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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RIMON HANNA,

Plaintiff and Appellant,

v.

CITY OF FRESNO et al.,

Defendants and Respondents.

F060936

(Super. Ct. No. 09CECG00482)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Law Offices of Richard A. Ruiz and Richard A. Ruiz for Plaintiff and Appellant. James Sanchez, City Attorney, Tamara Bogosian, Deputy City Attorney; Betts & Rubin, James B. Betts, and Joseph D. Rubin for Defendants and Respondents.

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INTRODUCTION

Plaintiff Rimon Hanna appeals from a judgment entered after the trial court granted the defendant police officers' motion for summary judgment. Hanna contends the trial court erred in concluding that he lacked standing to assert claims for breach of contract, fraud and civil conspiracy.

Defendants argue that Hanna lacked standing because (1) the oral contract alleged by Hanna was made with his corporation and not Hanna personally, (2) the alleged fraudulent misrepresentations were made to the corporation and not Hanna personally, and (3) the damages alleged in Hanna's pleading were suffered by the corporation, not Hanna.

The first step in our independent review of the motion for summary judgment is to identify the issues framed by the complaint and answer because those are the issues to which a defendant's motion must respond, not the issues the defendant wished these pleadings had raised. In this case, the defendants misinterpreted Hanna's operative complaint, which caused their separate statement of undisputed facts to be insufficient to justify a judgment in their favor. The facts in defendants' separate statements failed to establish that the corporation was the contracting party or that the alleged fraud was directed at the corporation and not Hanna. Thus, the separate statement failed to make a prima facie showing that Hanna lacked standing to assert his claims for breach of contract, fraud and civil conspiracy or that he suffered no damages from defendants' allegedly wrongful conduct.

Therefore, the judgment is reversed and the matter remanded for further proceedings.

BACKGROUND

Rimon Hanna, as an individual, filed this lawsuit against the City of Fresno (the City) and three members of the City's police department. The individual defendants are (1) Jerry Dyer, chief of the police department; (2) Andy Hall, a police captain; and (3) Christopher Lee, a police officer (hereafter the individual defendants).

Hanna is the sole owner of all shares of capital stock of Rimon's Culinary Enterprises, a California corporation (RCE). RCE was the owner of a restaurant that did business under the name Citron at a location on North Blackstone Avenue, near Shaw Avenue, in Fresno. The restaurant opened in May 2004 and was closed in May 2007.

Hanna's pleading alleged that members of the City's police department continually harassed him and interfered with the operation of the restaurant, which violated his constitutional rights to equal protection and due process. Hanna alleged, among other things, that the restaurant was written up for various permit and city code violations not supported by evidence and was forced to hire off-duty police officers as security in order to stay open. Finally, in an effort to convince Hanna to close his business, Hanna alleged that Captain Hall promised him that if he closed his restaurant, Hall would allow him to reopen it downtown and the police department would support his permit applications. Much of the conduct alleged in Hanna's pleading is not relevant to this appeal, which is limited to his causes of action for breach of contract, fraud and civil conspiracy. Conduct relevant to the other causes of action will not be described in this opinion.

PROCEEDINGS

In February 2009, Hanna¹ filed a complaint against the City and the California Department of Alcoholic Beverage Control containing four causes of action. In July 2009, Hanna dismissed the California Department of Alcoholic Beverage and filed a second amended complaint (SAC) against the City, Dyer, Hall and Lee. The SAC contained 10 causes of action, including the first for breach of contract against Chief Dyer and Captain Hall, the second for fraud against Captain Hall and Officer Lee and the fourth for civil conspiracy against Dyer, Hall and Lee. The remaining seven causes of action in the SAC, not the subject of this appeal, alleged unfair business practices, negligent supervision, assault and violations of due process and equal protection under both the California and United States Constitutions.

In March 2010, the individual defendants filed a motion for summary judgment or, in the alternative, for summary adjudication on all causes of action.² The individual

¹ Hanna represented himself throughout the trial court proceedings, with the exception of a five-month period from May 26, 2009, to October 20, 2009.

defendants asserted that Hanna lacked standing, essentially since the restaurant was owned by RCE--a corporation, and any alleged damages would be to the corporation. In addition, the individual defendants raised other grounds, such as immunity and Hanna's inability to prove the requisite elements of his claims. Their memorandum of points and authorities filed in support of their motion addressed Hanna's standing to bring the contract claim with a one-sentence argument: "The alleged contract is with RCE, not Plaintiff; thus, Plaintiff has no standing to assert a claim." With regard to Hanna's standing to bring the fraud claim, they made the same argument: "Once again, the injury is alleged to be that of RCE, not Plaintiff; thus, Plaintiff has no standing." With respect to the conspiracy claim, the individual defendants also presented the single-sentence argument that Hanna "lacks standing to maintain this claim as the injury was to the corporation." In their separate statement of undisputed material facts on the issue of standing as to all causes of action, the individual identified two undisputed material facts:

"1. Plaintiff alleges injuries to the restaurant at 5123 North Blackstone, Fresno, California."

"2. The restaurant was owned by a corporation called Rimon's Culinary Enterprises ("RCE")."

On May 28, 2010, the trial court issued a tentative ruling indicating it would grant the motions for summary judgment brought by the individual defendants and the City. The ruling discussed standing for nine of Hanna's 10 causes of action together, stating that "the instant action is derivative of the harm to the corporation" and concluding that Hanna "does not have standing to bring the action without joining the corporation."³

² At the same time, the City filed a motion for summary judgment or, in the alternative, for summary adjudication. That motion is not relevant to this appeal because the City was not named as a defendant in Hanna's causes of action for breach of contract, fraud and civil conspiracy

³ The court also indicated it would grant summary judgment on the assault claim as a matter of law and overrule defendants' evidentiary objections because those objections did not follow the proper format for raising written objections.

No party contested the tentative ruling and on June 2, 2010, the trial court adopted its tentative ruling granting summary judgment in favor of all defendants as the final order of the court.

Subsequently, a judgment was filed and, in August 2010, Hanna filed a notice of appeal challenging the judgment. Because Hanna's opening brief addresses only the granting of summary judgment on the breach of contract, fraud and civil conspiracy causes of action, we need only address those claims. (California Rules of Court, rule 8.204.)

DISCUSSION

I. STANDARD OF REVIEW

A. Independent Review

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

Appellate courts determine whether a triable issue of material fact exists by conducting an independent review of "the record that was before the trial court when it ruled on defendants' motion." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68.)

The success or failure of a motion for summary judgment "must be determined ... by application of the required step-by-step evaluation of the moving and opposing papers." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607 (*Brantley*).) Therefore, our independent review of the motion for summary judgment will use the three-step analysis set forth by this court in *Brantley, supra*, at page 1602. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012), ¶ 8:166, pp. 8-130, 8-131 [appellate courts use same three-step analysis required of trial court].)

B. Three-Step Analysis

1. *Identifying the Issues Framed by the Pleadings*

The first step for a court analyzing a motion for summary judgment is to “identify the issues framed by the pleadings,” because the motion must show “there is no factual basis for relief on any theory reasonably contemplated by the opponent’s pleading.” (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064; see *Brantley, supra*, 42 Cal.App.4th at p. 1602.) Stated otherwise, “[t]he materiality of a disputed fact is measured by the pleadings [citations], which ‘set the boundaries of the issues to be resolved at summary judgment.’ [Citations.]” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)

2. *Review of Moving Party’s Showing*

Step two of the *Brantley* analysis involves determining whether the moving party’s showing satisfied its initial burden and justified a judgment in its favor. (*Brantley, supra*, 42 Cal.App.4th at p. 1602.) To satisfy this burden, the moving party must “make a prima facie showing of the nonexistence of any triable issue of material fact” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

Our inquiry into the moving party’s prima facie showing involves an examination of (1) the facts listed in the moving party’s separate statement and (2) the supporting evidence referenced in the moving party’s separate statement.

Our examination of the facts set forth in the moving party’s separate statement is based on provisions in the statute and applicable court rule. Code of Civil Procedure section 437c, subdivision (b)(1) provides that the moving party’s “supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed.” (See *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 632 [emphasizing the mandatory nature of the statute’s use of “shall” and the breadth of its use of “all material facts”].) California Rules of Court, rule 3.1350(d) provides that the “Separate Statement of Undisputed Material Facts

in support of a motion must separately identify ... each supporting material fact claimed to be without dispute with respect to the cause of action”⁴

The facts set forth in the moving party’s separate statement of undisputed facts are sufficient to make the required prima facie showing when, standing alone and accepted as true, those facts require a favorable ruling for the moving party under the applicable principles of law. (Zebrowski, *The Summary Adjudication Pyramid* (Nov. 1989) 12 L.A. Law. 28, 29.)

If the facts stated in the moving party’s separate statement justify a ruling in its favor, the court examines the supporting evidence referenced in the separate statement. The party moving for summary judgment must produce sufficient evidence to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) Our Supreme Court has stated that, in the context of this burden of production, the required prima facie showing “is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.) In other words, the referenced evidence must establish, “either directly or by inference, the material fact that the moving party asserts is undisputed.” (*Haney v. Aramark Uniform Services, Inc., supra*, 121 Cal.App.4th at p. 632.)

Our examination of the evidence is guided by the well-established principle that a court must strictly construe a moving party’s papers. (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 739; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:117, p. 8-75 [appellate and trial courts strictly construe moving papers].) Under this principle of strict construction, a court reviewing a defendant’s motion for summary judgment must view the evidence in the light most favorable to the plaintiff and

⁴ Respondents are reminded that when “undisputed facts” relate to more than one cause of action, defense or issue, these facts (together with the supporting evidence) must be repeated for each such issue. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 10:96.6, p. 10-40.)

resolve any evidentiary doubts or ambiguities in the plaintiff's favor. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97; see Code Civ. Proc., § 437c, subd. (c) [where the fact is reasonably inferred from the evidence but that inference is contradicted by other inferences, a triable issue of fact exists].)

3. *Review of Opposing Party's Papers*

Once the moving party defendant has met its burden, “the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action” (Code Civ. Proc., § 437c, subd. (p)(2).) Thus, the third step of the *Brantley* analysis concerns whether a plaintiff demonstrated the existence of a triable issue of material fact. (See *Brantley, supra*, 42 Cal.App.4th at p. 1602.) A triable issue of fact exists when the evidence reasonably would permit the trier of fact, under the applicable standard of proof, to find the purportedly contested fact in favor of the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

II. SUMMARY JUDGMENT IN FAVOR OF THE CITY

Hanna's opening brief contends the trial court committed error only with respect to the causes of action for breach of contract, fraud and civil conspiracy. Hanna does not challenge the trial court's rulings as to his other seven causes of action.

The causes of action for breach of contract, fraud and civil conspiracy were brought against the individual defendants, not against the City. The heading to the first cause of action, which is for breach of contract, states the claim is brought against Dyer and Hall. (See Cal. Rules of Court, rule 2.112(4) [each cause of action must specifically state the party or parties to whom it is directed].) The heading for the second cause of action (fraud) states it is directed to Hall and Lee. The heading for the fourth cause of action (civil conspiracy) states it is directed to all three individual defendants.

Based on the way the causes of action in Hanna's second amended complaint were drafted and the challenges Hanna has raised on appeal, the City argues that the trial court's ruling granting the City's summary judgment should not be disturbed. We agree.

Because Hanna’s appeal concerns only the causes of action brought against the individual defendants, the order granting summary judgment in favor of the City on the seventh, eighth, ninth and tenth causes of action is unchallenged and will be affirmed.

III. STANDING FOR THE BREACH OF CONTRACT CLAIM

A. Rules of Law

The elements of a cause of action for breach of contract are well established. The California Supreme Court recently reiterated those elements as “(1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) This statement of the elements of a contract claim appears to assume that the contract was between the plaintiff and the defendant.

“Under the traditional common-law rule, only parties in privity of contract could sue on the contract” (13 Williston on Contracts (4th ed. 2000) § 37.1, p. 5.) This rule was applied in *Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, when the court stated that a subcontractor on a construction project had no standing to sue the city directly on a breach of contract claim because the subcontractor and the city “were not in privity of contract.” (*Id.* at p. 60.)

The traditional rule that only a party to the contract may sue for its breach has exceptions. The primary exception allows a third-party beneficiary of the contract to sue for its breach. (*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 428 [claim of no standing was based on argument that there was no contractual relationship between the two parties and plaintiff did not qualify as a third-party beneficiary].) Another exception is that an assignee may sue for breach of contract. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 786 [assignee had standing to sue for breach of contract providing for royalty payments].)

B. Issues Framed by Hanna's Pleading

Hanna's SAC set forth a breach of contract claim as its first cause of action. Hanna's allegation of the first element of that claim—the existence of a contract—stated: “In or around February, 2008, Plaintiff and Defendant entered into the oral Agreement as stated above.”⁵ Hanna alleged the second and third elements of the contract claim by stating that he performed his side of the contract and “Defendant has breached the Agreement by denying all of the Plaintiff's attempts to relocate his Restaurant to downtown Fresno.” With respect to the fourth element—resulting damages—Hanna alleged: “As a direct and proximate cause of Defendants' breach of the Agreement, as alleged above, Plaintiff has suffered damages resulting from lost revenues in an amount to be proven at the time of trial but believed to be no less than \$1,000,000.00.”

A fundamental issue raised by the motion for summary judgment is who were the parties to the alleged oral agreement. The individual defendants' memorandum of points and authorities in support of their motion asserted: “The alleged contract is with RCE, not Plaintiff; thus, Plaintiff has no standing to assert a claim.”

Hanna's breach of contract claim address the identities of the parties to the contract by alleging that “Plaintiff and Defendant entered into the oral Agreement” The SAC defined to the term “Plaintiff” to mean Rimon Hanna, an individual residing in Fresno County. Thus, the allegation that “Plaintiff and Defendant entered into the oral Agreement” means that Hanna, as an individual, was one of the parties to the alleged oral agreement. Stated in terms used by the case law, one of the theories reasonably contemplated by Hanna's pleading is that he, not his corporation, was a party to the oral

⁵ The earlier allegations addressed the contract offer as follows: “In an attempt to get Mr. Hanna to move his Restaurant to downtown Fresno, Officer Hall promised Mr. Hanna that if he closed his Restaurant, Mr. Hall would allow him to open it downtown and the [City's police department] would support his request for permits.” The allegations addressed Hanna's acceptance of the offer as follows: “Mr. Hanna accepted Mr. Hall's offer and closed the Restaurant. In January, February and March of 2008, Mr. Hanna began his attempt to relocate to downtown Fresno.”

agreement. (See *AARTS Productions, Inc. v. Crocker National Bank*, *supra*, 179 Cal.App.3d at p. 1064 [motion for summary judgment must show “there is no factual basis for relief on any theory reasonably contemplated by the opponent’s pleading”].)

Also, Hanna’s allegation that “Plaintiff has suffered damages” frames the issue whether he, as an individual, was injured economically by the breach of the oral agreement. The allegations set forth in the breach of contract cause of action do not assert that Hanna’s corporation was damaged by the breach of contract.

C. Facts Listed in Separate Statement

1. *Traditional Standing for a Contract Claim*

Issue No. 1 in the individual defendant’s separate statement is whether Hanna’s claims are barred based on a lack of standing. By presenting the question of standing in this manner, we assume the defendants regard standing as an affirmative defense to each of Hanna’s 10 causes of action.⁶ (See Cal. Rules of Court, rule 3.1350(b) [separate statement must state the specific cause of action or affirmative defense on which summary adjudication is sought].)

Individual defendants assert that Hanna’s lack of standing is established by the following two undisputed material facts:

“1. Plaintiff alleges injuries to the restaurant at 5123 North Blackstone, Fresno, California.”

“2. The restaurant was owned by a corporation called Rimón’s Culinary Enterprises (“RCE”).”

We evaluate the adequacy of defendants’ assertions by considering whether these facts, standing alone and accepted as true, legally require a ruling that Hanna lacked standing to assert the breach of contract claim. (See pt. I.B.2 of the Discussion, *ante*.) We begin by noting that defendants’ two enumerated facts do not address matters the law traditionally regards as relevant to a plaintiff’s standing to assert a breach of contract

⁶ Defendants’ answer to the SAC was not included in the appellate record.

claim—namely, whether the plaintiff is (1) a party to the contract, (2) a third party beneficiary of the contract, or (3) an assignee of the contract. (See pt. III.A of the Discussion, *ante*.) By omitting these material facts from their statement of undisputed facts, defendants have failed to make a prima facie showing that Hanna lacks standing to assert a breach of contract claim. In short, defendants have ignored, rather than negated, Hanna’s allegation that he was a party to the alleged contract. Under the traditional view that a party to the contract has standing to sue for breach of that contract (see 13 Williston on Contracts, *supra*, § 37.1, p. 5 [parties in privity can sue on the contract]), that unchallenged allegation creates a dispute as to a material fact which precludes granting summary judgment.

On appeal, defendants argue that (1) a corporation can only act through its agents and (2) the fact that Hanna was involved in the communications that formed the alleged oral contract does not defeat their standing argument. In response to Hanna’s argument that defendants did not establish that the contracting party was the corporation, defendants contend the argument “clearly amounts to form over substance.”

We acknowledge the proposition that a corporation is a legal fiction that can act only through its employees or agents. (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1392.) Nonetheless, we disagree with defendants’ view that RCE was a contracting party. Their separate statements do not assert that Hanna, when he agreed to the alleged oral contract, was acting in his capacity as an agent for RCE and not his personal capacity. The omission of that material fact from defendants’ separate statements is fatal to their theory regarding standing. In *Wilshire-Doheny Associates Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, the court considered whether acts allegedly taken by the appellants were performed in connection with their corporate functions or were performed in pursuit of personal interests. The court regarded the question as a factual one and stated: “A trial on the allegations of the complaint is necessary to determine

whether appellants' alleged acts ... were in fact taken on behalf of the corporation, or whether appellants were acting to further their own personal interests." (*Id.* at p. 1390.)

Therefore, we conclude that whether Hanna was acting for himself or for the corporation when he allegedly made the oral agreement is a question of fact that cannot be resolved in favor of the individual defendants based on their moving papers.

2. *Damages Element of a Contract Claim*

Notwithstanding this court's admonition to practitioners that there is little flexibility in the procedural imperatives of Code of Civil Procedure section 437c (*Brantley, supra*, 42 Cal.App.4th at p. 1607) and the general principle that courts strictly construe the moving papers (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:117, p. 8-75), we will construe defendants' standing argument as an attempt to negate the fourth element of Hanna's breach of contract cause of action. (See *Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 821 [fourth element of a breach of contract claim is "resulting damages to the plaintiff"].)

The issue of damages resulting from the alleged breach of contract is framed by paragraph 25 of the SAC, which alleges that "[a]s a direct and proximate cause of Defendants' breach of the Agreement, as alleged above, Plaintiff has suffered damages resulting from lost revenues ... believed to be no less than \$1,000,000.00." As previously discussed, "Plaintiff" means Hanna, not his corporation. Thus, Hanna has alleged he lost revenue due to the alleged breach.

Defendants' attempt to show Hanna suffered no damages is based on the assertion that it is undisputed that Hanna alleges "injuries to the restaurant" and that the restaurant is owned by a corporation. We conclude that these facts, standing alone and accepted as true, do not establish that Hanna suffered no damages, individually. More information is required to negate the damages element of Hanna's breach of contract claim. For example, defendants' separate statements do not assert that the "injuries to the restaurant" are the only injuries alleged in the complaint. Alternatively, defendants have not made

the more specific assertion that the injuries suffered by the corporation are the only injuries *for which the breach of contract action seeks recovery*. Thus, defendants have failed to provide enough information in their separate statements to show that the two undisputed facts are “material”⁷ to the breach of contract cause of action, much less that they negate Hanna’s allegation that he suffered damages from the alleged breach.

3. Conclusion

Based on our analysis of the issues framed by Hanna’s pleading and the facts that defendants claim are undisputed, defendants have failed to make a prima facie showing that there is no triable issue of material fact on the breach of contract claim. This conclusion is another example of “the importance of ... accurately identifying the facts material to the moving party’s legal theory” (*Haney v. Aramark Uniform Services, Inc., supra*, 121 Cal.App.4th at p. 632.) Here, defendants’ legal theory that Hanna lacked standing as to all 10 causes of action failed to identify the facts material to the specific cause of action for breach of contract as it was alleged by Hanna. Defendants’ argument that all of the claims belong to the corporation is, in effect, an attempt to rewrite Hanna’s pleading.

IV. STANDING FOR THE FRAUD CLAIM

Hanna’s fraud cause of action alleged: “In or around February, 2008, Officer Hall represented to Plaintiff, that if he closed his restaurant, Mr. Hall and the [City police department] would support his attempts to open the Restaurant downtown and support his request for permits.”⁸ Hanna also alleged that (1) Hall made the representation knowing

⁷ Code of Civil Procedure section 437c, subdivision (c) provides that a motion for summary judgment shall be granted if the papers submitted “show that there is no triable issue as to any material fact”

⁸ The allegation regarding the promise or obligation of support does not identify the level of that support. For instance, Hanna did not allege the obligation would be met by “reasonable efforts,” “best efforts” or some other standard. (See *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1441 [plaintiff alleged breach of defendant’s “best efforts” obligation].)

it to be false; (2) Hanna was ignorant of the falsity and reasonably relied on the representation; and (3) “[a]s a direct and proximate result of Defendant’s fraud, the Plaintiff has been damaged in the amount to be established at trial.”

Defendants’ contention that Hanna lacks standing to assert the fraud claim is based on the same two undisputed facts on which they based their assertion that Hanna lacked standing for the breach of contract claim. Hanna’s fraud allegations are similar to his breach of contract allegations in that Hanna alleged that the false representation was made to him (not his corporation). This allegation is similar to the allegation that the oral contract was made with him (not his corporation). Also, both claims allege that Hanna (not his corporation) suffered damages.

Because of the similarity in the allegations and defendants’ reliance on the same two undisputed facts, their contention that Hanna lacks standing to bring the fraud claim suffers from the same defect as their contention that he lacked standing to sue for breach of contract. Specifically, the “injuries to the restaurant” are not the same injuries that Hanna alleges he suffered as a result of relying on the fraudulent representation.

Therefore, defendants’ assertion of undisputed facts failed to make the required prima facie showing and, as a result, they are not entitled to summary adjudication of the fraud claim on the ground of standing or the absence of damages.

V. STANDING FOR THE CIVIL CONSPIRACY CLAIM

The elements of a claim of civil conspiracy “are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062.)

Under California law, civil conspiracy is not an independent tort. (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1141.) Instead, it is a legal doctrine that imposes liability on persons who share with the immediate tortfeasors a common plan or design in the perpetration of a tort, but do not actually commit the tort themselves. (*Ibid.*)

Consequently, the legal significance a civil conspiracy claim is that each member of the conspiracy may be held directly responsible as a joint tortfeasor, regardless of actual participation in the tortious act itself. (*Id.* at p. 1141, fn. 30.)

In this appeal, Hanna is challenging only the rulings as to his breach of contract claim, the fraud claim, and the civil conspiracy claim. Because fraud is the only tort claim Hanna is pursuing at this stage of the proceedings, the civil conspiracy claim can be viewed as an alternate theory of liability for the alleged fraud claim. In other words, the remaining purpose of Hanna’s civil conspiracy claim is to extend liability to members of the conspiracy who Hanna cannot prove actually participated in the fraudulent acts. Thus, it follows that if Hanna has standing to bring the fraud cause of action, he also has standing to pursue a claim of civil conspiracy to commit fraud. Therefore, we conclude defendants have failed to demonstrate that Hanna lacks standing to assert his civil conspiracy claim.

VI. AFFIRMING ON GROUNDS NOT RELIED UPON BY THE TRIAL COURT

The individual defendants contend that if the summary judgment is not upheld on the ground that Hanna lacked standing, this court has the authority to affirm the summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address that theory in the trial court. (See *Lujano v. County of Santa Barbara* (2010) 190 Cal.App.4th 801, 806 [this authority is a corollary of the de novo review standard].) !(RB 17)! In view of this contention and the case law that authorizes appellate courts to affirm summary judgment on legal grounds not adopted by the trial court (e.g., *Moghadam v. Regent of University of California* (2008) 169 Cal.App.4th 466, 474-475), we will examine the other arguments of the individual defendants.⁹

⁹ Under Code of Civil Procedure section 437c, subdivision (m)(2) appellate courts “are statutorily prohibited from affirming the judgment on a ground not relied upon by the trial court unless we first afford the parties an opportunity for supplemental briefing on the issue.” (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1377, fn. 7.) However, because we are not affirming the trial

A. Breach of Contract

As outlined earlier, Hanna's SAC references both Dyer and Hall as defendants in the breach of contract cause of action. !(CT 302:24)! Hanna asserts that Hall promised him that if he closed his restaurant, Hall would allow Hanna to open a restaurant downtown and City's police department would support his request for permits. !(CT 302:2-7)!

1. *Facts Asserted in Defendants' Separate Statement*

The individual defendants' separate statement of undisputed facts attempted to establish there were no triable issues of material fact regarding the contract claim by (1) incorporating by reference the facts set forth in paragraphs five through 20 of the separate statement and (2) asserting the following three additional facts are undisputed:

"41. The Individual Defendants were acting in their capacity as officers of the City Police Department.

"42. The Police Department was attempting to have RCE comply with applicable laws, zoning, regulations and permits.

"43. [Hanna] had no discussions with Dyer on issue." !(CT 459:1-7)!

The facts asserted in paragraphs five through 20 of the separate statement describe the following events. In 2005, the restaurant was issued a notice of violation for not having a dance permit. !(CT 453, ¶ 5)! RCE sought and received a dance permit subject to agreed-upon conditions addressing public safety and health concerns. !(CT 453, ¶ 6)! The fire department was attempting to have RCE gain compliance with the fire code. !(CT 453, ¶ 7)! The Department of Alcoholic Beverage Control (ABC) conducted numerous investigations and raised concerns about a number of violations of the Business and Professions Code and ABC license. !(CT 454, ¶ 8)! City had issues with RCE's

court's summary judgment order, that provision and requirement is not applicable and we have not requested additional briefing.

operating in violation of its dance permit and requiring numerous calls for service. !(CT 454, ¶ 9)!

On or about April 21, 2007, detective Debra Daniels issued Hanna a citation for actions in violation of the dance permit. !(CT CT 454, ¶ 10; CT 405:1-8)! On or about April 26, 2007, Rae Duke of City’s finance department sent RCE a notice of revocation of the dance permit because of the history of problems associated with the business. !(CT 454, ¶ 11; CT 357:11-20; CT 388)!

The notice of revocation informed Hanna of the right to appeal. !(CT 454, ¶ 13; CT 388)! RCE appealed the notice of revocation, but later dropped the appeal.¹⁰ !(CT 455, ¶ 15)!

Hanna applied for a new permit for a downtown location on “P” Street. !(CT 455, ¶ 16)! City denied Hanna’s application and gave notice of his right to appeal. !(CT 455, ¶ 18)! Hanna appealed the decision and failed to appear at the hearing. !(CT 455, ¶¶ 19-20)! We note that the facts asserted in paragraphs five through 20 of the separate statement do not describe specifically acts or omissions of the individual defendants.

2. *Sufficiency of Facts Contained in Separate Statement*

Our review of the individual defendants’ assertions of undisputed facts regarding the breach of contract claim seeks to determine whether those facts, standing alone and accepted as true, justify a judgment in favor of the individual defendants on the contract claim. (*Brantley, supra*, 42 Cal.App.4th at p. 1602 [step 2 of analysis includes an examination of the facts set forth in the moving party’s separate statement]; *Zebrowski, The Summary Adjudication Pyramid, supra*, 12 L.A. Law. at p. 29.)

¹⁰ Hanna’s version of the facts asserts that he dropped the appeal because of the misrepresentations and oral agreement involving the relocation of the restaurant downtown. !(CT 792:22-793:15; CT 303:20-304:17 [fraud allegations])!

First, we note that paragraphs five through 20 of the separate statement contain facts related to Hanna's claims that his rights to equal protection and due process under the California Constitution were violated. Most of those facts concern events that occurred before the formation of alleged oral agreement regarding a downtown restaurant and its subsequent breach. Thus, most of those facts provide background information, not facts material to the breach of contract claim.¹¹

Second, the general assertion of fact that the individual defendants were acting in their capacity as officers of the City police department is not directed or connected to any particular acts of the individual defendants. As a result, we cannot determine what acts or omissions were done in their capacity as officers. Furthermore, if we were to violate the general principle that a moving party's papers are to be strictly construed and assume the "acting in their capacity as officers" statement referred to matters contained in paragraphs five through 20 of the separate statement, that assumption does not help determine what Dyer and Hall did, or failed to do, in their capacity as officers, because paragraphs five through 20 mention no act or omission by an individual defendant. Similarly, the statement that the police department was attempting to have RCE comply with applicable laws and regulations fails to address the acts and omissions of Dyer and Hall, such as whether their actions confirm or dispel the alleged contractual obligation of support.

Accordingly, the facts set forth in the separate statement are insufficient to show that one or more elements of the breach of contract cause of action cannot be established against Dyer or Hall. Thus, we need not consider whether the asserted facts are supported by the evidence referenced in the separate statement (*Zebrowski, The Summary Adjudication Pyramid, supra*, 12 L.A. Law. at p. 29), or undertake the third step of

¹¹ Several paragraphs do provide information relevant to the contract claim such as the assertions that "[Hanna] applied for a new permit for [a downtown] location" and that City denied the application. !(CT 455, ¶¶ 16 & 18)!

judicial review of the summary judgment motion and consider whether the evidence referenced by Hanna creates a triable issue of material fact (See *Brantley*, supra)

3. *Sufficiency of Facts Concerning Dyer*

Dyer contends that Hanna made no attempt to assert a contract claim against him and, in any event, Hanna never communicated with Dyer about starting a restaurant downtown or whether Dyer would support such a venture. !(RB 30)!

The heading to the breach of contract claim references Dyer as a defendant, which we conclude brings Dyer into the breach of contract claim. !(CT 302:22-25)! Dyer's position that he is entitled to summary adjudication of the breach of contract is based on the following assertion of fact: "[Hanna] had no discussions with Dyer on issue." !(CT 459:5-7)!

This statement of fact, if accepted as true, is insufficient to establish that Dyer is entitled to prevail on the breach of contract claim. Even if we ignore the principle that the moving party's paper must be strictly construed and interpret the ambiguous phrase "on issue" to mean "concerning the alleged oral contract," the fact does not necessarily establish that Dyer was not a party to the oral contract. The allegations regarding the defendants acting as agents for one another¹² creates the possibility that Hall made the oral agreement for himself and as agent for Dyer. This possibility could have been negated had defendants asserted it was undisputed that Dyer was not a party to the alleged contract, but their separate statement made no such assertion.

¹² Paragraph eight of the SAC contains a boilerplate allegation that "each of the Defendants was the agent of the other on all the actions set forth [and] each was acting in the course and scope of its agency with its principle [*sic*]" !(CT 299:8-11)!

4. *Immunities*

Defendants Dyer and Hall contend Hanna's breach of contract claim is barred by statutory immunities based on the same assertions of undisputed facts used to support their position that Hanna could not prevail on his breach of contract claim.

Because the separate statement failed to identify the acts and omissions committed by Dyer and Hall with respect to the formation and breach of the alleged oral agreement, we are unable to determine whether those acts or omissions are protected by any statutory immunity.

B. Fraud

Hanna's SAC references both Hall and Lee as defendants in the fraud cause of action. The individual defendants' separate statement of undisputed facts addressed Hanna's fraud claim, like the breach of contract claim, by incorporating by reference the facts set forth in paragraphs five through 20 of the separate statement. The individual defendants' separate statement also asserted the following four additional facts are undisputed:

“35. The Individual Defendants had no competing business interest with [Hanna] or RCE.

“36. The Police Department was attempting to have RCE comply with applicable laws, zoning, regulations and permits.

“37. Defendant Lee made no representation as to [Hanna's] efforts to open a restaurant.

“38. The Individual Defendants were acting in their capacity as officers of the City Police Department.” !(CT 458:6-15)!

This presentation of facts suffers from the same defect as the presentation of facts made to challenge the breach of contract cause of action. Specifically, the asserted facts,

if accepted as true, do not provide enough information to resolve the fraud claim in favor of the moving parties.¹³

With respect to Hall, the separate statement fails to identify the acts and omissions committed by Hall relating to the alleged fraud. Among other things, the absence of this information renders the statement that Hall was acting in his capacity as an officer of the police department incomplete.

With respect to Lee, the statement that he made no representation as to Hanna's efforts to open a restaurant does not negate the possibility that Hall was acting on Lee's behalf when Hall made the alleged misrepresentations to Hanna. This possibility is created by the allegations regarding agency set forth in paragraph eight of the second amended complaint (see fn. 12, *ante*) and Hanna's use of the plural possessive "Defendants' representations" in paragraph 29 of the second amended complaint. !(CT 304:4-5)!

Therefore, the separate statement fails to set forth sufficient facts to negate one or more elements of Hanna's fraud claim or to show that the fraud claim is barred by statutory immunities.

C. Civil Conspiracy

The SAC references Dyer, Hall and Lee in the civil conspiracy cause of action. These individual defendants contend that Hanna cannot establish all of the elements of his civil conspiracy cause of action and, alternatively, that the claim is barred by statutory immunities. !(CT 457:1-2 & 457:14-15)! Their separate statement of undisputed facts supports these contentions by (1) incorporating by reference the facts set forth in paragraphs five through 20 of the separate statement and (2) asserting the individual

¹³ "If the facts presented in the separate statement are inconclusive in some respect (*i.e.*, a necessary fact is missing, the facts presented may permissibly support materially conflicting conclusions, *etc.*), the motion must be denied." (Zebrowski, *The Summary Adjudication Pyramid*, *supra*, 12 L.A. Law. at p. 29.)

defendants were acting in their capacity as officers of City's police department and they did not have an agreement "to engage in tortious or unlawful activity toward [Hanna]." !(CT 457:4-23; CT 457:8-10 [quote])!

As with the assertions of undisputed fact concerning the breach of contract and fraud causes of action, the general assertion that the "Individual Defendants were acting in their capacity as officers of the City Police Department" is not directed or connected to any acts or omissions of the individual defendants. !(CT 457:6-8 & 457:18-20)! Again, if we infer that this assertion refers to conduct set forth in paragraphs five through 20 of the separate statement, that inference leads nowhere because those paragraphs do not describe any conduct of Dyer, Hall or Lee.

The assertion of fact that the "Individual Defendants did not have an agreement to engage in tortious or unlawful activity toward [Hanna]" appears to have been drafted in broad terms so that it addressed all of the conspiracy theories possibly raised by the SAC. The attempt to negate all of the permutations of conspiracy made possible by Hanna's allegations in a single sentence that refers to all three individual defendants together was overly ambitious. The statement that the individual defendants had no agreement is the equivalent of stating that Dyer, Hall and Lee had no agreement as among themselves. Because a conspiracy can be formed by two people, the statement that Dyer, Hall and Lee had no collective agreement could be true and a conspiracy still could have been formed by two of the three. For example, the fact that the three did not have a collective agreement does not negate the possibility that Hall and Lee had an agreement that did not include Dyer. Therefore, the facts stated in the separate statement, if accepted as true, are insufficient to establish that Hanna cannot prevail on his conspiracy claim.

VII. CONCLUSION

The order granting the individual defendants' motion for summary judgment cannot be affirmed on the ground that Hanna lacked standing. Nevertheless, we will direct the trial court to enter an order granting summary adjudication as to Hanna's other

causes of action because Hanna only challenged the trial court's standing ruling the causes of action for breach of contract, fraud and civil conspiracy. As to those three remaining causes of action, the order granting the individual defendants' motion for summary judgment cannot be affirmed on a ground other than standing because their separate statement contained insufficient facts to establish another ground.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to vacate its June 2, 2010, order and enter a new order (1) denying the individual defendants' motion for summary judgment, (2) granting the individual defendants' alternate motion for summary adjudication as to the third and fifth through tenth causes of action, (3) denying the individual defendants' alternate motion for summary adjudication as to the breach of contract, fraud and civil conspiracy causes of action, and (4) granting City's motion for summary judgment. Appellant shall recover his costs on appeal.

Franson, J.

WE CONCUR:

Wiseman, Acting P.J.

Dawson, J.