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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID GAINES, as Assignee, etc.,

Plaintiff and Appellant,

v.

ESTATE OF THOMAS A. WALTZ, et al.,

Defendants and Respondents.

D059686

(Super. Ct. No. 37-2007-00073271-
CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager and Jay M. Bloom, Judges. Reversed and remanded with directions.

Gary Devoir brought suit against the Estate of Thomas A. Waltz, Nell F. Waltz, and the Waltz Family Partnership (collectively the Waltz Defendants). In his second amended complaint, Devoir alleged claims for fraud in the inducement, intentional interference with contract, breach of fiduciary duty, and implied contractual indemnity. The court sustained the Waltz Defendants' demurrer without leave to amend as to the claims for intentional interference with contract and breach of fiduciary duty. The matter

proceeded to trial, the jury found in favor of the Waltz Defendants, and the court entered judgment.

Devoir appealed, but during the appellate process, assigned his rights in this matter to David Gaines. Gaines contends the court erred when it sustained the Waltz Defendants' demurrer as to the intentional interference with contract claim. Specifically, he argues the claim was not barred by the statute of limitations. We agree and determine that Devoir stated a valid cause of action for interference with contract in the second amended complaint. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

This matter concerns whether Devoir stated a valid cause of action for interference with contract against the Waltz Defendants in the second amended complaint. We thus discuss only those portions of the factual and procedural background necessary for us to evaluate this issue. We do not discuss in detail the original complaint, the first amended complaint, the probate proceedings,¹ or the trial.

The Second Amended Complaint

Devoir and Gaines were shareholders in Alpha Diagnostics doing business as Active 1, Inc. Nell Waltz (Nell) was a general partner in the Waltz Family Limited Partnership (WFLP). WFLP was a member of Alpha Medical Center Partners, LLC (AMC Partners). Thomas Waltz (Thomas), who was a general partner, principal, and officer of WFLP, also served as a managing member of AMC Partners.

¹ During this litigation, Thomas Waltz passed away and claims related to this lawsuit were filed against his estate. The estate denied the claims.

Devoir alleges AMC Partners promised to offer a \$150,000 payment to National Loan Investors (NLI) to satisfy a debt of Active 1 and personally guaranteed by Devoir and Gaines. In exchange for this payment, Devoir allowed AMC Partners to acquire certain assets and leaseholds of Active 1. This agreement was memorialized in the first amendment to AMC Partners' operating agreement.

Devoir allowed AMC Partners to acquire certain assets of Active 1, but AMC Partners failed to make the \$150,000 payment to NLI. Devoir became aware that AMC Partners did not intend to make the payment as promised in summer 2005, "after [the Waltz Defendants] failed to pay the NLI debt as demanded by [Devoir] in writing in March, 2005 and after service of" a lawsuit filed by NLI against Devoir in May 2005.

Devoir alleged the Waltz Defendants were aware of his agreement with AMC Partners. Despite their knowledge, the Waltz Defendants "intentionally interfered with AMC Partners' contractual relationship with Devoir in May and June, 2005 when (after consummation of the AMC Partners LLC sale of assets to Sharp Health Plan and Grossmont Imaging), the W[altz] Defendants converted AMC Partners['] funds by causing AMC Partners to make multiple fraudulent conveyances via distributions and payments of funds to or on behalf of LLC members, including themselves, totaling over \$300,000, for wholly inadequate consideration and without receiving a reasonable equivalent value for such distributions, and as a means to interfere with the contractual rights of Devoir to payment of the NLI debt by AMC Partners." Devoir also averred that Thomas admitted that none of these payments were properly approved under AMC Partners' operating agreement and that he made the sole decision to make the payments.

Devoir claimed he did not discover and could not reasonably discover the illicit payments by the Waltz Defendants "until on or after February 19, 2006, after AMC Partners . . . filed a Chapter 11 proceeding [in bankruptcy court] and disclosed pertinent financial information which established both the wrongful preferential payment" and AMC Partners' insolvency at the time the payments were made.

Demurrer

Devoir filed three complaints in the matter. The original complaint was filed August 17, 2007. The first amended complaint was filed February 6, 2009. The second amended complaint was filed February 19, 2010.

The second amended complaint included causes of action for fraud in the inducement, intentional interference with contract, breach of fiduciary duty, and implied contractual indemnity. The Waltz Defendants demurred to the second amended complaint. The court sustained, in part, and overruled, in part, the demurrer. As relevant to this appeal, the court found that the intentional interference with contract claim had a two-year statute of limitations and was time-barred because the original complaint was filed more than two years after Devoir became aware of the actionable conduct.

After a jury found in favor of the Waltz Defendants on the remaining claims, Devoir timely appealed. Devoir then assigned his rights in this matter to Gaines.

DISCUSSION

Gaines asserts the court committed reversible error by sustaining the Waltz Defendants' demurrer to the second cause of action for intentional interference with contract without leave to amend. We agree.

I

STANDARD OF REVIEW

Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, we apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) We assume the truth of the allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) It is error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment. (*Ibid.*)

II

INTENTIONAL INTERFERENCE WITH CONTRACT

A. Statute of Limitations

The court sustained the Waltz Defendants' demurrer as to the second cause of action on the grounds that the intentional interference with contract claim was time-barred. In doing so, the court found that the applicable statute of limitations was two years. Gaines claims the court erred, and the statute of limitations for an interference with contract claim that is based on fraud is three years.

In general, a cause of action for intentional interference with contract is governed by a two-year statute of limitations. (Code Civ. Proc., § 339, subd. 1; *Trembath v.*

Digardi (1974) 43 Cal.App.3d 834, 836.) However, citing *Romano v. Wilbur Ellis & Co.* (1947) 82 Cal.App.2d 670 (*Romano*), Gaines argues that when the claim of interference is based on fraud, the statute of limitations is three years. Even if we agreed with Gaines that *Romano* establishes a three-year statute of limitations for an interference of contract claim based on fraud, we nevertheless would find it not helpful here. In *Romano*, the plaintiff entered into a contract with a third party whereby it had the exclusive right to sell its fish and fish products to the third party. The defendants falsely represented to the third party that the plaintiff was not fit or qualified to represent the third party, and the defendants could deal more profitably and advantageously with the third party. Based on these representations, the third party terminated its contract with the plaintiff. (*Id.* at pp. 671-672.)

The Court of Appeal concluded the plaintiff had stated a cause of action for interference with contract. (*Romano, supra*, 82 Cal.App.2d at pp. 672-673.) The court also determined that the cause of action was subject to a three-year statute of limitations because "the gist of this type of action [was] fraud." (*Id.* at pp. 673-674.)

Here, the interference that caused AMC Partners to breach its agreement with Devoir is not analogous to the interference in *Romano, supra*, 82 Cal.App.2d 670. In *Romano*, the third party breached its contract with the plaintiff based on the false statements made by the defendants. (*Id.* at pp. 671-672.) In contrast, Devoir did not plead any similar type of interference. Instead, he alleged Thomas caused AMC Partners to pay certain AMC Partners' members' personal debts, and after doing so, AMC Partners no longer had the means to make the \$150,000 payment on behalf of Devoir. He also

alleged that Thomas was the managing member of AMC Partners and "made the sole decision to make [the] payments." There is no indication that Thomas engaged in fraud to cause AMC Partners to make the payments to the members' personal creditors. To the contrary, it appears Thomas, as the managing member, simply caused AMC Partners to make the subject payments. No deception was required.

The second amended complaint characterizes some of Thomas's conduct as "fraudulent" in relation to the subject payments, but this description is not aimed at the act of interference (i.e., causing AMC Partners to make other payments that rendered the company insolvent), but instead, at Thomas's varying comments about whether AMC Partners had any obligation to make a \$150,000 payment to NLI. Unlike the defendants in *Romano, supra*, 82 Cal.App.2d 670 who deceived the third party to breach its contract with the plaintiff, here, there are no allegations that Thomas (or any of the other Waltz Defendants) hoodwinked AMC Partners to breach their contract with Devoir.² Therefore, we agree with the superior court: a two-year statute of limitations applies to the cause of action for intentional interference with contract.

Agreeing with the superior court that a two-year statute of limitations applies here does not end our review of the court's conclusion that the claim was time-barred. We next must consider when the action accrued. "A plaintiff must bring a claim within the limitations period after accrual of the cause of action. [Citations.] In other words, statutes of limitation do not begin to run until a cause of action accrues." (*Fox v. Ethicon*

² The second amended complaint included a claim for fraudulent inducement, but the conduct at issue in that claim was not related to the alleged interference with contract.

Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 806.) In general, a cause of action accrues when it is " 'complete with all of its elements.' " (*Ibid.*; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*).

"An exception to the general rule for defining the accrual of a cause of action -- indeed, the 'most important' one -- is the discovery rule. [Citation.] . . . It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart, supra*, 21 Cal.4th at p. 397.) "[T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof -- when, simply put, he at least 'suspects . . . that someone has done something wrong' to him [citation], 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding[.]' " (*Id.* at pp. 397-398.)

"A close cousin of the discovery rule is the 'well accepted principle . . . of fraudulent concealment.' " (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) " It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' " (*Ibid.*)

Here, the superior court found that the claim accrued in the summer of 2005 when Devoir "became aware of the falsity of Waltz's representations." Gaines argues the court's finding was in error because Devoir did not allege that he was aware of the

"fraudulent payments" in the summer of 2005. Instead, Gaines contends Devoir did not become aware of these payments until February 19, 2006. We agree.

In paragraph 20 of the second amended complaint, Devoir alleged he "did not discover the falsity of Defendants' representations until summer, 2005, after Defendants failed to pay the NLI debt as demanded by Plaintiff in writing in March 2005, and after service of the NLI lawsuit" The representations to which Devoir refers are not the illicit payments made by AMC Partners. The false representations are AMC Partners' promises to make the \$150,000 payment to NLI on behalf of Devoir. These claims are made within Devoir's allegations regarding his first cause of action for fraud in the inducement. Thus, his allegations about discovering the falsity of the representations relates only to the fraud at issue in the first cause of action, namely AMC Partners' promise to pay Devoir's debt.

In alleging the second cause of action for intentional interference with contract, Devoir makes clear that he "did not discover and could not have reasonably discovered these acts of interference by the W[altz] Defendants until on or after February 19, 2006, after AMC Partners had filed a Chapter 11 proceeding and disclosed pertinent financial information which established both the wrongful preferential payment and the insolvency of AMC Partners at the time it was made." Devoir further avers Thomas "actively concealed" the payments as well. These allegations appear logical because there is no indication that Devoir had access to AMC Partners' books or would or should have known why it decided not to make the promised \$150,000 payment. The Waltz Defendants may be able to prove that Devoir should have known of the allegedly

fraudulent payments in the summer of 2005 (they argue as much in their respondent's brief). However, whether Devoir reasonably should have discovered the illicit payments is a factual dispute that cannot be addressed on demurrer. (See *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879 ["A demurrer is simply not the appropriate procedure for determining the truth of disputed facts."].) Simply put, the allegations of the second amended complaint, which we must accept as true, clearly stated that Devoir was not aware of the interference with the contract by the Waltz Defendants until February 19, 2006. We thus conclude, based only on the second amended complaint, that Devoir adequately alleged he did not discover the interference until February 19, 2006 and the claim for interference of contract accrued then. (*Norgart, supra*, 21 Cal.4th at p. 397.)

Although Devoir alleged he discovered the illicit payments on February 19, 2006, he did not allege a cause of action for interference with contract until almost four years later when he included it in his second amended complaint. Gaines argues this gap of time does not take the claim outside the applicable statute of limitations because it should relate back to the filing of the original complaint, which occurred within a year of Devoir's discovery of the interference.

"The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one." (*Norgart, supra*, 21 Cal.4th at pp. 408-409, italics in original.) Here, Gaines contends the claim for intentional interference with contract shares the same facts, injury, and instrumentality as the breach of fiduciary claim in the

original complaint. The Waltz Defendants did not address Gaines's contentions. We find the Waltz Defendants' silence on this point telling, considering their otherwise thorough respondents' brief.

We agree with Gaines that the intentional interference with contract claim relates back to the breach of fiduciary duty cause of action in the original complaint. In the original complaint, Devoir alleged that the Waltz Defendants "breached their fiduciary duty to Plaintiff by causing AMC Partners to preferentially pay the sum of \$250,000 to California Bank and Trust to retire the joint and several loan" of the Waltz Defendants "ahead of the obligation owed by AMC Partners to Plaintiff." Based on this alleged breach of fiduciary duty, Devoir sought actual and punitive damages.

Devoir's breach of fiduciary duty claim was based on AMC Partners' payment of its members' personal debts. This is precisely the same conduct that gives rise to Devoir's intentional interference claim in the second amended complaint. Both the breach of fiduciary claim and the intentional interference claim involve the same injury: AMC Partner's failure to make the \$150,000 payment on behalf of Devoir. The second amended complaint presents more detailed allegations and states the amount of the illicit payments was \$300,000 not \$250,000 as alleged in the original complaint, but we are satisfied that the intentional interference with contract claim arises out of the same facts, involves the same injury, and refers to the same instrumentality as the claim for breach of fiduciary duty found in the original complaint. The intentional interference with contract

cause of action therefore relates back to the original complaint and is not barred by the statute of limitations.³ (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 934.)

B. The Waltz Defendants' Additional Contentions

The Waltz Defendants raise additional arguments why Devoir failed to state a valid claim for intentional interference with contract in the event we determine the claim is not time-barred. Specifically, they assert: (1) any action on the alleged illicit payments is barred as a matter of law; (2) any alleged interference based on fraud has been unsuccessfully tried to a jury; (3) as the managing member of AMC Partners, Thomas cannot be liable for interfering with the company's contract; and (4) the Waltz Defendants are parties to the contract with Devoir and thus cannot have interfered with their own contract as a matter of law. Gaines substantively addresses each of these points, but as a threshold matter, argues we cannot consider any of these new contentions because they were not raised in the Waltz Defendants' demurrer. We disagree.

Because we are reviewing the superior court's ruling on demurrer, we are applying the law to undisputed facts. (*California Logistics, Inc. v. State* (2008) 161 Cal.App.4th 242, 247.) "[W]here a legal argument was not raised in the trial court, we have discretion to consider it where, as here, it involves a legal question applied to undisputed facts." (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287-1288.) We exercise our discretion

³ The original complaint alleges that Devoir became aware of the illicit payments on January 18, 2006, but the second amended complaint alleges that he became aware of the payments on February 19, 2006. Although the pleadings are inconsistent, even if we adopted January 18, 2006 as the date Devoir discovered the interference, the claim would not be time-barred. The original complaint was filed August 17, 2007, within the two-year statute of limitations.

and address the Waltz Defendants' additional arguments on the merits. It would be a waste of judicial resources to send this matter back to the superior court only to have that court sustain the demurrer on grounds argued in the respondents' brief, and then have Gaines appeal the ensuing judgment, which would raise the very issues before us now.

1. Breach of Fiduciary Duty and Intentional Interference with Contract

The Waltz Defendants maintain Devoir's intentional interference with contract claim is nothing more than a relabeling of Devoir's failed breach of fiduciary duty claim. And, because Devoir cannot state a claim for breach of fiduciary duty as a matter of law, the Waltz Defendants assert he should not be permitted to plead around the court's prior order dismissing the breach of fiduciary claim. We disagree.

AMC Partners is a Delaware limited liability company. " "A limited liability company is a hybrid business entity formed under the Corporations Code . . . [which] provides members with limited liability to the same extent enjoyed by corporate shareholders [citation] . . . " [citation] while maintaining the attributes of a partnership for federal income tax purposes." (*People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1211-1212.) The limited liability company consists of members " "who own membership interests [citation]. The company has a legal existence separate from its members . . . but . . . the members . . . actively participate in the management and control of the company . . . " " (*Id.* at p. 1212.) Under California law, the liability of the members of a foreign limited liability company is governed by the law of the state in which it was formed. (Corp. Code, § 17450, subd. (a).) The liability of the members of AMC Partners therefore would be determined under Delaware law.

Because of the application of Delaware law, the Waltz Defendants assert: "The question of whether an individual creditor may maintain an action against the director or manager of an insolvent company has been answered--unequivocally--by the Delaware Supreme Court: '[I]ndividual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors.' (*North American Catholic Education Programming Foundation v. Gheewalla* (Del. 2007) 930 A.2d 92, 103 [*Gheewalla*])." The Waltz Defendants thus conclude that *Gheewalla* prohibits Devoir's intentional interference with contract claim. It does not.

The court in *Gheewalla, supra*, 930 A.2d 92 did not address a claim for intentional interference with contract. Instead, *Gheewalla* made clear that, under Delaware law, directors of an insolvent corporation do not owe a fiduciary duty to creditors. (*Id.* at p. 103.) *Gheewalla* is not instructive here.

We also are not impressed by the Waltz Defendants' argument that the intentional interference with contract claim is the same as a breach of fiduciary duty cause of action. They are not alike. As its name implies, a claim for breach of fiduciary duty requires the existence of a fiduciary duty. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.) In contrast, a claim for intentional interference with contract does not require any duty--fiduciary or otherwise. To state a valid claim for intentional interference with contract, a plaintiff must allege: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)

resulting damage. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Here, there is no dispute that Devoir adequately pled the required elements for his intentional interference with contract claim. *Gheewalla, supra*, 930 A.2d 92 does not prohibit this claim as a matter of law. We conclude Devoir's failed breach of fiduciary claim does not prevent him from alleging a valid claim for intentional interference with contract.

2. Fraud Has Been Unsuccessfully Tried to a Jury

The Waltz Defendants next contend Devoir cannot base his intentional interference with contract claim on the same fraudulent conduct that lead to Devoir's fraudulent inducement claim. This argument misses the mark. The fraudulent conduct that Devoir relied upon for his fraudulent inducement claim was AMC Partners' promise to make the \$150,000 payment. The conduct that gave rise to Devoir's intentional interference with contract claim was AMC Partners' payment of certain members' personal debts, which left AMC Partners insolvent and incapable of paying Devoir's debt. There is no indication that the jury made any finding regarding the alleged illicit payments or that this issue was even presented at trial. Accordingly, the jury's finding that the Waltz Defendants did not fraudulently induce Devoir has no bearing on the intentional interference with contract claim.

3. The Waltz Defendants' Relationship With AMC Partners

The Waltz Defendants' last two arguments involve their relationship with AMC Partners. First, because Thomas was the managing member of AMC Partners when the

illicit payments were made, the Waltz Defendants contend that they cannot be held liable for interfering with AMC Partners' contract with Devoir. In other words, the Waltz Defendants argue Thomas's conduct was privileged. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24 (*Shoemaker*) ["It is also well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract."].) Second, the Waltz Defendants argue they are parties to AMC Partners' contract with Devoir, and as such, cannot interfere with it as a matter of law. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 (*Litton*) [noting a party to a contract cannot interfere with its contract as a matter of law].) We reject both these contentions.

In making their arguments, the Waltz Defendants ignore a number of California cases holding owners, managers, and advisors of a company may be held liable in tort as third parties when they were not acting to protect the interest of the company.⁴ (See *Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875, 883 (*Collins*); *Culcal Stylco, Inc. v. Vornado, Inc.* (1972) 26 Cal.App.3d 879, 882-883 (*Culcal*); *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593, 598-600 (*Kozlowsky*).) Here, Devoir alleged that Thomas was not acting to protect the interest of AMC Partners. To the contrary, he

⁴ An underlying problem of the Waltz Defendants' position is their assumption they were members of AMC Partners and acting as members in conducting the alleged acts. The Waltz Defendants are mistaken, at least at the pleadings stage of this suit. Devoir alleged the Waltz Defendants were not acting on behalf of the company when they caused AMC Partners to make the illicit payments. The Waltz Defendants may be able to prove that they actually were acting on behalf of the company, but this is a question better resolved at summary judgment or trial. It is not an appropriate subject for demurrer when, as here, the relevant facts are clearly disputed.

alleged that none of the allegedly illicit payments were properly approved under the company's operating agreement and Thomas made the "sole decision" to make the payments. We conclude these allegations should have withstood the Waltz Defendants' demurrer.

Shoemaker, supra, 52 Cal.3d 1 does not compel a different result. In *Shoemaker*, the plaintiff sued multiple defendants, including his supervisors for, among other things, interference with prospective economic advantage.⁵ The economic advantage was the plaintiff's "continuation of his employment relationship." (*Id.* at p. 24.) The court determined the plaintiff could not maintain this cause of action because his supervisors were vested with the right to act for the employer in terminating the plaintiff's employment. As such, the court concluded the supervisor defendants stood in the place of the employer, "because the employer--the other party to the supposed contract--cannot act except through such agents." (*Id.* at p. 25.)

Here, there is no employer-employee relationship between Devoir and AMC Partners or Devoir and the Waltz Defendants. Devoir brought suit against the Waltz Defendants because they allegedly interfered with his contract with AMC Partners by causing AMC Partners to make certain payments of their members' personal debts that

⁵ "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. [Citation.] The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric v. Bear Stearns & Co.*, *supra*, 50 Cal.3d at p. 1126.)

rendered the company insolvent. In *Shoemaker, supra*, 52 Cal.3d 1, the supervisor defendants terminated the plaintiff's employment and were authorized to do so on behalf of the employer. (*Id.* at p. 25.) The supervisor defendants were acting on behalf of the employer and within the scope of their duties. In contrast, Devoir alleged that Thomas acted beyond his authority as the managing member of AMC Partners. Devoir thus adequately alleged that Thomas was not acting for or on behalf of AMC Partners, which removes Thomas's conduct, at least for purposes of demurrer, from the protection of *Shoemaker, supra*, 52 Cal.3d 1.

Similar to their argument about Thomas's position as managing member of AMC Partners, the Waltz Defendants claim they are parties to the company's contract with Devoir, and therefore, could not interfere with it as a matter of law. (See *Litton, supra*, 7 Cal.4th at p. 514.) To this end, the Waltz Defendants have requested we take judicial notice, under Evidence Code section 452, subdivision (h), of the following: "[The] Waltz Defendants are parties to the Original Operating Agreement of Alpha Medical Center Partners, LLC . . . dated July 18, 2003 and First Amendment thereto." We conclude that the Waltz Defendants' request for judicial notice has no bearing on our analysis of the validity of Devoir's intentional interference with contract claim, and for this reason, deny the request.

AMC Partners' promise to pay Devoir's \$150,000 debt is memorialized as part of the first amendment to the operating agreement. The Waltz Defendants claim they are a party to this agreement, but they do not concede that they, personally, are obligated to make any payment under the agreement to Devoir. By arguing they are parties to the

operating agreement, the Waltz Defendants are merely asserting they are members of the company. However, as members, they would not be liable for the debts or obligations of AMC Partners. (Del. Code Ann., tit. 6, § 18-303, subd. (a) (2012) [the "liabilities of a limited liability company, whether arising in contract, tort or otherwise, . . . no member or manager of a limited liability company shall be obligated personally [therefore] . . . solely by reason of being a member or acting as a manager of the limited liability company."].)⁶

Our high court explained the rationale for the rule that a claim for intentional interference with a contract does not lie against a party to the contract: "One contracting party owes no general tort duty to another not to interfere with performance of the contract; its duty is simply to perform the contract according to its terms. The tort duty not to interfere with the contract falls only on strangers--interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Litton, supra*, 7 Cal.4th at p. 514.) This rationale does not exist here. As members of AMC Partners, the Waltz Defendants arguably have an "interest in the scope or course of the contract's performance." However, Devoir did not sue the Waltz Defendants in their roles as members of AMC Partners. Instead, Devoir clearly alleged that Thomas was not acting

⁶ Comparable exclusion of personal liability exists for members and managers of a California limited liability company. (See Corp. Code, § 17101, subd. (a) ["no member of a limited liability company shall be personally liable . . . for any . . . liability of the limited liability company, whether that liability . . . arises in contract, tort, or otherwise, solely by reason of being a member of the limited liability company"]; see also Corp. Code, § 17158, subd. (a) ["No person who is a manager or officer or both . . . of a limited liability company shall be personally liable . . . for any . . . liability of the limited liability company, whether that liability . . . arises in contract, tort, or otherwise, solely by reason of being a manager or officer or both . . . of the limited liability company."].)

within the scope of his duties as managing member when he caused AMC Partners to make the allegedly illicit payments. Further, there are no allegations that the Waltz Defendants are personally liable for the breach of the contract. Thus, according to the allegations in the second amended complaint, the Waltz Defendants are strangers to AMC Partners' contract with Devoir, and Devoir is not prevented from alleging a cause of action for intentional interference with contract. (Cf. *Collins, supra*, 47 Cal.2d at p. 883; *Culcal, supra*, 26 Cal.App.3d at pp. 882-883; *Kozlowsky, supra*, 6 Cal.App.3d at pp. 598-600.)

DISPOSITION

The judgment in favor of the Waltz Defendants is reversed to the extent it precludes Gaines from further litigating a claim of intentional interference with contract against the Waltz Defendants. We remand this matter to the superior court with directions to modify the June 4, 2010 minute order to overrule the Waltz Defendants' demurrer as to the second cause of action for intentional interference with contract in the second amended complaint. Gaines is awarded his costs on appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.