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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CORNELL MITCHELL,

Plaintiff and Appellant,

v.

CT CORPORATION SYSTEMS et al.,

Defendants and Respondents.

B243004

(Los Angeles County  
Super. Ct. No. YC066631)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed.

Cornell Mitchell, in pro. per., for Plaintiff and Appellant.

Jenner & Block, Brent Caslin, Christopher C. Chiou and Kate T. Spelman, for Defendants and Respondents CT Corporation System and Wolters Kluwer United States Inc.

Bradley & Gmelich and Mark I. Melo, for Defendants and Respondents AT&T Mobility, LLC and AT&T Corporation.

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## SUMMARY

Plaintiff Cornell Mitchell sued a former litigation adversary and others for obstruction of justice, civil conspiracy and breach of an unspecified civil duty. The trial court found the complaint did not state and could not be amended to state a viable cause of action and sustained defendants' demurrers to the complaint without leave to amend. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

In November 2011, Mitchell filed a small claims action against defendants AT&T Mobility, LLC and AT&T Corporation (collectively, AT&T). On November 7, 2011, AT&T was served with notice of the small claims action through its agent for service of process, defendant CT Corporation System (CT Corp.). Mitchell was awarded a default judgment against AT&T in December 2011.

In January 2012, AT&T moved to vacate the default judgment in the small claims action. In support of its motion, AT&T submitted a declaration signed by an employee of CT Corp., stating CT Corp. had no record of having been served with process in the small claims action.

AT&T's motion to vacate was denied. AT&T subsequently satisfied the small claims judgment.

In March 2012, Mitchell filed a verified complaint in the instant action against AT&T, CT Corp. and CT Corp.'s parent corporation, defendant and respondent Wolters Kluwer United States, Inc.<sup>1</sup> He alleged causes of action for "obstruction of justice," in violation of Penal Code section 182, subdivision (a)(1), (5) and Title 18 United States Code section 1503, and for "civil conspiracy" against AT&T and CT Corp. Mitchell also alleged a claim for "breach of civil duty" against CT Corp. Mitchell sought \$1.7 million in compensatory damages, plus punitive damages.

AT&T and CT Corp. filed demurrers to the complaint, arguing Mitchell had failed to state any valid cause of action. Each argued there was no independent civil claim for violation

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<sup>1</sup> Further references to CT Corp. are to CT Corp. and its parent, collectively.

of criminal conspiracy statutes, that Mitchell had failed to state facts sufficient to establish a civil conspiracy claim, and that their conduct in the course of the small claims action was protected under the litigation privilege (Civ. Code, § 47, subd. (b)). CT Corp. also argued, among other things, that there was no independent cause of action for “breach of civil duty.”

Mitchell opposed the demurrers. But, apart from asserting that the litigation privilege was not applicable, he took no issue with defendants’ substantive arguments. Instead, he argued only that he should be permitted to amend the complaint to delete the “obstruction of justice” claim, and reframe it as a cause of action for “fraud” against the trial court, based on CT Corp.’s false assertion that it was never notified of the small claims action.

Following oral argument, the trial court determined Mitchell had not alleged, and could not amend the complaint to allege, sufficient facts to state a viable cause of action against any defendant. Both demurrers were sustained without leave to amend, and the action was dismissed. This appeal followed.

## **DISCUSSION**

Mitchell’s sole contention on appeal is that the judgment should be reversed and the matter remanded to the trial court with instructions to “grant [his] motion seeking leave of court to amend this complaint.”<sup>2</sup> We conclude otherwise.

### *1. Legal standard*

“We review de novo an order sustaining a demurrer without leave to amend.” (*Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 515.) “In reviewing the sufficiency of a complaint against a . . . demurrer, . . . “[w]e treat the demurrer as [having] admit[ed] all [well-pleaded] material facts,”” and consider matters which may be judicially noticed (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), but do not assume the truth of any contention, deduction or conclusion of law (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126).

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<sup>2</sup> Contrary to Mitchell’s assertion, the record does not reflect that Mitchell formally sought leave to amend his complaint. (Code Civ. Proc., § 472.) He simply requested leave to amend in his oppositions to defendants’ demurrers.

Where a demurrer has been sustained without leave to amend, we must determine if there is a reasonable possibility that the defect can be cured by amendment. It is an abuse of discretion to sustain a demurrer if there is a reasonable probability that defective pleading can be cured. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) If, however, amendment would be futile, leave to amend should not be granted. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 211.) The burden of showing how a complaint can be cured by amendment rests squarely with the plaintiff. (*Schifando*, at p. 1081.)

2. *The demurrers were properly sustained without leave to amend*

a. *No private cause of action for “obstruction of justice.”*

Mitchell purported to rely on Penal Code section 182, subdivision (a) and Title 18 United States Code section 1503 to plead a civil claim for obstruction of justice against defendants. Both statutes are criminal conspiracy statutes; neither gives rise to a private cause of action. A violation of a state statute does not necessarily give rise to a private cause of action unless the “Legislature has ‘manifested an intent to create such a private cause of action’ under the statute. [Citations.]” (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596.) Mitchell offers no authority to support his theory that the criminal statutes on which he relies create a private cause of action, and our research has revealed none. (See *Hillblom v. County of Fresno* (E.D.Cal. 2008) 539 F.Supp.2d 1192, 1212 [no private cause of action under Pen. Code, § 182, subd. (a)]; *Forsyth v. Humana, Inc.* (9th Cir. 1997) 114 F.3d 1467, 1482, overruled on another ground by *Lacey v. Maricopa County* (9th Cir. 2012) 693 F.3d 896, 928 [affirming judgment on the pleadings as to claim for obstruction of justice in violation of 18 U.S.C. § 1503, because the criminal statute does not sanction a private cause of action].)

No legal bases support Mitchell’s purported claim for “obstruction of justice.” The court correctly sustained demurrers to that cause of action without leave to amend.

b. *Nonexistent claim of “breach of civil duty”*

Mitchell alleges that CT Corp. breached its “civil duty” by “creat[ing] the environment for the ensuing civil wrong done to [him]” by submitting a false representation denying receipt of process in an effort to assist AT&T’s attempt to have

the small claims judgment vacated. No claim for “breach of civil duty” exists in California. In *Mobley v. Los Angeles Unified School Dist.* (2001) 90 Cal.App.4th 1221, the court affirmed the sustaining of a demurrer because “breach of duty” is “not [a] recognized cause[] of action under California law.” (*Id.* at p. 1240.) A valid pleading “must contain factual allegations supporting the existence of all the essential elements of a known cause of action. Plaintiffs cannot simply cite a few facts and then invent causes of action to cover them.” (*Id.* at p. 1239.) Mitchell failed to identify any duty CT Corp. owed to him, and does not purport to be able to amend his complaint to do so. The trial court properly sustained CT Corp.’s demurrer to this claim.

*c. No independent claim for civil conspiracy*

To state a viable claim for civil conspiracy requires that plaintiff plead and prove three elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511.) As even Mitchell acknowledges, civil conspiracy is not an independent tort. Rather, civil conspiracy is a “legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.” (*Ibid.*) ““The essence of the [civil conspiracy] claim is that it is merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability.”” (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 206.) As such, conspiracy “allows tort recovery only against a party who already owes [a] duty.” (*Applied Equipment Corp.*, at p. 514.) Mitchell did not, and does not assert that he can, allege that CT Corp. owed a duty to him.

*d. Futility of amendment*

Apart from a bare-bones assertion that he should have been permitted to change the label, and replace his allegations of “obstruction of justice” with a fraud claim, Mitchell does not explain how he might amend the complaint to cure its defects. Even if we assume Mitchell could allege a claim of fraud, such an amendment would be futile.

To state a claim for fraud, Mitchell must plead and prove (1) a knowingly false representation, (2) intent to deceive or induce reliance, (3) justifiable reliance, and (4) resulting damage. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) For at least two reasons, Mitchell cannot amend to allege a viable cause of action: he has suffered no damages, and the conduct about which he complains is absolutely protected by the “litigation privilege.”

First, Mitchell does not claim he suffered damages as a result of the allegedly false declaration submitted by CT Corp. in the small claims action. Mitchell acknowledges that the small claims court denied AT&T’s motion to vacate, and that he prevailed in the small claims action against AT&T. The record reflects that judgment was satisfied. Thus, Mitchell prevailed in the small claims action and has suffered no damages. “[F]raud without damage is not actionable.” [Citation.]” (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1415 [affirming sustaining without leave to amend a demurrer to fraud claim where plaintiff failed to allege damages].)

Second, any fraud claim Mitchell might otherwise assert would be barred by the litigation privilege. With exceptions not applicable here, Civil Code section 47, subdivision (b) provides an absolute privilege for publications filed in a judicial proceeding.<sup>3</sup> “The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation.” [Citations.]” (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.) The privilege is broadly applied. “It is absolute and applies regardless of malice’ . . . [and] ‘has been extended to *any* communication, whether or not it is a publication,

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<sup>3</sup> In relevant part, Civil Code section 47 provides that “[a] privileged publication or broadcast is one made: [¶] . . . [¶] (b) “In any . . . (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . .”

and to *all* torts other than malicious prosecution. [Citations]” (*Ibid.*) “The litigation privilege applies ‘even though the publication is made outside the courtroom and no function of the court or its officers is involved.’ [Citation]” (*Ibid.*)

Where it applies, the litigation privilege protects “communicative” acts or conduct made inside and outside of open court. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1248–1249.) For the privilege to obtain, the communicative act must: (1) be made in a judicial proceeding; (2) have some connection to the action; (3) be made to achieve the purpose of the litigation; and (4) involve the litigants or other participants authorized by law. (*Carney v. Rotkin, Schmerin & McIntyre* (1988) 206 Cal.App.3d 1513, 1521.) “The communication may be made outside a courtroom,” and “may be made even ‘preliminary to a proposed judicial proceeding.’” (*Id.* at p. 1521, fn. 4.) “When a communication meets these requirements, the privilege is absolute.” (*Ibid.*)

The allegations of the complaint demonstrate the declaration submitted by CT Corp. was a privileged “communicative” act. The “fraudulent” document, signed by CT Corp.’s employee, was submitted in the small claims action to support AT&T’s motion to vacate judgment and to induce the court to grant the motion. Mitchell’s protestations notwithstanding, he cannot overcome the litigation privilege by asserting that respondents committed a “flagrant minded and malicious” act. The litigation privilege bars actions, “even when based on fraudulent representations.” (*Mansell v. Otto* (2003) 108 Cal.App.4th 265, 278, fn. 47.) The presence or absence of malice or good or bad faith is irrelevant to the inquiry whether the litigation privilege is applicable. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 215–216.)

The demurrers were properly sustained without leave to amend.

**DISPOSITION**

The judgment is affirmed. Respondents are awarded their costs of appeal.  
NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.