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

JAMES A. LANGHOLFF, et al.,

Plaintiffs and Appellants,

v.

FEDERAL REALTY INVESTMENT
TRUST, et al.,

Defendants and Respondents.

H038808

(Santa Clara County

Super. Ct. No. CV211764)

Plaintiffs James and Joan Langholff¹ brought this action against James's former employer, Federal Realty Investment Trust (FRIT) and Ellen Novelli, a FRIT Human Resources manager. The superior court sustained defendants' demurrer to plaintiffs' first amended complaint without leave to amend. On appeal from the ensuing judgment of dismissal, plaintiffs contend that they adequately stated causes of action based on Novelli's disclosure to prospective employers of false, misleading, and confidential information about James's performance and qualifications. We will affirm the judgment.

¹ Plaintiffs have referred to themselves individually as James and Joan for clarity. We will follow their lead.

Background

Because this appeal arises from the sustaining of a demurrer, our summary of the factual history is drawn from the operative pleading, plaintiffs' first amended complaint. Toward this end "we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

From 2003 to 2006 James worked for FRIT as an electrician at Santana Row, a complex of shops, restaurants, and residences. In 2006 FRIT retained "ServiceForce" to oversee the facilities at Santana Row, and ServiceForce began paying James.

Before the contract with ServiceForce ended on March 26, 2007, Novelli, a Human Resources manager at FRIT, asked James if he wanted to resume working for FRIT. James had been on disability since January, and the "pressure" from Novelli caused his doctor to write her a note asking her to stop calling him. James was terminated on March 26, 2007.

Throughout his employment at FRIT James had experienced a hostile work environment caused by a pattern of sexual harassment by Novelli toward him and others. In September 2007 an attorney representing James and his wife, Joan, sent FRIT a letter outlining potential causes of action against it for sexual harassment and loss of consortium and offering to settle the case without litigation for \$500,000. According to plaintiffs, FRIT settled those claims for \$40,000.

After leaving FRIT James applied for more than 300 jobs, in positions calling for an electrician, a facilities technician, and a building engineer. He was "repeatedly informed that he [was] a top candidate, and then [was] suddenly rejected, without meaningful explanation." Suspecting "badmouthing" by Novelli, James hired two reference-checking companies, "Documented Reference Check" (DRC) and Allison & Taylor, to make reference-check calls to FRIT as if James were a candidate for

employment. Novelli not only disclosed confidential information about James in violation of company policy, but gave false and misleading responses to the reference checkers that cast him in an unfavorable light. James further alleged "on information and belief" that Novelli had also provided such "false, misleading, defamatory and/or private information to James' actual potential employers, which caused loss of employment opportunities."

In October 2011, plaintiffs initiated this action against FRIT and Novelli. In their original complaint they alleged that defendants had repeatedly made disparaging statements about James to "potential employers." The superior court sustained defendants' demurrer with leave to amend, pointing to plaintiffs' failure to identify the particular acts that constituted the alleged wrongful conduct.

Plaintiffs then amended their pleading to assign fault to Novelli for her disclosures to his hired reference checkers, and to actual prospective employers only "on information and belief." Their first amended complaint,² filed March 26, 2012, asserted 12 causes of action: retaliation; defamation; negligence; violation of Labor Code section 1050; violation of Labor Code section 1052; negligent retention and supervision of Novelli; violation of James's constitutional right of privacy; promissory estoppel; intentional infliction of emotional distress; fraud; Joan's loss of consortium; and gross negligence.

Defendants again demurred to all causes of action, emphasizing the absence of any *actual* prospective employer identified in the complaint—and consequently, of any damages. The superior court discussed each claim and determined that none of them could withstand defendants' facial challenge. Accordingly, the court sustained the

² There had already been a "First Amendment to Complaint," but that document merely changed the caption to reflect FRIT as a defendant rather than Federal Realty Partners LP. The superior court continued to use plaintiffs' designation of the final pleading as the first amended complaint. For consistency and clarity, we will do so as well.

demurrer without leave to amend and thereafter entered a judgment of dismissal. This appeal followed.

Discussion

1. Principles of Review

The parties are familiar with the standards by which the present appeal is evaluated. A demurrer is properly sustained when the complaint "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "On appeal from a judgment dismissing the action after the sustaining of a demurrer, this court reviews the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. . . . [¶] Because the function of a demurrer is not to test the truth or accuracy of the facts alleged in the complaint, we assume the truth of all properly pleaded factual allegations. [Citation.] Whether the plaintiff will be able to prove these allegations is not relevant; our focus is on the *legal* sufficiency of the complaint." (*Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 203; see also *Leyte-Vidal v. Semel* (2013) 220 Cal.App.4th 1001.) We also examine the exhibits attached to the complaint. "If the facts appearing in the attached exhibit contradict those expressly pleaded, [the facts] in the exhibits take precedence." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568; *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1337.)

2. Viability of Plaintiffs' Action

a. Retaliation

To establish a prima facie case of retaliation plaintiffs must show that James engaged in protected activity, that he was subjected to adverse employment action by his employer, and that there is a causal link between the two. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) In their first cause of action plaintiffs alleged that defendants had retaliated against James for complaining about sexual harassment. The "adverse action" they cited consisted in "attempting twice to

prevent him from obtaining employment," by giving the two reference-check companies "false, misleading and/or private information about James' performance at FRIT." As a result, plaintiffs claimed, James "sustained loss of income and job benefits, interest, emotional and financial distress, frustration, worry, inconvenience, anxiety, embarrassment, humiliation, feelings of betrayal, loss of personal time, medical bills, impaired sexual relations, and attorney fees and costs."

In rejecting this cause of action the superior court stated that Novelli's statements to the reference checkers were not "employment-related" actions, as James's employment had ended in March of 2007. (See *Thomas v. Dept of Corrections* (2000) 77 Cal.App.4th 507, 512 ["claim of retaliation must be based upon an adverse *employment* action"]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 [an "adverse employment action" must "materially affect the terms and conditions of employment" under the totality of the circumstances].) We agree with this reasoning. Plaintiffs did not assert an adverse employment action because James was not employed with FRIT. Furthermore, James was not seeking employment with any entity associated with the hired reference checkers. Mischaracterizing the events that occurred here as "disclosures to separate employers" does not assist plaintiffs.

Citing California Code of Regulations, title 2, former section 7287.8,³ plaintiffs contend that Novelli's statements "were made in the *context* of recommendations for

³ Former section 7287.8 of the Regulations is now section 11021, which similarly states: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment that the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the [Fair Employment and Housing] Council or Department [of Fair Employment and Housing] or its staff."

employment. Respondents took adverse employment action against Appellant James by making an unfair, partial, false and misleading account of his job performance. Moreover, an employee benefit was denied, as his released employment information was confidential as stated in the employee manual." These assertions are themselves misleading and indeed disingenuous. The "recommendations for employment" were set up by plaintiffs, not genuine inquiries from any prospective employers. Furthermore, there could be no "employment benefit" that was denied if he was not employed; and if he meant that he was denied the benefit of *being* hired, there is no stated connection between the contrived reference checks and any loss of employment opportunity. Finally, even if the "released employment information was confidential," as plaintiffs assert, that release was invited by plaintiffs themselves by hiring the two companies to find out what Novelli would say about James.

The circumstances presented here are not comparable to those in *Yanowitz, supra*, 36 Cal.4th 1028, where the aggrieved *existing* employee resisted summary judgment by demonstrating a triable issue of fact on the issue of retaliation. Here James was not an employee of FRIT or a prospective employee of anyone, and certainly not one represented by DRC or Allison & Taylor. The court correctly determined that James had not suffered an adverse employment action; consequently, plaintiffs' first cause of action for retaliation necessarily failed.

b. Defamation

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1369, citing *Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Plaintiffs' second cause of action was based on the following statements made by Novelli to the reference checkers: (1) He did not supervise anyone; (2) she did not know if he was capable of supervising others; (3) she was not aware of any noteworthy projects or accomplishments; (4) he was not eligible for rehire;

and (5) in 2007 (after the end of the ServiceForce contract) employees were brought back in and he was not one of them.⁴ These statements, plaintiffs alleged, were "false and/or misleading, and tended to suggest James was incompetent." Plaintiffs attempted to incorporate *actual* prospective employers into the scope of the allegation by stating that James "is informed and believes" that defendants had "repeatedly made material false and/or misleading misstatements to potential employers about him concerning his job qualifications and performance, awards, supervision of others, and eligibility for re-hire."

These allegations cannot withstand scrutiny. "It is axiomatic that for defamatory matter to be actionable, it must be communicated, or 'published,' intentionally or negligently, to 'one other than the person defamed.' [Citation.]" (*Cabesuela v. Browning-Ferriss Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112.) As defendants point out, the only publication alleged here was made to plaintiffs' own agents. These circumstances are nearly identical to those considered in *Senisch v. Carlino* (NJ Super. App.Div. 2011) 32 A.3d 217, 221. In that case the plaintiff obtained a reference letter from his former employer, a medical center, by retaining DRC to pose as a prospective employer. The New Jersey appellate court held that the letter "was not a publication of an alleged defamatory statement to a third party. A plaintiff does not have a cause of action for defamation because false and defamatory statements were made directly to the

⁴ The complaint alleged the following statements to DRC, with plaintiffs' bracketed commentary: "1) She said [James] did not supervise anyone. [which was false, he did.] [¶] 2) She said she did not know if he is capable of supervising others. [which was false, she did know he supervised others well]. [¶] 3) She said she was not aware of any noteworthy projects or accomplishments [by James]. [She was aware because she personally handed him awards, and was present for his nomination for the 2003 FRITZ awards]. [¶] 4) That he was not eligible for re-hire. [The settlement agreement stated he was terminated because of *position elimination*, not for lack of performance . . .]." To Allison & Taylor Novelli was alleged to have said, "Things were going on with his employment at Service Force that I'm not at liberty to discuss. We couldn't extend an offer at that time. (emphasis added). [As noted in 4 above, he was eligible for re-hire, and Novelli did extend an offer on 3/7/07 to James to return to FRIT]."

plaintiff. It is damage to the plaintiff's reputation in the eyes of others that is the basis for a cause of action for defamation. [Citation.] In this case, because Documented Reference Check was acting as plaintiff's agent and not as a potential source of employment, [the Human Resources officer's] letter was the legal equivalent of direct communication with plaintiff. It could not damage plaintiff's reputation in the eyes of any third party." (*Id.* at p. 222; see also *McKinnon v. Hermes of Paris* (SDNY 2007) 2007 WL 1098707 [because DRC, hired by plaintiff, was not an actual employer, plaintiff suffered no loss of potential employment or other recoverable damages from allegedly disparaging comment]; cf. *Swanson v. Baker & McKenzie, LLP* (2013) 527 Fed. Appx. 572 [defamation claim properly dismissed where publication made only to plaintiff's agent, Allison & Taylor, which did not qualify as a third party for defamation purposes]; cf. *Allen v. Quest Online LLC* (2011) 2011 WL 4403674 [damages element of breach not met by negative comments made to Allison & Taylor representative].)

Here plaintiffs provided no facts indicating that Novelli's allegedly defamatory statements were either republished or repeated to actual prospective employers. Nor did they allege any *prior* inquiry by any prospective employer who had asked FRIT for a reference and received defamatory negative information about James. Because no publication was made to anyone other than plaintiffs' agents, the demurrer to this cause of action was properly sustained.

Plaintiffs attempt to avoid this fatal defect by pointing out that they alleged "on information and belief that [Novelli] divulged confidential and false information to actual employers." In their view, this allegation "must be accepted as true for purposes of a [d]emurrer hearing." This argument does not save their pleading from an adverse judgment. A complaint must contain a statement of the *facts* constituting the cause of action. (Code Civ. Proc., § 425.10, subd. (a)(1); see *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537 [reciting "settled law that a pleading must allege facts and not conclusions, and that material facts must be alleged directly and not

by way of recital"].) The complaint ordinarily may allege ultimate rather than evidentiary facts, and it may allege " 'on information and belief any matters that are not within [the plaintiff's] personal knowledge if he has information leading him to believe that the allegations are true.' " (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, quoting *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788.) But "a pleading made on information and belief is insufficient if it 'merely assert[s] the facts so alleged without alleging such information that "lead[s] [the plaintiff] to believe that the allegations are true." ' " (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159, quoting *Doe v. City of Los Angeles, supra*, 42 Cal.4th at p. 551, fn. 5.)

The first amended complaint alleges no occasions on which any prospective employer or its agent even asked for, much less received, information about James's performance at FRIT. Thus, we are offered no *facts* permitting an inference that Novelli made damaging statements about James to such a person. That James "fears and suspects" that Novelli was "badmouthing him" to actual employers is insufficient to state a cause of action for either retaliation or defamation.

Novelli's statements to DRC and Allison & Taylor cannot be considered actionable defamation for another reason: the failure to allege any causal link between Novelli's allegedly negative statements and James's claims of "loss of income and job benefits" and emotional distress. Novelli's statements to DRC and Allison & Taylor stopped with them. From the vague allegation that the "wrongful conduct described herein" resulted in the damages James suffered we cannot take the leap, without more, that a negative evaluation was made to anyone other than DRC and Allison & Taylor. Without a nexus between the alleged negative references and James's failure to obtain employment, the claim of defamation must fail.

Finally, we agree with the superior court's point that Novelli's statements, even if interpreted as defamatory in nature and even if we could infer that they were made to actual prospective employers, fell within the conditional privilege of Civil Code

section 47, subdivision (c) (hereafter "section 47(c)").⁵ "It is well established that a former employer may properly respond to an inquiry from a potential employer concerning an individual's fitness for employment, and if it is not done maliciously such response is privileged." (*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 877.) Section 47(c) expressly makes this "common-interest privilege" applicable to communications made by current or former employers to prospective employers. (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1369.) In its 1994 amendment of section 47(c), "the Legislature foreclosed any argument [that] the common-interest privilege is inapplicable in the employment reference context, and sought to encourage current or former employers to respond, or more fully respond, to inquiries of prospective employers regarding applicants' job qualifications." (*Id.* at pp. 1373-1374.)

The privilege described in section 47(c) is a qualified one, which turns on the absence of malice. Thus, when a statement about a former employee is made in response to an inquiry from a potential employer, "malice becomes the gist of the action and it must exist as a fact before the cause of action will lie." (*Locke v. Mitchell* (1936) 7 Cal.2d 599, 602 (*Locke*); see generally *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1538-1539 [discussing malice element of section 47(c) privilege].) In a qualified privilege "no malice is presumed and in order to state a cause

⁵ This provision defines a "privileged publication" to include "a communication, *without malice*, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. *This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom [sic] the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee.*" (Civ. Code, § 47, subd. (c); italics added.)

of action the pleading must contain affirmative allegations of malice in fact." (*Locke, supra*, at p. 602; *Lesperance v. North Am. Aviation, Inc.* (1963) 217 Cal.App.2d 336, 341; cf. *Noel v. River Hills Wilsons, Inc.*, *supra* 113 Cal.App.4th at p. 1370 [malice is not inferred from the communication itself].)

As in *Locke*, "[t]he complaint in this case sets forth no facts showing that malice existed at the time the communication was published." (*Locke, supra*, 7 Cal.2d at p. 603.) At best, plaintiffs' second cause of action alleges only that Novelli "knew, recklessly should have known, or should have known" that her statements to the reference checkers were "false and/or misleading." There is no allegation of malice in this claim—and no allegation at all with respect to the intent with which she *may* have responded to any genuine employment inquiries that *may* have been made.

c. Negligence Allegations

The third, sixth, and twelfth causes of action (negligence, negligent retention and supervision, and gross negligence) are all based on Novelli's "misrepresentation" to the reference checkers about James's qualifications and performance and her "divulging to them private information about job awards and accomplishments, supervision of others, eligibility for re-hire, attendance, and circumstances for termination." Again plaintiffs alleged "on information and belief" that the information was released to potential employers.

As discussed above, however, plaintiffs alleged no facts contributing to the inference of misrepresentation or inappropriate disclosure beyond the statements made to plaintiffs' own agents. Thus, there is nothing from which to infer that plaintiffs' injury is attributable to any conduct they did not invite.

d. Alleged Labor Code Violations

The same result must attend the fourth and fifth causes of action for violating Labor Code sections 1050 and 1052.⁶ Both are premised solely on the misrepresentations to DRC and Allison & Taylor. No mention is even made of misrepresentations to others, much less to actual prospective employers. As the superior court noted, "Labor Code section 1050 applies only to misrepresentations made to prospective employers" (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288.) Even to the extent that Novelli may have *attempted* to prevent James from obtaining employment through misrepresentations, plaintiffs have not offered any factual basis on which to establish damages caused by the statements made to the reference checkers. Furthermore, the conditional privilege defined in section 47(c) applies equally to complaints alleging violations of misrepresentations under Labor Code section 1050. (*O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047.) To defeat the privilege plaintiffs had to affirmatively allege malice, and they did not do so.

⁶ These Labor Code sections apply to misrepresentations that prevent or attempt to prevent a former employee from obtaining employment. Labor Code section 1050 states: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." Section 1052 states, "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of sections 1050 and 1051, or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor." Notably, however, section 1053 cautions that "[n]othing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer." (Lab. Code, § 1053.)

e. Invasion of Privacy

Plaintiffs' seventh cause of action asserted a violation of article I, section 1, of the California Constitution by Novelli's "divulging" of James's "confidential information held by FRIT regarding his performance and conduct." Unquestionably the disclosure that occurred not only was with plaintiffs' consent but was invited by them when they hired the reference checkers for that very purpose. They made only brief, vague allegations "on information and belief" that "similar wrongful disclosures" were made to other former employees and to "actual potential employers." Because these allegations were insufficient to overcome demurrer, it is unnecessary to discuss the issue of whether Novelli's statements regarding James's employment at FRIT could be actionable as a matter of law as intrusions so "serious in their nature, scope, and actual or potential impact [as] to constitute an egregious breach of the social norms underlying the privacy right." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 287; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 929.)

f. Violations of Corporate Policy Manual

The eighth, ninth, and tenth causes of action pertained to "clear written promises" in FRIT's policy manual, setting forth the company policies regarding responses to reference checks, ethical obligations of employees, and the safeguarding of confidential information, as well as the company's intolerance of harassment, discrimination, and retaliation. According to plaintiffs, after settling James's harassment and discrimination claims, he applied for new employment in "reasonable and foreseeable" reliance on the policy of Human Resources to respond to reference checks by "confirm[ing] only dates of employment, wage rates, and position(s) held." Instead, defendants (through Novelli, presumably) revealed to the two hired reference checkers "private, false and/or misleading information"—and (once again) "on information and belief," to *actual* potential employers as well. This conduct, according to plaintiffs, constituted not only

promissory estoppel (eighth cause of action) but also intentional infliction of emotional distress (ninth cause of action) and fraud (tenth cause of action). The tenth cause of action was further divided into four counts: intentional misrepresentation, concealment, making promises without intention of performing, and negligent misrepresentation.

The superior court ruled that "these causes of action fail because the [first amended complaint] plainly alleges that the employment relationship ended on March 26, 2007. Plaintiffs are not asserting that James had an employment contract to be employed in perpetuity and that therefore the personnel policies should likewise apply in perpetuity. Therefore, Plaintiffs cannot allege any breach of the provision of the Corporate Policy Manual." In addition, the court ruled, as it had in sustaining the previous demurrer, that (1) plaintiffs had stated no clear and unambiguous promise and (2) the alleged violation of FRIT's "clear promise" did not amount to outrageous conduct as a matter of law.

Each of these three causes of action alleged harm resulting from the disclosure of confidential information—not to actual prospective employers but to DRC and Allison & Taylor, plaintiffs' own agents. Whatever reliance James could have placed on promises in the company's policy manual, there could have been no emotional distress or any other damage suffered as a result of disclosures invited by plaintiffs themselves. As discussed in the preceding sections, the mere assertion "on information and belief" that improper disclosures were also made to *actual* prospective employers was insufficient; no specific facts were pleaded that gave rise to a plausible inference that such conduct did occur and that it, rather than the contrived investigations, was the cause of James's emotional distress.

This is all the more applicable in the four counts of alleged fraud. This cause of action requires proof of " '(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.' " (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 329, quoting *Robinson Helicopter*

Co. v. Dana Corp. (2004) 34 Cal.4th 979, 990.) Fraud must be set forth with particularity. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) Here, however, the complaint fails to allege either a representation of any kind to an actual employer or causation between the misrepresentation that James speculates occurred and the harm he allegedly suffered.

g. Business and Professions Code Section 17200 Claim

Plaintiffs next resurrect a claim from the third cause of action in their original complaint, in which they alleged that defendants had "engaged in an unfair, unlawful and fraudulent business practice by repeatedly providing false and/misleading [*sic*] information about Plaintiff to his potential employers." The court granted leave to amend this cause of action, but plaintiffs chose not to restate it in the first amended complaint. Although we do not consider the claim waived by plaintiffs' election,⁷ the third cause of action contained no new facts giving rise to a violation of Business and Professions Code section 17200. Instead, plaintiffs only incorporated the preceding allegations of the complaint and simply relied on that one-sentence repetition of the allegation of misconduct. Their appellate briefs suggest no result different from the other causes of action.

h. Loss of Consortium

Joan Langholff's sole individual claim was for "years of substantial loss" of "the normal benefits of their marital relationship." Her allegations, however, were explicitly

⁷ "If a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action or amended versions of the remaining causes of action, no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment. It is only where the plaintiff amends the cause of action to which the demurrer was sustained that any error is waived." (*County of Santa Clara v. Atlantic Richfield Co.*, *supra*, 137 Cal.App.4th at p. 312; accord, *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 44.)

premised on the misconduct alleged in the preceding causes of action. Because those allegations were insufficient to constitute viable claims as a matter of law, the superior court properly sustained the demurrer with respect to the 11th cause of action.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.