]” (*Spinks, supra*, 171 Cal.App.4th at p. 1040; see also *Von Goerlitz v. Turner* (1944) 65 Cal.App.2d 425, 429 [a license merely confers a personal privilege to occupy the premises of the licensor and is revocable at any time at the will of the licensor].) However, because it is a contract with terms set by the parties, a license “may contain terms that give greater rights to a contracting party than would be accorded by the common law, such as, for example, an irrevocable license or the incorporation of specific terms relating to termination.” (*Qualls v. Lake Berryessa Enterprises, Inc.* (1999) 76 Cal.App.4th 1277, 1285; see also *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 36-37, fn. omitted [“The contractual relationship between the parties must be analyzed based on the evidence and findings without regard to its classification under traditional common law concepts.”].)

Here, the extension agreements provided that Gallo had a possessory interest in the properties that would expire on March 31, 2010, unless terminated earlier by SCE. In particular, the agreements stated that “Gallo’s right to possession and the date to vacate shall be extended and Gallo shall have until March 31, 2010 . . . to remove himself and his property, leaving the Premises in a clean and undamaged condition.” The agreements also stated that if Gallo failed to comply with the terms of the licenses and extensions, then “Gallo’s right to possession shall cease immediately.” While the license agreements contained language indicating that Gallo had no possessory interest in the properties by reason of the license, the extension agreements specified that where the two agreements conflicted, the terms and conditions of the extension agreement “shall prevail.” The express language of the extension agreements was therefore sufficient to support Gallo’s allegation that he was in peaceful (albeit wrongful) possession of the properties at the time SCE evicted him by means of self-help.

C. SCE's Forcible Entry

Gallo's allegations that SCE's self-help measures included posting guards and changing the locks on the gates to preclude Gallo from accessing his plant stock were also sufficient to satisfy the forcible entry element of his wrongful eviction claim. By statute, a forcible entry occurs when any person "[w]ho, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession." (Code Civ. Proc., § 1159, subd. (2).) A non-violent lock change thus can support a tort claim for wrongful entry or eviction. (*Spinks, supra*, 171 Cal.App.4th at pp. 1039, 1042.) While SCE may have had a right to enter the properties at any time and for any purpose pursuant to the license agreements, the extension agreements limited its right to evict Gallo from the properties without judicial process. SCE also did not have any right under the license or extension agreements to interfere with Gallo's peaceful possession of the County property by barring his access to such premises. Given the rights and obligations expressly agreed to by the parties in the extension agreements, Gallo's complaint alleged sufficient facts to state a cause of action for wrongful eviction.²

III. Invasion and Disturbance of License

Gallo's second cause of action was for invasion and disturbance of license. This particular cause of action was recognized as an action in trespass in *Lucky Auto Supply v. Turner* (1966) 244 Cal.App.2d 872, 881, where the Court of Appeal stated as follows: "It is true that a license does not confer a right of possession sufficient to support an action in trespass . . . , or an action of ejectment. [Citation.] But a licensee may maintain an action of trespass in the nature of common-law case for any invasion or disturbance of the terms of the license whether by the licensor or by third parties." [Citation.]" In his

² In light of our conclusion that Gallo stated a wrongful eviction claim based on allegations that SCE failed to comply with its contractual obligation to evict Gallo only through an unlawful detainer action, we need not address Gallo's alternative arguments regarding the alleged irrevocability of the licenses or unconscionability of the license and extension agreements.

second amended complaint, Gallo alleged that SCE interfered with his rights under the licenses by removing both Gallo and his personal property from the premises without bringing an unlawful detainer action as expressly required by the extension agreements. Because SCE contractually bound itself to effecting Gallo's eviction through the unlawful detainer procedure, its alleged actions in immediately ousting Gallo from the properties upon termination and then denying him any opportunity to remove his plant stock were sufficient to constitute an interference with Gallo's rights under the licenses.³

SCE claims that any action in trespass fails as a matter of law because Gallo expressly consented to the actions taken by SCE by virtue of the license and extension agreements. Although Gallo did acknowledge in both agreements that his continued presence on the properties after the termination date would be deemed a "trespass," he never specifically agreed that SCE could effect a lawful eviction by means of self-help and without a valid writ of possession. To the contrary, Gallo acknowledged and agreed that SCE would "have no option but to file an unlawful detainer action" in the event he failed to vacate the properties by the extended termination date. The parties accordingly contemplated that SCE would comply with the unlawful detainer procedure prior to removing Gallo from the premises and would not resort to the self-help measures that SCE ultimately chose to use. Based on the allegations in the second amended complaint, the trial court erred in sustaining the demurrer to the invasion of license claim.

IV. Conversion

In his third cause of action for conversion, Gallo alleged that SCE misappropriated the plant stock that he had placed on both the SCE and County properties. "Conversion

³ Given that Gallo failed to relocate any of his plant stock during the five-month extension period, he ultimately may be unable to prove that SCE's refusal to grant him access to his plant stock upon termination of the licenses caused the damages claimed. However, for purposes of this demurrer, Gallo pleaded sufficient facts to show that he suffered some measure of damages as a result of SCE's removal of Gallo and his personal property from the premises without judicial process.

is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." [Citation.]" (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 939-940.)

““It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]” [Citation.]” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507.) Moreover, “[c]onversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. . . . [T]he act of conversion itself is tortious. [Citations.]” (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.)

In his second amended complaint, Gallo alleged that, following the termination of the licenses, SCE immediately changed the locks and posted guards on its properties to prevent Gallo from accessing any of the plant stock that had been left on the premises. SCE then destroyed the entire plant stock on one of its properties and allowed third parties to misappropriate the plant stock on its other properties as well as the County property. Following the demise of approximately 90 percent of Gallo's plant stock, SCE auctioned off the remaining plant stock at a price far below the fair market value. These allegations were sufficient to sustain a cause of action for conversion.

SCE argues that Gallo cannot state a conversion claim because he contractually abandoned his right to any personal property remaining on the premises as of the termination date. This argument does not withstand scrutiny. First, the license and extension agreements did not apply to any of the plant stock located on the County property pursuant to Gallo's lease agreement with the County. Therefore, Gallo's allegations concerning SCE's misappropriation of the County property plant stock were sufficient, on their own, to sustain a conversion claim. Second, a careful reading of the extension agreements reflects that Gallo did not abandon his right to the plant stock located on SCE's properties upon termination of the licenses. Rather, Gallo agreed that if he “failed to removal all property . . . before turning over possession,” SCE could pursue

Gallo personally for any removal costs incurred. Once Gallo turned over possession of the properties to SCE, whether voluntarily or pursuant to a valid writ of possession, “anything left behind shall be considered abandoned.” Because the extension agreements required SCE to file an unlawful detainer action to lawfully effect Gallo’s eviction, SCE was not entitled to dispose of Gallo’s plant stock until the unlawful detainer proceedings were concluded. Gallo accordingly pleaded sufficient facts to state a cause of action for conversion.

V. Breach of the Implied Covenant of Good Faith and Fair Dealing

Gallo’s fourth cause of action was for breach of the implied covenant of good faith and fair dealing. “The covenant of good faith and fair dealing, implied by law in every contract, exists . . . to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made.*’ [Citation.]” (*American Express Bank, FSB v. Kayatta* (2010) 190 Cal.App.4th 563, 570.) “The scope of conduct prohibited by the implied covenant depends on the purposes and express terms of the contract. [Citation.]” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885.) The covenant thus “cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; see also *Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094 [“The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.”].)

In support of this claim, Gallo alleged that SCE frustrated his right to receive the benefits of the license and extension agreements by removing him from the properties upon termination of the licenses without judicial process and thereafter precluding him from accessing the premises for purposes of retrieving his plant stock. Because SCE contractually obligated itself to file an unlawful detainer action in the event Gallo failed to vacate the premises by the extended termination date, Gallo’s allegations do not rest on

any implied term; instead he alleges breach of the express obligations of SCE to effect the eviction only through the unlawful detainer procedure. However, Gallo has not asked this Court for leave to further amend his complaint to allege a cause of action for breach of contract, and has argued on appeal that his breach of the implied covenant claim is based in tort, not contract. (See *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 572 [“On appeal, ‘the burden is on the plaintiff to show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’”].) Because Gallo’s second amended complaint failed to state a cause of action for breach of the implied covenant of good faith and fair dealing, the trial court properly sustained the demurrer to this claim.⁴

VI. Negligence

In his fifth cause of action for negligence, Gallo alleged that SCE breached a duty to exercise reasonable care to maintain and store his plant stock following his eviction from the properties. To state a cause of action for negligence, a plaintiff must plead that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff’s injuries. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1145.) The threshold element in a negligence claim is “the existence of a duty to use due care toward an interest of another.” (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) Such a duty can be created by law, by a preexisting relationship between the parties, or by the defendant’s assumption of that duty. (*Aguirre-Alvarez v. Regents of the University of California* (1998) 67 Cal.App.4th 1058, 1063.) The existence of a duty in the first instance is a question of law for the court. (*Bily v. Arthur Young & Co., supra*, at p. 397.)

⁴ In light of our conclusion that the breach of the implied covenant claim was properly dismissed, we need not consider whether the trial court erred in granting SCE’s motion to strike the punitive damages allegations from this claim.

In his second amended complaint, Gallo alleged that, pursuant to Civil Code sections 1983 and 1993 et seq., SCE had a duty to store Gallo's plant stock in a place of safekeeping until it released the property to Gallo in accordance with the terms of the statutes. However, the plain language of the statutes reflects that they apply solely to the termination of tenancies, not licenses. (See Civ. Code, § 1983, subd. (a) ["Where personal property remains on the premises after a tenancy has terminated and the premises have been vacated by the tenant, the landlord shall give written notice to the tenant and to any other person the landlord reasonably believes to be the owner of the property."]; § 1993.02, subd. (a) ["This chapter provides an optional procedure for the disposition of property that remains on the premises after a tenancy of commercial real property has terminated and the premises have been vacated by the tenant."].) SCE therefore did not owe a legal duty to Gallo pursuant to these statutes.

Gallo also alleged that, [p]ursuant to the fact that [SCE] took possession of the plaintiff's plant stock . . . on April 1, 2010 and by refusing the plaintiff the opportunity to remove his plant stock" until July 21, 2010, SCE was under a duty to use reasonable care to maintain and store Gallo's plant stock during the period it had such possession. We agree that, based on these allegations, Gallo pleaded sufficient facts to show that SCE assumed a legal duty with respect to his plant stock when it evicted him from the premises without judicial process and gained exclusive control over the plant stock that remained on the properties. As previously discussed, SCE was contractually required to file an unlawful detainer action prior to removing Gallo or his personal property from the premises. When SCE chose to take possession of the plant stock immediately upon termination of the licenses and to deny Gallo further access to it, SCE assumed a duty of reasonable care over the plant stock until a valid writ of possession was issued. Gallo alleged that SCE breached that duty by, among other acts, failing to irrigate the plant stock or protect it from harmful pests, destroying all of the plant stock on the Monterey Park property, and allowing third parties to misappropriate the plant stock on SCE's other properties. Gallo also alleged that, due to SCE's breach, approximately 90 percent of his

plant stock died or became unsalvageable. These allegations were sufficient to sustain a cause of action for negligence.

DISPOSITION

The order dismissing the action is reversed. The matter is remanded to the trial court with directions to vacate its order sustaining the demurrer to the second amended complaint without leave to amend and to enter a new order (1) sustaining the demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing, and (2) overruling the demurrers to the causes of action for wrongful eviction, invasion and disturbance of license, conversion, and negligence. Gallo shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.