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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT STIGLMIER,

Plaintiff and Appellant,

v.

SANTA BARBARA  
COMMUNITY COLLEGE  
DISTRICT et al.,

Defendants and Respondents.

2d Civil No. B261296  
(Super. Ct. No. 1438862)  
(Santa Barbara County)

COURT OF APPEAL – SECOND DIST.

**FILED**

**Nov 16, 2016**

JOSEPH A. LANE, Clerk

Nhalhoul Deputy Clerk

Robert Stiglmier appeals from judgments of dismissal entered after the trial court sustained, without leave to amend, demurrers to appellant's second amended complaint for identity theft. (Code Civ. Proc., § 581d.) Appellant did not oppose the demurrers. We affirm the judgment in favor of respondents Santa Barbara Community College District (SBCC) and Barbara Bell (Bell), and dismiss as untimely, the appeal on the iParadigms LLC (iParadigms) judgment. (Cal. Rules of Ct., rule 8.104(b).)

### *Facts and Procedural History*

In 2011, appellant, an honors student, enrolled in an English 110 class at SBCC. Bell taught the class and required that students submit all written assignments to Turnitin.com (Turnitin), a plagiarism-detection website for colleges. (See *A.V. ex rel Vanderhy v. iParadigms, LLC* (4th Cir. 2009) 562 F.3d 630, 634-635.)

Turnitin is owned and operated by iParadigms. Before submitting an academic paper, the student creates a user profile on the Turnitin web site and clicks an “I agree” icon under the user agreement terms and conditions.

Appellant was not computer proficient and asked Bell to help him register as a Turnitin user. Bell clicked the “I agree” icon on the terms and conditions web page, making appellant a registered user. Appellant’s first essay was submitted to Turnitin with no problems.

A month later, appellant submitted a second essay to Turnitin. After doing so, appellant read the terms of the user agreement and refused to submit his third and fourth essays to Turnitin, resulting in a failing grade.

Appellant protested to the SBCC administration and urged SBCC alumni, the Board of Trustees, and SBCC deans to adopt a full disclosure policy concerning the Turnitin user agreement. Appellant continued to protest and was suspended from August 8, 2012 through August 8, 2013.

### *The Complaint: Identity Theft*

Proceeding in propria persona, appellant sued SBCC, Bell, and iParadigms for identity theft on March 27, 2014. The trial court sustained, with leave to amend, demurrers to the complaint and first amended complaint.

Appellant filed a second amended complaint for identity theft that alleged four new causes of action for negligence, breach of contract, lack of full disclosure, and fraud. Respondents again demurred. Appellant did not oppose the demurrers but lodged, without leave of court, a third amended complaint for negligence, misappropriation, breach of contract, and declaratory and injunctive relief. The trial court sustained the demurrers without leave to amend.

After judgments were entered, appellant brought a motion for reconsideration which was denied. (Code Civ. Proc., § 1008.)

### *Discussion*

We review the order sustaining the demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) We accept as true properly pleaded allegations of facts, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden is on appellant to demonstrate that the second amended complaint can be amended to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

### *SBCC and Bell*

The first cause of action for identity theft alleges that SBCC and Bell wrongfully provided appellant's personal information to Turnitin and clicked on the "I agree" icon without explaining the terms and conditions of the user agreement. The second amended complaint fails to state what information was

wrongfully provided,<sup>1</sup> how respondents had reason to know the information was private, or how respondents acted with reckless disregard of the fact that a reasonable person would consider the dissemination of such information to be highly offensive. (CACI 1801; *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483-1484; *Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914-915 [expectation of privacy must be objectively reasonable].) No facts are alleged that respondents sold, used or misappropriated appellant's personal information for commercial gain. (Pen. Code, § 530.5 [identity theft]; Civ. Code, § 3344, subd. (a) [use of another's name or likeness]; *Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684.) Conclusory allegations that respondents' conduct caused appellant damage or injury are not sufficient to survive a demurrer. (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12.)

#### *Negligence*

With respect to the negligence cause of action, no facts are alleged that SBCC and Bell owed and breached a duty of care that was a substantial factor in causing appellant's harm. (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834 [discussing elements of cause of action for negligence].) The second amended complaint is premised on the theory that Bell had a duty to read the user agreement to appellant and make sure he understood the user terms and conditions. Appellant was an honors student and taking a college English course. He was capable of reading the user agreement.

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<sup>1</sup> The second amended complaint states that Turnitin was provided "a psychological profile" for data market "mining," but no facts are alleged what the information was or how it violated appellant's privacy rights.

No facts are alleged that Bell breached a duty of care that was a legal cause of appellant's harm or injury. (See *A.V. ex rel Vanderhye v. iParadigms, LLC*, *supra*, 562 F.3d at pp. 644-645 [use of Turnitin service does not violate students' copyright in their works or the marketability of their works].)

With respect to SBCC, there is no common law liability for a public entity. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 688.) Because SBCC is a public entity, it may not be sued for common law negligence. (Gov. Code, § 815, subd. (a); *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1127.) Appellant's failure to allege compliance with the Government Claims Act (Gov. Code, § 905.2) bars any claim for tort or contract damages. (*Bates v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 367, 382.) The trial court did not err in sustaining the demurrer.

#### *Breach of Contract*

No facts are alleged that Bell and SBCC had a written or oral contract with appellant, the terms of the contract, or how it was breached by respondents. (*McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1489.) "A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom. [Citation.]" (*Ibid.*) Appellant has failed to plead the requisite elements for breach of contract. (*Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 473 [breach of contract not actionable without damages].) The second amended complaint states that "any contract [appellant] enter[ed] into with any or all of the three defendants was null and void." The trial court did not err by sustaining the demurrer.

### *Fraud and Nondisclosure*

To sue for fraud based on concealment or nondisclosure, appellant must allege that (1) respondents concealed or suppressed a material fact; (2) respondents had a duty to disclose the fact to appellant; (3) respondents intentionally concealed or suppressed the fact with the intent to defraud appellant; (4) appellant was unaware of the fact and would not have acted as he did if he had known of the concealed fact, and (5) as a result of the concealment or nondisclosure, appellant sustained damage. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 775.) Appellant asked Bell to assist him to register as a Turnitin user, which she did. The second amended complaint states there was a “lack of full disclosure” and that Bell was “negligent to reveal the truth.” No facts are alleged that Bell or SBCC breached a duty to disclose the user agreement terms or concealed information with the intent to defraud or harm appellant. Fraud must be pled with specificity. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) General and conclusory allegations are insufficient. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) The trial court did not err in sustaining the demurrer without leave to amend.

### *Proposed Third Amended Complaint*

Appellant argues that his third amended complaint, filed in lieu of opposition to the demurrer, demonstrates that the complaint can be amended to correct the pleading defects. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890.) The third amended complaint abandons the identity theft claim and alleges new causes of action for declaratory and injunctive relief based on conclusory allegations that fail to state a cause of

action in tort or contract. Because the causes of action for declaratory and injunctive relief are wholly derivative of the other causes of action on which the demurrer was previously sustained, the third amended complaint fails to state a viable cause of action for injunctive or declaratory relief. (See *Ochs v. PacifiCare of California*, *supra*, 115 Cal.App.4th at p. 794.) Leave to amend is properly denied where, under the substantive law, no liability exists and the plaintiff fails to make a prima facie showing that the complaint can be amended to state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

*iParadigms*

iParadigms correctly argues that the appeal is untimely. Notice of entry of judgment was served October 28, 2014. Appellant filed his notice of appeal on January 2, 2015, more than 60 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a).) “If a notice of appeal is filed late, the reviewing court must dismiss the appeal.” (Cal. Rules of Court, rule 8.104(b).) The fact that appellant is a pro per litigant is not good cause to save an untimely appeal. (See, e.g., *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639 [litigant appearing in propria persona is held to same restrictive rules and procedures as an attorney].)

Appellant asserts that his motion for reconsideration, which was filed the same day the iParadigms judgment was entered (October 22, 2014), should be treated as a motion for new trial and extends the time to appeal. iParadigms opposed the motion for reconsideration on the ground that the judgment mooted the motion and argued that appellant must challenge the judgment by way of a motion for new trial. Appellant declined to

file a motion for new trial or ask the trial court to treat the motion for reconsideration as a motion for new trial.

The trial court correctly ruled that a motion for reconsideration cannot be heard or granted after a final judgment is entered. (*Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1048.) Absent a showing of “extremely good cause” a motion for reconsideration will not be treated as a motion for new trial to extend the time for appeal. (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1610; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1261.) “We decline to construe the motion for reconsideration as something that it was not.” (*APRI Ins. Co. S.A. v. Superior Court* (1999) 76 Cal.App.4th 176, 184.)

#### *Conclusion*

The judgment in favor of SBCC and Bell is affirmed and respondents are awarded costs on appeal. We dismiss the appeal on the iParadigms judgment and award iParadigms costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J., Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.



Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

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Robert Stiglmier, in propria persona, for Plaintiff and Appellant.

Hall Hieatt & Connely, Molly E. Thurmond, Cyrus Khosh-Chashm, for Respondents and Defendants, Santa Barbara Community College District and Barbara Bell.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Brittany H. Bartold, Gordon J. Calhoun, Robert L. Slaughter III, for Respondent and Defendant, iParadigms, LLP.