1. FEDOR v. THE GRAND WALL, INC., SC20180239

(A) Issues Conference

(B) Ex Parte Application to Continue Trial

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, FEBRUARY 16, 2024, IN DEPARTMENT FOUR.

2. DE LOIA, ET AL. v. CEFALU, ET AL., 23CV2066

(A) Demurrer

(B) Motion to Strike

(A) <u>Demurrer</u>

Pursuant to Code of Civil Procedure section 430.10, subdivisions (e) and (f), defendants generally and specially demur to plaintiffs' Complaint.

1. Background

This is a shareholder derivative lawsuit brought by Gina De Loia ("Gina") and Chris Cefalu ("Chris") against JARS Linen, Inc. ("JARS"), as well as John Cefalu ("John") and Jonathon "Joby" Cefalu ("Joby"), who are both shareholders and directors of JARS. (Compl., ¶ 1.)

In addition to several residential properties, JARS owns several commercial properties, including two in South Lake Tahoe, located at 824 Tallac Street and 3100 Nevada Avenue, respectively. (Compl., ¶ 12.)

In 2011, plaintiffs began to suspect that John and Joby were mishandling JARS funds. (Compl., ¶ 14.) In 2011, Gina allegedly overheard John state that he was using JARS funds to refurbish a personal property he owned. (*Id.*, ¶ 15.) That same year, Joby allegedly told Gina that JARS was paying for insurance on behalf of Joby and his wife, Laura Cefalu ("Laura"). (*Id.*, ¶ 16.) Gina questioned these payments and John told her it was "none of her business." (*Ibid.*)

In 2012, John filed a California Statement of Information from JARS. (Compl., ¶ 17.) When Gina reviewed the filing, she discovered she had been temporarily removed from her officer position. (*Ibid.*) Gina believes this was done in retaliation for her questions regarding the propriety of JARS's finances. (*Ibid.*)

In 2015, Gina allegedly noticed that JARS was paying Joby's son, John Tyler, approximately $900 per month. (Compl., ¶ 18.) Gina claims she had no knowledge nor

reason to believe that John Tyler was earning the money in exchange for services provided to JARS because John Tyler was in college at the time. (*Ibid.*)

In May 2016, Joby allegedly mentioned using JARS funds to pay for search engine and website optimization for his personal fishing-guide website. (Compl., ¶ 19.)

In 2018, Gina allegedly discovered that JARS was paying funds to another one of Joby's sons, apparently for college expenses. (Compl., ¶ 20.) When Gina inquired about the payments, John allegedly told her she was "snooping around again," became enraged, and physically threatened Gina. (Compl., ¶ 20.)

In 2019, Chris allegedly found and took pictures of JARS's fiscal year-end documents, which showed that JARS had allegedly disbursed $25,925 in Director's Fees. (Compl., ¶ 21.) Plaintiffs claim they were unable to find evidence of any approval of this distribution. (*Id.*, ¶ 22.) At a board meeting held on July 15, 2021, John and Joby allegedly told Gina that the disbursement was a "mistake" by their accountant. (*Id.*, ¶ 23.) However, in October 2021, Joby allegedly claimed he was advised by JARS's accountant that the disbursement would help "them" take advantage of a tax deduction, and that the amount of the disbursement had been subtracted from "their" salaries (plaintiffs claim they were never provided documentation showing who received the Director's Fees). (*Id.*, ¶¶ 26, 27.)

The Complaint also alleges that "[i]n or about June 2021, there was a major leak in a JARS water main. Chris discovered that Joby included the installation of a valve on the 824 Tallac Avenue property with the cost to repair the leak. [¶] Plaintiffs believe Joby installed the valve on the 824 Tallac Avenue property to circumvent a moratorium on landscape watering in the Tahoe Keys, imposed due to water contamination. Gina believes Joby was using JARS water to landscape his own lawn and those of his neighbors. Gina also believes Joby allowed one of his sons to water other lawns in the area with JARS' water, for profit. Plaintiffs have not seen any documentation showing JARS received any of that income." (Compl., ¶¶ 28, 29.)

In October 2021, Joby allegedly advised Gina that Joby planned to instruct Laura to pay $9,000 of JARS funds for the appraisal of the Cefalu Family Trust. (Compl., ¶ 30.) Gina allegedly told Joby this was not a proper use of JARS funds, but Joby continued with the transaction. (*Ibid.*)

On November 27, 2023, plaintiffs filed their Complaint against defendants, stating causes of action for (1) breach of fiduciary duty; (2) corporate waste; (3) conversion; (4) civil theft under Penal Code section 496, subdivision (c); and (5) accounting.

2. Preliminary Matters

Plaintiffs generally object to defendants' Introduction paragraph in their demurrer to the extent that it includes factual allegations not made in plaintiffs' Complaint. (Opp. at 2:5–10.) Indeed, at the demurrer stage, the court may only consider the well-pleaded allegations of the complaint and judicially noticeable facts. (Code Civ. Proc., § 430.30, subd. (a).) Here, defendants did not make any request for judicial notice. The objection is sustained. The court considers the well-pleaded allegations of the complaint only in deciding the instant demurrer.

3. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

4. Discussion

4.1. Alleged Failure to State a Claim

Defendants claim the Third C/A fails to state sufficient facts to constitute a cause of action for conversion where there is no specific, identifiable sum of money that defendants allegedly took from plaintiffs. (Dem. at 11:23–12:3.)

" 'A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. [Citation.] Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]' [Citations.]" (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.)

"The tort of conversion is derived from the common law action of trover. The gravamen of the tort is the defendant's hostile act of dominion or control over a specific chattel to which the plaintiff has the right of immediate possession. [Citations.] That is why money can only be treated as specific property subject to being converted when it is 'identified as a specific thing.' [Citation.]" (*PCO, Inc.*, *supra*, 150 Cal.App.4th at p. 395.) California cases permitting an action for conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others. (See, e.g., *Haigler v. Donnelly*, 18 Cal.2d at p. 681 [real estate broker]; *Fischer v. Machado*, 50 Cal.App.4th at pp. 1072–1074 [sales agent for consigned farm products]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [attorney's claim for $6,750 fee from proceeds of settlement subject to lien]; *Watson v. Stockton Morris Plan Co.* (1939) 34 Cal.App.2d 393, 403 [savings and loan issued duplicate passbook and delivered funds to third party].) In each of these cases, the amount of money converted was readily ascertainable.

In contrast, actions for the conversion of money have not been permitted when the amount of money involved is not a definite sum. (*Vu v. Cal. Commerce Club, Inc.*, 58 Cal.App.4th at p. 235; *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* 49 Cal.App.4th at p. 485 [no conversion where money was allegedly misappropriated "over time, in various sums, without any indication that it was held in trust for" plaintiff].) For example, in *Vu v. California Commerce Club, Inc.*, *supra*, 58 Cal.App.4th 229, the court affirmed a summary judgment on a conversion claim against two gamblers who lost "approximately $1.4 million" and "approximately $120,000," respectively, at a specific card club during specified periods of time, due to alleged cheating. (*Id.* at pp. 231–232.) The court held, "neither by pleading nor responsive proof did plaintiffs identify any specific, identifiable sums that the club took from them. That rendered the generalized claim for money not actionable as conversion." (*Id.* at p. 235.)

Plaintiffs argue that defendants "have offered no authority requiring Plaintiffs to identify a specific sum of money at [the pleading] phase." (Opp. at 6:24–25.) The court notes, however, that "[a] complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390.) Because a "generalized claim for money [is] not actionable as conversion" it follows that, where money is concerned, the specific, identifiable sum of money at issue is an essential element of the cause of action. (*Vu*, *supra*, 58 Cal.App.4th at p. 235.) Therefore, such fact(s) must be pleaded in order to maintain a cause of action for conversion.

Here, the only specific, identifiable sums of money alleged are (1) the monthly payment of "approximately" $900 to Joby's son, John Tyler (Compl., ¶ 18); (2) the $25,925 disbursement of Director's Fees (*id.*, ¶ 21); and (3) the $9,000 used for the appraisal of the Cefalu Family Trust. (*id.*, ¶ 30.) However, the court finds that none of these amounts can properly sustain a conversion action. There is no allegation that any of these sums of

money were earmarked for a specific person (i.e., plaintiffs) before allegedly being misappropriated and absorbed into another's coffers. (See *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1156.) Therefore, the court sustains the demurrer as to the Third C/A for conversion with leave to amend.

4.2. Alleged Uncertainty

Generally speaking, each cause of action in a complaint must identify the parties asserting the claim (if the complaint is filed on behalf of more than on plaintiff) and against whom it is asserted. (Cal. Rules of Ct., Rule 2.112, subds. (3) & (4).)

Defendants claim that the First, Second, Third, and Fourth C/A are uncertain "as it is unclear which allegations constitute the basis for the cause of action and which defendants [the] cause of action is brought against." (Dem., p. 4.) Further adding to the uncertainty, defendants argue, is that there are many allegations of wrongdoing that occurred several years ago and are time-barred as a matter of law. (Dem. at 10:10–21, 11:3–5, 12:14–16.)

Having reviewed the Complaint, the court finds that plaintiffs have failed to identify the parties asserting each claim, and against whom each claim is asserted. Therefore, the demurrer is sustained on the grounds of uncertainty with leave to amend.

(B) Motion to Strike

Pursuant to Code of Civil Procedure section 435, defendants move to strike the following portions of the Complaint:

1. Compl., ¶ 15: "In 2011, Gina overheard John state that he was using JARS' funds to refurbish a personal property of John's to ready the property for a tenant. John did not state whether or when that money would be repaid to JARS. Presently, Plaintiffs are unaware if that money was ever repaid."

2. Compl., ¶ 16: "This same year, Joby told Gina that JARS was paying insurance for Joby and Laura. Gina questioned these payments and John told her it was 'none of her business.' "
3. Compl., ¶ 18: "In 2015, Gina noticed JARS was paying Joby's son, John Tyler, approximately $900.00 per month. Neither John nor Joby informed Gina why the payments were being made. Gina had no knowledge nor reason to believe John Tyler was earning the money in exchange for services he provided to JARS, because John Tyler was in college. To date, Plaintiffs have no clarity on the reason for these payments."
4. Compl., ¶ 19: "In May 2016, Joby and Gina visited the University of California, San Francisco for purposes related to their mother's health. During the visit, Gina recalls Joby mentioning using JARS' funds for search engine and website optimization for Joby's personal fishing guide website."
5. Compl., ¶ 20: "In 2018, Gina discovered JARS was paying funds to another of Joby's sons. These payments were also seemingly for college expenses. Gina inquired as to why only Joby's children were receiving these payments and John told her she was 'snooping around again,' became enraged, and physically threatened Gina."
6. The following portions of Compl., ¶¶ 21–24: "In 2019, Chris found and took photos of JARS's fiscal year-end documents, which indicated that Director's Fees in the amount of $25,925.00 had been disbursed. [¶] Chris informed Gina of this discovery and she reviewed her own records…. Plaintiffs were unable to find evidence of any approval of the 2019 distribution. [¶] On or about July 15, 2021, JARS held its first board meeting since approximately 1996. At that meeting Gina inquired about the disbursement of Director's Fees. Neither John nor Joby gave a satisfactory explanation, claiming it was a 'mistake' by their accountant. [¶] Laura was not present at the meeting. Prior to the meeting, Gina questioned her about

the disbursement of Director's Fees. Laura also claimed it was an accounting mistake."

7. The following portions of Compl., ¶ 45: "… (a) Paying health insurance without authorization; (b) Using JARS funds to cover expenses for non-JARS business; (c) Using JARS funds to pay for refurbishing of non-JARS real estate; … (e) taking cash distributions and/or loans (unpaid) without JARS' approval…."
8. The following portions of Compl., ¶ 51: "…by, among other things, using JARS' funds for personal projects, personally benefitting financially at the expense of JARS, improperly disbursing Director's Fees…."
9. The following portions of Compl., ¶ 63: "…side businesses, paid salaries from JARS' funds to non-JARS employees and/or for non-JARS work…."
10. The following portions of Compl., ¶ 32: "… Accordingly, the discovery rule most definitely applies here as a basis to equitably toll any facial issues involving any statute of limitations."

1. Preliminary Matters

Plaintiffs generally object to defendants' Introduction paragraph in their motion to the extent that it includes factual allegations not made in plaintiffs' Complaint. (Opp. at 5:13–18.) Indeed, a motion to strike may be used when a substantive defect is clear from the face of the complaint. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682–1683.) The objection is sustained.

2. Discussion

Code of Civil Procedure section 436 provides, in part, "[t]he court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) Defendants claim that certain portions of plaintiffs' Complaint should be stricken where the allegations are time-barred as a matter of law. "[W]hen a substantive defect is clear from the face of the complaint, such as a violation

of the applicable statute of limitations …, a defendant may attack that portion of the cause of action by filing a motion to strike. [Citation.]" (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682–1683.)

The parties do not dispute that the applicable statute of limitations for civil theft and conversion is three years; and the applicable statute of limitations for breach of fiduciary duty and corporate waste is four years. Plaintiffs filed their Complaint on November 27, 2023. The issue is when did the limitations period commence for each of the four causes of action mentioned.

The limitations period commences when the cause of action accrues. (Code Civ. Proc., § 312; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) "Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' " (*Fox*, *supra*, 35 Cal.4th 797 at p. 806, quoting *Norgart*, *supra*, 21 Cal.4th at p. 397.) "An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule." (*Norgart*, *supra*, 21 Cal.4th at p. 397.) The discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Ibid.*; accord, *Fox*, *supra*, 35 Cal.4th at p. 807.)

The discovery rule "protects the plaintiff, whose cause of action is preserved when, despite diligent investigation, he is blamelessly ignorant of the cause of his injuries. It also protects the defendant, who is spared precipitous litigation." (*Bastian v. County of San Luis Obispo* (1988) 199 Cal.App.3d 520, 529.) The discovery rule "is based on the notion that statutes of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights; therefore, those statutes should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence." (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 297.) Thus, in actions

where the rule applies, the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury. (*Fox*, *supra*, 35 Cal.4th at p. 807.)

Notice may be actual or constructive. (Civ. Code, § 18.) Actual notice is "express information of a fact," while constructive notice is that "which is imputed by law." (*Ibid.*) A person with "actual notice of circumstances sufficient to put a prudent man upon inquiry" is deemed to have constructive notice of all facts that a reasonable inquiry would disclose. (Civ. Code, § 19; see *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 439.)

For purposes of accrual of the limitations period, inquiry notice is triggered by suspicion. As the California Supreme Court explained in the *Jolly* case: "Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.) The court reaffirmed the suspicion rule in *Fox*, saying "under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff *has reason to suspect an injury and some wrongful cause*, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action." (*Fox*, *supra*, 35 Cal.4th at p. 803 [italics added].)

Plaintiffs claim they "have adequately plead facts supporting the application of the discovery rule [and thus] no statutes of limitations issues can be said to appear on the face of their Complaint." (Opp. at 5:5–7.) Yet, plaintiffs do not explain how the pleaded facts support application of the discovery rule.

Plaintiffs' Complaint clearly alleges that plaintiffs suspected injury and some wrongful conduct no later than 2011, 2012, 2015, 2016, and 2018. (See Compl., ¶¶ 14–20.) However, plaintiffs appear to claim that a reasonable investigation at these times would not have revealed a factual basis for the causes of action they now assert. For example, in 2011 when Gina questioned John about the insurance payments being made on behalf of Joby and Laura, John allegedly told Gina it was "none of her business." (Id., ¶ 16.) In 2018, when Gina inquired as to why only Joby's children were receiving monthly

payments from JARS, John allegedly told Gina she was "snooping around again," became enraged, and physically threatened Gina. (Id., ¶ 20.)

The court is not convinced. The allegations demonstrate that plaintiffs had notice of the facts constituting injury in 2011, 2012, 2015, 2016, and 2018. The court finds that this is not a case of delayed discovery. It is clear from the face of the complaint in this case that plaintiffs had at least "a suspicion of wrongdoing" (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d 1103, 1111) by defendants more than three and four years, respectively, before plaintiffs filed suit. Those suspicions were sufficient to satisfy the discovery element for commencement of the statute of limitations. Therefore, the allegations of wrongdoing in Paragraphs 15, 16, 18, 19, and 20 of the Complaint are time-barred and shall be stricken. Further, because the court finds that the discovery rule does not apply, the challenged portion of Paragraph 32 of the Complaint shall also be stricken.

The court finds that the challenged portions of Paragraphs 21 through 24 of the Complaint, which occurred in 2019 and after, are not time-barred. Therefore, the motion to strike these portions of the Complaint is denied.

The challenged portions of Paragraphs 45, 51, and 63 of the Complaint are not time-barred on the face of the Complaint. The motion to strike these portions of the Complaint is denied.

TENTATIVE RULING # 2: THE DEMURRER IS SUSTAINED WITH LEAVE TO AMEND. THE MOTION TO STRIKE IS GRANTED IN PART AND DENIED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY

TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. MATTER OF WEIR, 23CV2224

OSC Re: Name Change

TENTATIVE RULING # 3: PETITION IS GRANTED AS REQUESTED.

4. KUSHNER v. RIGHTPATH SERVICING, LLC, ET AL., 23CV1329

Motion for Preliminary Injunction

On the court's own motion, the matter is continued to February 23, 2024. The court apologizes to the parties for any inconvenience.

The existing Temporary Restraining Order shall remain in effect until the continued hearing date.

TENTATIVE RULING # 4: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, FEBRUARY 23, 2024, IN DEPARTMENT FOUR. THE EXISTING TEMPORARY RESTRAINING ORDER SHALL REMAIN IN EFFECT UNTIL THE CONTINUED HEARING DATE.