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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Conservatorship of the Person and Estate of
THELMA LOUISE FRAZIER.

H037162
(Santa Clara County
Super. Ct. No. CV122604)

DONALD MOODY,

Plaintiff, Cross-defendant and
Respondent,

v.

PHILLIP H. FRAZIER,

Defendant, Cross-complainant and
Appellant.

Phillip H. Frazier sued Donald Moody as Public Guardian of the County of Santa Clara for interference with the disposition of his mother's remains and other causes of action related to his mother's death arising from Moody's role as his mother's conservator. The trial court sustained Moody's demurrer to the third amended complaint without leave to amend and dismissed the action. Frazier appeals from the judgment and contends that he stated four causes of action.¹ We disagree and affirm the judgment.

¹ The third amended complaint alleges five causes of action, but Frazier concedes that the fifth cause of action is moot.

SCOPE OF REVIEW

We review an order sustaining a general demurrer under well-established principles. The appeal presents the question of law whether the complaint, liberally construed, contains facts sufficient to entitle plaintiff to any relief. We assume the truth of all material facts properly pleaded in the complaint unless they are contradicted by facts judicially noticed, but no such credit is given to pleaded contentions or legal conclusions. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 768-769.)

FIRST CAUSE OF ACTION

Moody was the conservator of Frazier's mother, Thelma Louise Frazier. Thelma Louise died at O'Connor Hospital on Saturday, May 23, 2009, Memorial Day weekend. O'Connor placed the body in the hospital morgue. On Tuesday, May 26, O'Connor informed Moody that Thelma Louise had died and was in the morgue. Thelma Louise had three surviving children and left a will naming Frazier as executor. The will stated: "I direct all my just debts and funeral expenses be paid as soon as possible after my death, with the EXECUTOR to finalize such debts and funeral expenses."² Moody contacted Frazier and his two siblings about the disposition of the remains and funeral arrangements. On May 28, Frazier spoke with his sister, Dolores Jean Cross-Douglas, and the two agreed on "an open casket viewing, funeral, burial and Catholic Mass." On May 28, Frazier discovered that his brother, Carl Frazier, had learned of the death and arranged for an acceptable funeral package. On May 28, Frazier informed Moody that he would take custody of the remains and place them for funeral care at Lima Family Mortuary. On June 2, Frazier gave the hospital his identification and a copy of the will. The hospital agreed to release the body to Frazier, but Frazier had become ill and left San

² Frazier attached a copy of the will to his original complaint, but did not attach a copy to the third amended complaint.

Jose for his home in San Diego before he could complete the hospital's paperwork, which included Moody's consent. Moody, however, believed that the siblings had not spoken to each other and had no agreement as to how Thelma Louise should be buried or interred. He refused to consent³ and, on or about June 24, filed an ex parte petition within the conservatorship proceeding in the probate department seeking instructions on the disposition of the remains.⁴ The petition explained: "It has been reported by O'Connor Hospital that the three siblings have not been able to come to an agreement as to how their mother should be buried or interred. [Moody] does not believe that any of the three children have spoken to the other children to try and resolve this issue."⁵ It added that the

³ Frazier attached a copy of Moody's internal memo dated June 18, 2009, to the third amended complaint which noted the following: "[O'Connor] stated that [its] legal dept reviewed the paperwork that was sent by [Frazier] and they felt it was 'sort of' legitimate. [O'Connor] advised me that they are prepared to release her body to him since he's been the only one to contact them for it. I expressed my concern that we are in the process of betting [*sic*] the court to consent to our proposed actions. I explained that we needed to be kept in the loop about this and that it would be embarrassing for us to go to court to seek direction and then find out that the body had already been taken. [O'Connor is] also thinking about calling the coroner and seeing if they would be willing to take her body since no one has 'claimed' it. I wonder if Karl [*sic*] or the daughter should contact O'Connor. Either way, [O'Connor is] prepared to do whatever we tell [it], but wants to be kept informed."

⁴ Frazier complains that Moody's petition belonged in the civil department of the superior court rather than the probate department of the superior court. He cites *Estate of Jimenez* (1997) 56 Cal.App.4th 733, 741, for the proposition "that where the decedent's wishes are not contained in the will itself, a dispute over disposition of the remains belongs in the civil court, not probate." We fail to understand the significance of the point. If Frazier was aggrieved by the probate department's assumption of jurisdiction, he could have objected. Instead, he apparently consented to the probate department's authority and stipulated to its order. In any event, the holding in *Jimenez* is questionable because the case ignores Probate Code section 800, which vests the probate department with "general jurisdiction" having "the same power and authority with respect to the proceedings as otherwise provided by law for a superior court"

⁵ Frazier attached a copy of the petition as an exhibit to the third amended complaint. He also attached a copy of Moody's internal memo reporting about a conversation with Dolores on May 26, 2009, in which Dolores stated that she had not (continued)

will naming Frazier as the executor did not provide written directions on how to dispose of the remains and what funeral goods and services were to be provided. It informed that Carl had received an estimate from Cedar Lawn Memorial Park (burial for approximately \$4,200 and cremation for approximately \$904) and Moody had received estimates from Lima Family Mortuary (cremation for approximately \$2,695) and Chapel of Flowers (cremation for approximately \$1,303). It estimated that the estate had approximately \$4,700 in two accounts. It asked for an order that Moody control disposition of the remains and contract and pay for cremation services.

Frazier, Carl, Dolores (by speaker phone), Moody, and O'Connor Hospital appeared at a hearing on the petition. The siblings agreed on certain disposition particulars and the court so ordered. The order specifically recites: "The Court accepts the agreement of Conservatee's children . . . and orders that Conservatee shall be buried in the grave of her deceased husband at Cedar Lawn Memorial Park."⁶ It also ordered that any funeral costs that exceed the amount contributed by the estate be split between Frazier and Carl.

Frazier claims that Moody is tortiously liable for interfering with his paramount right to dispose and inter his mother's body. He alleges that Moody's actions caused a delay that allowed the body to decompose and prevent an open casket viewing and timely

spoken to her brothers, preferred that Moody notify the brothers of their mother's death, might want an autopsy, and would share the autopsy expense but would "not push the issue if it is not agreed upon." The memo concluded that Dolores exclaimed that " 'Now is not the time to argue. . . . We just need our mother to be put to rest.' " Frazier had attached other memos of Moody's to the second amended complaint. One, dated June 2, 2009, notes that "We cannot proceed with final arrangements because there is a minute chance that [Frazier] might have a legitimate document, but also because no one seems to agree what to do and how to pay for it." Another memo begins in mid-sentence in an apparent continuation from a missing previous page as follows: "from family if he were to do cremation. But reports cremation was what his mom wanted. Reports he will be willing to pay for his share if burial."

⁶ The trial court took judicial notice of the probate department's order.

funeral. He specifically pleads that “[Moody] refused to allow Frazier to take control of his Late Mother’s remains, and disposition of his Late Mother’s Remains although the legal department at O’Connor was prepared to release her remains to Frazier.”

Frazier grounds his claim on Health and Safety Code section 7100.⁷ The section provides that “(a) The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided unless other directions have been given by the decedent pursuant to Section 7100.1,^[8] vests in . . . the following in the order named: [¶] (1) An agent under a power of attorney for health care . . . [¶] (2) The competent surviving spouse. [¶] (3) The sole surviving competent adult child of the decedent or, if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. . . . [¶] (4) The surviving competent parent or parents of the decedent. . . . [¶] (5) The sole surviving competent adult sibling of the decedent (6) [¶] [The next of kin]. [¶] (7) A conservator of the person [¶] (8) A conservator of the estate [¶] (9) The public administrator when the deceased has sufficient assets.”

It is true that the right of disposition includes the right to be free from interference with the exercise of that right and courts of law will recognize and protect that right. (*Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1111; *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988, 994.) “In California, actions for damages based on interference with the right to dispose have arisen in situations in which the body has been mishandled (*Allen v. Jones* (1980) 104 Cal.App.3d 207), negligently prepared or preserved by the cemetery authorities (*Chelini v. Nieri* (1948) 32 Cal.2d 480), or even

⁷ Further unspecified statutory references are to the Health and Safety Code.

⁸ Under section 7100.1, a decedent must set forth written directions concerning disposition of his or her remains and funeral goods and services to be provided “clearly and completely . . . in sufficient detail so as to preclude any material ambiguity with regard to the instructions.”

buried according to procedures which contravene the beliefs of the party who has the right to dispose (*Sinai Temple v. Kaplan, supra*, 54 Cal.App.3d at p. 1112).” (*Ross v. Forest Lawn Memorial Park, supra*, 153 Cal.App.3d at p. 994, fn. 4.) In short, the holder of the statutory right to control disposition of the body, “ ‘while not in the full proprietary sense “owning” the body of the deceased, ha[s] property rights in the body which will be protected, and for a violation of which [he or she] is entitled to indemnification.’ ” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 890.)

Actions for damages based on interference with the right to dispose typically lie against a mortician, cemetery, or close relative. (*Christensen v. Superior Court, supra*, 54 Cal.3d at p. 890.) Frazier cites no authority for the proposition that such an action can lie against the conservator of the decedent. But, assuming that Frazier--as one of a majority of surviving children with the paramount right to control disposition--has stated a cause of action against Moody, Moody’s interference with the right to dispose was in the context of contemplated litigation and absolutely privileged.

Civil Code section 47, subdivision (b), provides a privilege for any publication made in connection with “any . . . official proceeding authorized by law,” with exceptions not here relevant. “[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The principal purpose of the privilege “is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.” (*Id.* at p. 213.) The privilege extends to all kinds of tort suits, including fraud and misrepresentation, with the exception of malicious prosecution suits. (*Id.* at pp. 215-216.) The litigation privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. (*Harris v. King* (1998) 60 Cal.App.4th 1185, 1187-1188.)

The California Supreme Court has recognized that the privilege’s “application to communications made in a ‘judicial proceeding,’ . . . is not limited to statements made in a courtroom. Many cases have explained that [Civil Code] section 47[, subdivision] (b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.” (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) “Nonetheless . . . this prelitigation privilege ‘applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.’ [Citations.] [¶] . . . [W]e have therefore held that the litigation privilege only attaches when imminent access to the courts is seriously proposed and actually contemplated, seriously and in good faith, as a means of resolving a dispute and not simply a tactical ploy to induce a settlement.” (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1378-1379.)

Here, Frazier alleges that Moody’s interference was the refusal to consent to O’Connor’s release of the body. But that refusal was grounded upon Moody’s beliefs that (1) the three children did not agree on disposition, and (2) a court proceeding was required to determine disposition. Indeed, the pleadings additionally indicate that (1) Dolores did not wish to speak with her brothers, (2) Thelma Louise may have desired cremation but one of the brother’s would pay a share for burial, and (3) Dolores did not agree to pay a share for burial. Moreover, litigation actually resulted from this uncertainty. And it resulted in an agreement among the children.

We understand that Frazier alleges that he and his siblings were in agreement from the first. Frazier urges that we should accept the truth of that allegation rather than Moody’s contrary assertions. But the truth of Frazier’s allegation is immaterial. The pleadings show that Moody (1) believed there was no agreement on disposition, and (2)

interfered with Frazier's right of disposition for the purpose of litigating the question. The interference was therefore absolutely privileged.

SECOND CAUSE OF ACTION

The second cause of action appears to be for theft. It alleges that (1) before his death, Frazier's late father conveyed Louisiana property to Frazier, (2) the property generated royalties belonging to Frazier, and (3) Moody cashed the royalty checks. In his original complaint, Frazier more fully and somewhat inconsistently alleged that (1) Moody cashed four royalty checks after Thelma Louise's death, and (2) Frazier and Carl owned one-half of each check pursuant to Thelma Louise's will. In any event, the original complaint attached copies of the disputed checks. Each check is made payable to Thelma Louise and her conservator.

It is elementary that the sufficiency of an amended complaint is determined without reference to the original, except that the original complaint may be examined to discover whether the new pleading, by reason of unexplained omissions, is untruthful or a sham. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1190, p. 621.) And where an incorporated written instrument is the foundation of a cause of action or defense, its recitals may serve as a substitute for direct allegations ordinarily essential to the pleading. (*Byrne v. Harvey* (1962) 211 Cal.App.2d 92, 103.) The recitals, if contrary to allegations in the pleading, will be given precedence, and the pleader's inconsistent allegations as to the meaning and effect of an unambiguous document will be disregarded. (*Stoddard v. Treadwell* (1864) 26 Cal. 294, 303.)

Here, Frazier's allegation that he owned the royalty checks is contradicted by the checks themselves. Since Frazier alleges nothing to the contrary, we presume that Moody deposited the checks in the conservatorship account as part of his duty to wind up the conservatorship and distribute the conservatorship estate to Frazier in his capacity as executor of Thelma Louise's estate.

THIRD CAUSE OF ACTION

The third cause of action appears to be for fraud. It alleges that Moody cashed the royalty checks knowing that they belonged to Frazier. This cause of action fails for the same reason as the second cause of action fails.

FOURTH CAUSE OF ACTION

The fourth cause of action simply asserts that Moody is vicariously liable for acts committed by his employees. Since there are no standing claims against Moody or any employee, the cause of action necessarily fails.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.