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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GRAYSON SERVICES, INC., Plaintiff and Appellant, v. WELLS FARGO BANK, Defendant and Respondent.	F059773 (Super. Ct. No. CV263497) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Mahaffey & Associates, Douglas L. Mahaffey, Susan B. Ghormley and Daniel Willett for Plaintiff and Appellant.

Barton, Klugman & Oetting and Thomas E. McCurnin for Defendant and Respondent.

INTRODUCTION

Based on a default judgment, a judgment creditor served a writ of execution and notice of levy on Wells Fargo Bank (Wells Fargo) in an attempt to obtain two certificates

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II A, B, & C, and III of the Discussion.

of deposit and related interest payments that the judgment creditor believed were the property of its judgment debtor. The certificates of deposit in question were in the possession of, and made payable to, a public entity. The accrued interest had been delivered to a creditor with a competing levy. Consequently, Wells Fargo's memorandum of garnishee stated it had nothing to report and no certificates or funds were delivered in response to the levy. A second writ of execution and levy were served on Wells Fargo, with essentially the same response.

The judgment creditor sued Wells Fargo in a separate action alleging (1) the bank's response to the levies violated its duties under California's Enforcement of Judgments Law (EJL)[1] and (2) the bank conspired with its customer and others to fraudulently transfer assets and hinder the judgment creditor's attempts to levy on those assets.

The trial court eliminated both claims at the pleading stage. First, the court sustained a demurrer to the conspiracy claim, concluding there was no allegation that a fraudulent transfer (the wrongful act underlying the conspiracy) had occurred. Later, the court granted a motion for judgment on the pleadings, concluding the claim alleging a violation of the EJL could not be pursued against a financial institution. The judgment creditor appealed.

In the published portion of this opinion, we conclude that a bank chartered as a national association is a "person" as defined in section 680.280 and, accordingly, is subject to the duties and liabilities imposed on "third persons" by the EJL, particularly sections 701.010 (duty of garnishee), 701.020 (liability for noncompliance with levy), and 701.030 (garnishee's memorandum).

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[1] The EJL is contained in title 9 of part 2 of the Code of Civil Procedure. It consists of five divisions, beginning at Code of Civil Procedure section 680.010 and ending at section 724.260. All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

In the unpublished portions, we conclude the allegations that Wells Fargo failed to deliver funds representing interest accrued on the certificates of deposit were sufficient to state a claim under the EJL. In addition, we conclude that the allegations in the conspiracy claim (1) were insufficient to allege a violation of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439-3439.12) (UFTA) and (2) failed to allege with the requisite particularity all the elements of a general fraud claim based on false representations or concealment. These allegations, however, were sufficient to allege all the elements of a claim for conversion of personal property.

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

FACTUAL AND PROCEDURAL BACKGROUND

In July 2001, Grayson Service, Inc. (Grayson) filed a complaint against New Chaparral Petroleum, Inc. (New Chaparral) in Kern Superior Court, alleging New Chaparral had not paid for oil and gas well work performed by Grayson. In February 2002, Grayson obtained a default judgment against New Chaparral for $94,115.83.

In February 2005, Grayson filed a notice of judgment lien with the California Secretary of State that listed New Chaparral as the judgment debtor. Grayson alleges it obtained a writ of execution in April 2006, which it later served, along with a notice of levy, on a Wells Fargo branch in Bakersfield, California. Wells Fargo returned the levy to the Kern County Sheriff noting in the memorandum of garnishee report there were no assets in its possession responsive to the writ of execution and levy.

In October 2007, Grayson filed a separate complaint against Wells Fargo, New Chaparral, and Core Energy, LLC.[2] The only cause of action against Wells Fargo alleged the bank had violated the EJL by failing to deliver a $150,000 certificate of deposit to the

[2] New Chaparral had financial difficulties and Core Energy attempted to acquire some of its wells and assets.

levying officer in response to Grayson's April 2006, writ of execution. Grayson later obtained a second writ of execution and served a second levy on Wells Fargo in September 2008, seeking to levy on the two certificates of deposits listed below and accrued interest. The Memorandum of Garnishee again reported there were no assets to report or release, but did note that $11,735 was being held in an interest account, pending further order from the Kern County Sheriff because a third party, Core Energy, was also claiming an interest in the funds.

Following successful demurrers by Wells Fargo, Grayson filed a second amended complaint in April 2009, containing two causes of action.[3] The first cause of action alleged Wells Fargo violated the EJL by failing to deliver monies it held for the account of New Chaparral and failing to provide correct information in the garnishee's memorandum. The second cause of action alleged Wells Fargo participated in a conspiracy to fraudulently convey certificates of deposit and other money accounts subject to Grayson's levy to third parties to hinder or defeat Grayson's attempts to collect the judgment against New Chaparral. The second amended complaint is the operative pleading in this appeal.

As alleged in the second amended complaint, Wells Fargo had previously issued two certificates of deposit (CD). The first, dated April 22, 1998, referenced account 1892029489-000, and was for $100,000. That CD was issued with monies deposited by Capital Acquisition, Inc., for Chaparral Petroleum, Inc. and was payable to the California Division of Oil, Gas and Geothermal Resources (DOGGR). The CD was for a term of 12 months and stated it would automatically renew at maturity. The interest on the CD,

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[3] The exhibits referenced in the second amended complaint are not attached to that complaint as set forth in the appellant's appendix. Some of those exhibits, however, are located elsewhere in the appellate record. Also, the trial court's January 2010 order denying the motion for new trial makes several references to exhibits attached to the second amended complaint. Therefore, we infer that those exhibits were attached to the second amended complaint in the form filed in the superior court.

$4,870 per year, was to be paid at maturity and credited to another account, 0900-919598, in the name of Capital Acquisition, Inc.

The second CD referenced account 1892-029547-000, was for $150,000, was dated April 10, 2000, was payable to DOGGR, and was from funds deposited by New Chaparral. The certificate was to automatically renew, with interest paid monthly with an annual return of $6,555 per year, credited to account 6867-538787, in the name of New Chaparral. The first cause of action alleges that Wells Fargo failed honor the 2006 and 2008 levies and turn over the two CDs and accrued interest accounts to Grayson.

Wells Fargo demurrered to the second cause of action, contending Grayson's conspiracy claim failed to state a cognizable cause of action because (1) Grayson had suffered no damages, (2) the allegations state the alleged fraudulent conveyance was unsuccessful, (3) Wells Fargo's knowledge of the fraud was not pled with sufficient specificity, and (4) Grayson had failed to join indispensable parties.

In June 2009, the trial court rejected the failure to join indispensable parties argument, but sustained the demurrer to the conspiracy claim on the other three grounds, without leave to amend.

In July 2009, Wells Fargo filed a motion for judgment on the pleadings on the first cause of action for failure to comply with the EJL, asserting Grayson had suffered no damages, because the underlying judgment against New Chaparral had been satisfied and Grayson lacked standing under section 367 to assert account irregularities concerning the two CDs that were alleged to have occurred prior to the levy. The trial court granted the motion without leave to amend, concluding that Grayson's suit was barred by the satisfaction of the underlying judgment, and Grayson lacked standing to assert a claim concerning account irregularities.

In October 2009, Grayson filed a motion for new trial, asserting that its allegations were sufficient to state a claim under the EJL and the court's determination that its

judgment had been satisfied was a finding of fact that should not have been made at the pleading stage of the lawsuit.

Later in October 2009, before the motion for new trial was heard, the trial court filed a judgment dismissing the action with prejudice and awarding Wells Fargo its costs of suit. No notice of entry of judgment was served.

In January 2010, following a hearing on the motion for new trial, the court denied the motion for a new trial, although it reversed its finding that the underlying judgment had been satisfied.

Grayson thereafter filed a timely notice of appeal.

DISCUSSION

I. STANDARD OF REVIEW*

This case presents a classic example of the longstanding rule that "in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue" as "[t]hat is always the ultimate question to be determined by the evidence upon a trial of the questions of fact." (*Colm v. Francis* (1916) 30 Cal.App.742, 752.) The parties have spent considerable effort arguing facts extraneous to this appeal, since they were not contained in the second amended complaint or the exhibits, but were instead gathered during pre-trial discovery or presented to the trial court in the motion for summary judgment and opposition.

Our standard of review of an order sustaining a demurrer on the ground that the complaint fails to state facts sufficient to constitute a cause of action is well settled. We review the sufficiency of the complaint de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our analysis begins with the second amended complaint. "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their

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* See footnote, *ante*, page 1.

context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "We also consider matters that may be judicially noticed." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083, disapproved on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 12.)

Similarly, a motion for judgment on the pleadings may be made on the ground that the complaint fails to "state facts sufficient to constitute a cause of action." (*Reynolds v. Bement, supra,* 36 Cal.4th at p. 1083; § 438, subd. (c)(1)(B)(ii).) Like demurrers, motions made on this ground test the sufficiency of the complaint alone, not the evidence or other extrinsic matters. (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1283.)

The sufficiency of a pleading is a question of law. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.) An appellate court independently decides this question of law without deference to the trial court's conclusions. (*Id.* at p. 1304.) Regardless whether the sufficiency of the pleading was raised by general demurrer or a motion for judgment on the pleadings, an appellate court applies the same rules to determine whether a cause of action has been stated. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

When a court analyzes the facts alleged to determine whether those facts entitle the plaintiff to relief under any legal theory, the labels the plaintiff used for its causes of action may be ignored.[4] (E.g., *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 385

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[4] The requirement for labels is set forth in California Rules of Court, rule 2.112, which provides, among other things, that each separately stated cause of action or count must specifically state its number (e.g., "first cause of action") and nature (e.g., "for fraud").

[erroneous or confusing labels ignored if complaint alleges facts that entitle plaintiff to relief]; *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908 [same].)

II. CLAIMS FOR VIOLATIONS OF THE EJL

The EJL is a comprehensive statutory scheme for the enforcement of civil judgments in California. (*SBAM Partners v. Cheng Miin Wang* (2008) 164 Cal.App.4th 903, 909.) The Legislature enacted the EJL in 1982 based on the recommendation of the Law Revision Commission. (*OMC Principal Opportunities Fund v. CIBC World Markets Corp.* (2008) 168 Cal.App.4th 185, 192.)

A. Allegations in First Cause of Action*

Grayson's first cause of action in its second amended complaint includes the following general allegations. Pursuant to sections 700.140, 701.030, and 701.020, Wells Fargo was required to comply with Grayson's May 2006 and September 2008 levies, including releasing all amounts in any deposit accounts of New Chaparral that Wells Fargo possessed or controlled. Wells Fargo violated the statutory duties it owed to Grayson, which caused damage to Grayson.

Grayson also alleged that at the time of the May 2006, levy, New Chaparral had $8,657.49 in Wells Fargo account 6867-538787, interest proceeds from the $150,000 CD and at least $5,327.29 in account 892029489 or account 0900-919598, interest proceeds from the $100,000 CD (collectively, the interest accounts). Grayson alleged its levy applied to the interest accounts and the certificate of deposit accounts of New Chaparral. Wells Fargo improperly responded to the May 2006 levy—its memorandum of garnishee omitted information about the interest accounts and certificates of deposit, and it delivered no funds from the interest accounts or certificates of deposit to the Kern County Sheriff. Wells Fargo completed the memorandum of garnishee by stamping "NOTHING TO REPORT." In response to another question, which asked about the rights of other

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* See footnote, *ante*, page 1.

persons to the property levied upon, Wells Fargo indicated its records showed "NO FUNDS TO ATTACH."

Grayson also alleged that Wells Fargo concealed the fact that (1) Stranberg, another creditor, allegedly had levied at the exact same time as Grayson and (2) Wells Fargo sent the $8,657.49 in interest proceeds to Stranberg.

B. Contentions of the Parties*

On appeal, Grayson asserts Wells Fargo committed two types of statutory violations that caused Grayson to suffer two different injuries. The first was the failure to deliver money to the levying officer, including the approximately $14,000 allegedly in the interest accounts. The second violation was the failure to set forth correct information in the memorandum of garnishee, which caused Grayson to incur additional attorney fees and costs in trying to collect its original judgment against New Chaparral.

Wells Fargo's appellate brief addresses three potential claims that are based on alleged violations of the EJL. The first claim concerns account irregularities alleged to have occurred before service of the first levy in May 2006. The second claim concerns the failure to disclose information about the interest accounts and certificates of deposit on the memorandum of garnishee. The third claim concerns the failure to turn over funds from the interest account — a situation that Wells Fargo describes as "the 'dueling levy' morass created by [Grayson]."

C. Analysis of Three Theories*

1. Account Irregularities

The trial court's order denying the motion for a new trial addressed the theory involving account irregularities that occurred before service of the May 2006 levy. The court determined that Grayson lacked any standing to claim a violation of the EJL based

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* See footnote, *ante*, page 1.

* See footnote, *ante*, page 1.

on activity that occurred prior to the service of the levy, because the duties and obligations contained in the EJL only became operative when the levy was served.

In its opening brief, Grayson has not pursued the theory that Wells Fargo violated the EJL by committing account irregularities before the levy was served or by failing to disclose those irregularities in the memorandum of garnishee.

Wells Fargo's respondent's brief contends that Grayson abandoned this particular theory by not developing it in its opening brief. Grayson did not file a reply brief and, therefore, does not contest the abandonment argument.

When an appellant fails to raise a point, we treat the point as forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [reviewing court need not discuss point merely asserted by appellant without argument or authority].) Based on this principle, we conclude that Grayson has forfeited the issue whether its allegations of account irregularities stated a cognizable claim under the EJL. Thus, we need not consider that theory further.

2. Failure to Deliver Funds

Subdivision (a) of section 701.020 provides that a third person who fails or refuses to make payment to the levying officer as required by the EJL is liable to the judgment creditor for the lesser of the (a) the amount required to be paid or (b) the amount required to satisfy the judgment.

a. Interest Accounts

The second amended complaint alleges that at the time of the 2006 levy New Chaparral owned approximately $14,000 in two accounts at Wells Fargo. Wells Fargo's memorandum of garnishee (exhibit 9 to the second amended complaint) indicates the bank delivered no funds to the levying officer. These allegations adequately state a violation of a statutory duty to deliver the $14,000 in the interest accounts of New Chaparral.

Wells Fargo responds to the possibility that Grayson stated a claim under the EJL regarding the $14,000 allegedly in the interest accounts as follows:

> "[Grayson] levied on the accounts, along with another judgment creditor, both represented by the same lawyer, levying at the same time, against the same judgment debtor, served on the same bank, and the bank allegedly wrongfully honored one levy, while dishonoring [Grayson's]. This 'dueling levy' morass was created by [Grayson's] own lawyer in complete derogation of his responsibilities to avoid a conflict of interest to dual representation under Rule of Professional Conduct 3-310 …."

In making this argument, Wells Fargo has cited no statute, regulation, case law, or secondary authority for the proposition that when a judgment creditor's attorney creates a so-called dueling levy situation, the financial institution is not liable for any breach of its statutory obligations that occurs. Based on this lack of authority and Wells Fargo's failure to present any public policy justifications for adopting such a proposition, we will not create a new principle of law modifying the statutory duties imposed on persons served with a levy. (§ 1858 [judge may not insert what Legislature has omitted].) Similarly, we reject the proposition that Wells Fargo's mere assertion that Grayson's lawyer had a conflict of interest frees the bank from liability for breaches of a statutory duty imposed by the EJL.

In summary, the arguments made by Wells Fargo about dueling levies and conflicts of interest do not negate an essential element of Grayson's claim that Wells Fargo violated its duty under the EJL to pay money to the levying officer who presented the May 2006 levy. Furthermore, the arguments do not present a recognized affirmative defense that can be resolved in the bank's favor at the pleading stage of this lawsuit. Therefore, we conclude that the second amended complaint has stated facts sufficient to constitute a cause of action for a violation of the EJL. The trial court erred in granting the motion for judgment on the pleadings as to the first cause of action.

b. Certificates of Deposit

It appears that Grayson no longer contends that Wells Fargo violated the EJL in June 2006 by failing to deliver the certificates of deposit to the levying officer or by failing to pay the funds represented by those certificates to the levying officer. The trial court considered and rejected this possible claim by concluding that the certificates of deposit were payable exclusively to DOGGR at the time and no certificates of deposit were held by New Chaparral. Nevertheless, we will review the trial court's determination because the second amended complaint can be interpreted as asserting that the certificates of deposit were deposit accounts owned by New Chaparral and that Wells Fargo violated the EJL by failing to deliver all amounts represented by the certificates of deposit.

First, we note that Grayson's assertion that the certificates of deposit were deposit accounts of New Chaparral is not binding on this court because it is a legal conclusion. (*Neilson v. City of California City, supra,* 133 Cal.App.4th at p. 1305 [court reviewing demurrer does not assume the truth of pleading's legal contentions or conclusions of law].) We will review the written documents labeled by Wells Fargo as special purpose certificates of deposit to determine whether they were owned by New Chaparral.

The face of the $100,000 certificate of deposit dated April 22, 1998, states it is payable to "California Division of Oil, Gas and Geothermal Resources" and that it was received from "Capital Acquisition Inc. for Chaparral Petroleum Inc." Terms on the face of the certificate also provide: "This certificate is non-transferable. Presentation of the original certificate, signed by the payee, is required to withdraw funds."

The face of the $150,000 certificate of deposit dated April 10, 2000, states that it is payable to "Department of Conservation, Div. of Oil, Gas & Geothermal Resources" and that it was received from "New Chaparral Petroleum, Inc." In addition, the certificate states: "This certificate is nontransferable, nor is it required to withdraw funds."

Because both certificates of deposit were made payable to DOGGR, we conclude that at the time of the levies New Chaparral had no right to draw on the funds represented by the certificates of deposit. Therefore, Wells Fargo was not required to deliver the funds represented by the certificates of deposit in response to the levy. (See *United States v. First National Bank and Trust Co.* (W.D.Pa. 1988) 695 F.Supp. 194 [federal tax levy on certificate of deposit failed because taxpayer had no leviable property interest in certificate of deposit and, therefore, there was nothing to which the government levy could attach; taxpayer had used certificate of deposit as security for loan from same bank that issued certificate of deposit; the loan had matured and bank's automatic right of set off extinguished taxpayer's right to draw on funds]; *Zimler v. United States* (E.D.N.Y. 1979) 79-1 USTCP 9395 [1979 WL 1359] [certificates of deposit in wife's name and held by savings and loan association were not subject to federal tax levy concerning tax liability of ex-husband; ex-husband's interest in certificates of deposit at time of the levy was described as "inchoate"].)

3. Failure to Disclose Information

Section 701.030 contains various provisions outlining when a garnishee's memorandum must be submitted in response to a levy and the information it must contain. For instance, the garnishee's memorandum shall contain a "description of any property of the judgment debtor sought to be levied upon that is not delivered to the levying officer and the reason for not delivering the property." (§ 701.030, subd. (b)(1).) Also, the garnishee's memorandum shall contain a "description of any property of the judgment debtor *not* sought to be levied upon that is in the possession or under the control of the third person at the time of the levy." (§ 701.030, subd. (b)(2), italics added.)

Subdivision (d) of section 701.030 sets forth the general rule that if a third person does not "provide complete information" in the garnishee's memorandum, "the third person may, in the court's discretion, be required to pay the costs and reasonable

attorney's fees incurred in any proceedings to obtain the information required in the garnishee's memorandum."

Grayson contends that Wells Fargo violated this statutory duty by failing to include information in the memorandum of garnishee about the interest accounts and the certificates of deposit.

Based on our conclusion that Grayson's allegations were sufficient to state a claim for failing to pay the levying officer the $14,000 held in New Chaparral's interest accounts, we also conclude that Grayson's allegations were sufficient to state a violation by Wells Fargo of its duty to provide information about those interest accounts in the garnishee's memorandum.

Once an appellate court has determined a complaint has stated a cause of action under a cognizable legal theory, the court can end its inquiry and require reversal. (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938.) Applying this principle, we decline to consider the question whether Grayson stated another claim based on Wells Fargo's failure to include information in its memorandum of garnishee about any property interest that New Chaparral might have had in the certificates of deposit (as opposed to the interest accrued).

We do not decide this issue regarding the disclosure of New Chaparral's property interests in the certificates of deposit because the appellate record is not complete. It does not contain a copy of the April 2006 writ of execution. Thus, we are unable to see how the property interests subject to the levy were described. (See § 680.290 ["'[p]ersonal property' includes both tangible and intangible personal property"].) Also, the record does not contain a copy of the "Disclosure Statement" referenced on the face of the certificates of deposit. The disclosure statement might have set forth rights (which might have been contingent or conditional) held by the customer to the funds in the account underlying the certificate of deposit. In addition, the appellate briefing in this case does not present a detailed examination of the intangible property rights that New

Chaparral might have held in the funds in the account underlying the certificates of deposit.[5] Therefore, it would be imprudent for this court to decide whether, at the time of the May 2006 levy, New Chaparral had a reportable property interest or property right of some sort in the funds underlying the certificates of deposit.

Consequently, having determined that the allegations concerning the $14,000 in the interest accounts are sufficient to state a violation of the EJL, we will not analyze whether the first cause of action states additional claims.

D. A National Banking Association is a Person for Purposes of the EJL

The trial court's written order denying Grayson's motion for a new trial stated that the provisions of the EJL concerning the duty of a garnishee (§ 701.010), liability for noncompliance with a levy (§ 701.020), and the garnishee's memorandum (§ 701.030), applied to "third persons." The court concluded that a financial institution was not a "person" or a "third person" under the EJL based on the separate statutory definitions for "financial institution" and "person" contained in sections 680.200 and 680.280. Because Wells Fargo was a financial institution, the court concluded that it was not subject to the statutory duties and liabilities imposed on "third persons."

On appeal, Grayson contends that the trial court's interpretation of the EJL was erroneous. In Grayson's view, the statutory provisions apply to all garnishees, irrespective of whether the garnishee is a financial institution. We agree.

The interpretation of a statute and the application of that interpretation to a set of undisputed facts are questions of law subject to independent review on appeal. (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 417.) Our inquiry into the meaning of the EJL is guided by the following general principles of statutory construction.

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[5] Grayson appears to argue that New Chaparral held a right to the funds represented by the certificates of deposit because DOGGR was required to surrender the certificates of deposit once New Chaparral no longer had any oil wells to bond. Grayson does not say whether this purported right or interest of New Chaparral was statutory, contractual, or a type of property right or interest.

A reviewing court's fundamental task in construing a statute is to determine the intent of the lawmakers so as to effectuate the purpose of the statute. (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 20.) Courts start this task by scrutinizing the actual words of the statute, giving them their usual, ordinary meaning. (*Id*. at p. 21) When statutory language is clear and unambiguous (i.e., susceptible to only one reasonable construction), courts adopt the literal meaning of that language, unless that literal construction would frustrate the purpose of the statute or produce absurd consequences. (*Ibid*.) In contrast, when the statutory language is ambiguous, courts must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute. (*Ibid*.)

This appeal presents a general, conceptual issue regarding the interpretation of the EJL, and a specific question regarding the application of the statute to Wells Fargo. The first question is whether an entity can be both a "financial institution" under section 680.200 and a "person" under section 680.280. The second question is whether Wells Fargo is a "person" under the EJL and, thus, subject to the statutory duties and liabilities imposed on "third persons" who have been served with a levy. (See §§ 701.010, 701.020, 701.030.)

1. Financial Institutions Are Not Excluded From the Definition of Person

Pursuant to the rules of statutory construction, our analysis of the first issue begins with the words used in the EJL to define the terms "person" and "financial institution." "'Person' includes a natural person, a corporation, a partnership or other unincorporated association, a general partner of a partnership, a limited liability company, and a public entity." (§ 680.280.) "Financial Institution" means "a state or national bank, state or federal savings and loan association or credit union, or like organization, and includes a corporation engaged in a safe deposit business." (§ 680.200.)

The text of these definitions contains no words of exclusion. Specifically, the definition of "person" does not exclude from its scope entities that meet the definition of "financial institution" and vice versa. To the contrary, the words used demonstrate that the definitions overlap. The most obvious overlap concerns "a corporation engaged in a safe deposit business." (§ 680.200.) Such an entity is a "financial institution." (*Ibid*.) In addition, because the entity is "a corporation" it also meets the definition of a "person." (§ 680.280.) There is no textual basis for concluding that such a corporation is not among the corporations that qualify as a "person" because the definition of a "person" contains no exclusions, exceptions, or provisos. (*Ibid*.)

Additional overlap between the two definitions is possible. For instance, savings and loan associations are listed in the definition of "financial institution." Thus, if a savings and loan association is the type of association that qualifies as an "unincorporated association" for purposes of section 680.280, it would satisfy both definitions. Similarly, if a national bank is a corporation or an unincorporated association, it would satisfy both definitions.

Based on a literal reading of the language in the EJL, we conclude that an entity meeting the definition of a financial institution in section 680.200 is not automatically excluded from being a "person" under section 680.280. Consequently, a financial institution that meets the definition of a "person" is subject to the duties and liabilities imposed by the EJL on a "third person" that has been served with a levy, unless the EJL explicitly sets forth a special rule or exception for financial institutions. (E.g., § 700.160, former subd. (e) [garnishee financial institutions are not liable for certain delays].)

2. Wells Fargo is a Person Subject to the EJL

The next question concerns how the definitions in the EJL apply to Wells Fargo.[6] The second paragraph of Grayson's second amended complaint alleges: "WELLS

[6] At oral argument, counsel for Wells Fargo conceded that the EJL applied to Wells Fargo and referenced a recent United States Supreme Court case in which corporations

FARGO BANK, N.A. ('WELLS FARGO') is a banking institution doing business in Kern County, California." The abbreviation "N.A." stands for national association. In *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, the California Supreme Court stated: "Wells Fargo Bank, National Association (hereafter referred to as Wells Fargo or the bank) is a national banking association created pursuant to the [National Bank] Act. (12 U.S.C. § 21 et seq.) Wells Fargo operates a statewide network of branch banks, each of which has a branch manager." (*Id.* at p. 1086.)[7] Therefore, we conclude that Wells Fargo is a national banking association and, as a national bank, meets the definition of a financial institution contained in section 680.200.

Whether Wells Fargo qualifies as a person for purposes of section 680.280 will depend on whether it is "a corporation" or an "unincorporated association." Before considering these two terms, we will address whether the EJL impliedly recognized the existence of *incorporated associations* and intended to exclude that type of entity from the definition of a person.

We have found case law that uses the term "'incorporated association.'" (E.g., *Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 665; *Redondo*

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were treated the same as natural persons for purposes of the First Amendment. (See *Citizens United v. Federal Election Commission* (2010) __ U.S. __ [130 S.Ct. 876, 900, 175 L.Ed.2d 753] [First Amendment's protection of political speech extends to corporations and is not limited to natural persons]; see also, *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605, fn. 9 [corporations are persons for purposes of 42 U.S.C. § 1983].)

[7] Section 21 of title 12 of the United States Code addresses the formation of national banking associations and their articles of association as follows: "Associations for carrying on the business of banking under title 62 of the Revised Statutes may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

Beach Police Officers Assn. v. City of Redondo Beach (1977) 68 Cal.App.3d 595, 599 [municipal employees union referred to as incorporated association].) These cases, however, do not hold that an incorporated association is different from a corporation. In addition, our review of the Recommendation Relating to Enforcement of Judgments Law (Sept. 1982) 16 California Law Revision Commission Report (1982) page 1009 et seq. found no reference or indication that an incorporated association is distinct from a corporation. Furthermore, we have located no purpose or public policy underlying the EJL that would be promoted by treating incorporated associations as distinct from corporations and outside the definition of a "person." Based on the foregoing, we conclude that to the extent an entity might be called an incorporated association, it would be regarded as a corporation and therefore a person for purposes of the EJL. Accordingly, even if a national banking association could be described as an incorporated association, it would be inappropriate to use that description as a basis for concluding the national bank falls outside the scope of the EJL's definition of a person.

Next, we note that whether Wells Fargo is categorized as a corporation or an unincorporated association is not important in this case. The important question is whether it is a "person" under the EJL, a status it can achieve by being *either* a corporation *or* an unincorporated association. As discussed below, we conclude that Wells Fargo is either one or the other and, thus, qualifies as a person for purposes of the EJL.

The EJL does not define the term "unincorporated association."[8] Consequently, we will determine the usual, ordinary meaning of that term. (*Smith v. Selma Community*

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[8] This term is part of the statutory phrase "a partnership or other unincorporated association." (§ 680.280.) We note that the phrase "a partnership or other unincorporated association" used in section 680.280 appears elsewhere in the Code of Civil Procedure. Section 369.5, subdivision (a) states: "A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known."

Hospital, supra, 188 Cal.App.4th at p. 20 [courts scrutinizing words of statutes give them their usual, ordinary meaning].)

One source for the usual, ordinary meaning of the term might be other statutes. Corporations Code section 18035, subdivision (a) defines "unincorporated association" to mean "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not."

Another source is case law. Thirty years ago, the court in *Demott v. Board of Police Commissioners* (1981) 122 Cal.App.3d 296 stated that "[t]he law of unincorporated associations is sparse." (*Id.* at p. 305.) The court went on to state:

> "In an early California case, *Law v. Crist* (1940) 41 Cal.App.2d 862, 865 …, the court said: '"The usual meaning of the term 'association' is an 'unincorporated organization composed of a body of men partaking in general form and mode of procedure of the characteristics of a corporation.'"' Corporate resemblance is relevant but not conclusive; *Scott v. Donahue* [(1928)] 93 Cal.App. 126."

The court in *Law v. Crist, supra,* 41 Cal.App.2d at page 865 stated that the term "association" often is synonymous with "company" or "society." (See generally 7 Cal.Jur.3d (2011) Associations and Clubs § 1, pp. 120-122 ["association" defined].)

The plain and unambiguous meaning of the word "unincorporated" is "not incorporated." Thus, the term "unincorporated association" means a group or organizations of two or more people or entities that is not incorporated.

Applying this interpretation of "unincorporated association," we conclude that a national banking association meets the definition of a person under section 680.280 because it is either a corporation or an unincorporated association.

On the one hand, a national banking association is a federally chartered entity labeled an "association" by federal law. (E.g., 12 U.S.C. §§ 21, 37.) Thus, if we strictly adhere to the federal label, a national banking association would be classified as an "unincorporated association" for purposes of section 680.280.

On the other hand, if one looks behind the federal label, one sees a federally chartered entity with the organizational characteristics of a corporation. For example, the provision of the National Banking Act that sets forth a national banking association's powers refers to the entity as "a body corporate" with the power to "adopt and use a corporate seal," elect or appoint a board of directors, and prescribe bylaws. (12 U.S.C. § 24.) Also, as a safeguard for national banks with financial subsidiaries, the statute requires such banks to take steps to "preserve the separate corporate identity and limited liability" of the bank. (12 U.S.C. § 24a(d)(2).) In addition, the articles of association that a national bank must file with the Office of the Comptroller of the Currency (OCC) appear to serve the same function as articles of incorporation. (Compare 12 U.S.C. § 21 with Corp. Code, § 202.)

A further demonstration that a national banking association operates like a corporation is provided by the rules adopted by the OCC. Part 5 of title 12 of the Code of Federal Regulations "establishes rules, policies and procedures of the [OCC] for corporate activities and transactions involving national banks." (12 C.F.R. § 5.1 (2011).) The numerous references to "corporate activities" of a national bank indicate that the OCC regards a national bank as a corporate entity or its equivalent. (E.g., 12 C.F.R. § 5.3(b), (j) (2011).) A further indication exists in the provision titled "Corporate status" that addresses the authority of an interim bank to enter agreements. (12 C.F.R. § 5.33(e)(4)(iii) (2011) ["An interim bank becomes a legal entity and may enter into legally valid agreements when it has filed, and the OCC has accepted, the interim bank's duly executed articles of association and organization certificate"].)

Regardless of whether one (1) adheres to the federal label and concludes a national banking association is an "association" for purposes of section 680.280 or (2) examines the entity's underlying organizational characteristics and determines that, for all practical intents and purposes, a national banking association is a federally chartered corporation

bearing the label of an association, the result is the same. A national banking association is one or the other and thus is a "person" under section 680.280.

As the final step in our statutory analysis, we will insert our conclusion that a national bank is a "person" under the EJL into the statute's other provisions and examine whether the statutory purposes are promoted or frustrated and whether statutory harmony or discord results.

We have found no reason why subjecting national banks to the statutory duties and liabilities imposed on "third persons" who have been served with a levy would frustrate the purpose or policies underlying the EJL. In addition, the statutory scheme assumes that financial institutions are subject to those duties and liabilities unless provided otherwise by the statutes. For example, section 701.010 sets forth the duty of a garnishee by stating, in part:

> "(a) Except as otherwise provided by statute, when a levy is made by service of a copy of the writ of execution and a notice of levy on a third person, the third person at the time of levy or promptly thereafter shall comply with this section."

The 1982 California Law Revision Commission's comment to section 701.010 addresses this subdivision as follows: "The introductory portion of subdivision (a) recognizes exceptions to the duty of the garnishee. See, *e.g.*, Section 700.160 (delay by a financial institution) …." (Recommendation Relating to Enforcement of Judgments Law (Sept. 1982) 16 Law Revision Com. Rep. (1982) com. on § 701.010, p. 1348.) An exception for financial institutions would not be necessary unless the general rule contained in section 701.010, subdivision (a) applied to financial institutions in the first place. Because section 701.010 applies to a "third person" who has been served with a levy, the existence of an exception for financial institutions in certain situations unequivocally implies that a financial institution is a "third person." If a financial institution was not a third person, there would have been no reason for the Legislature to

create an exception for financial institutions. Thus, financial institutions must be regarded as third persons for the statutory scheme to work in harmony.

This statutory analysis is consistent with other published cases. In those cases, banks were treated as subject to the duties imposed on a "third person" by the EJL. (See *Grover v. Bay View Bank* (2001) 87 Cal.App.4th 452, 459 ["the bank breached its duty under section 701.010 when it failed to honor the writ of execution," fn. omitted]; *Da-Green Electronics, Ltd. v. Bank of Yorba Linda* (9th Cir. 1989) 891 F.2d 1396, 1397 [§ 701.010, subd. (a) imposes a duty on banks to honor writs of execution on the property of judgment debtors].)

In summary, we conclude that a national banking association is a person under section 680.280 and is subject to the duties and liabilities imposed on third persons by sections 701.010, 701.020, and 701.030 of the EJL, unless a specific exception or special rule applies to financial institutions. Therefore, the allegations in Grayson's first cause of action were sufficient to state a cognizable theory of recovery against Wells Fargo even though it is a financial institution.

III. SUFFICIENCY OF SECOND CAUSE OF ACTION, WHICH ALLEGED A CONSPIRACY*

A. Principles Concerning the Pleading of a Civil Conspiracy

Under California law, civil conspiracy is a legal doctrine not an independent tort. The legal doctrine is used to hold each member of the conspiracy directly responsible as a joint tortfeasor even though they did not actually commit the tort underlying the conspiracy themselves. (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1141.) Thus, a plaintiff attempting to plead that someone is liable for participating in a civil conspiracy must allege the elements of a conspiracy and the elements of the underlying tort.

The elements of a 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; see *Black v. Sullivan* (1975) 48 Cal.App.3d 557, 566-569 [Ct. App., Fifth Dist. denies summary adjudication of civil conspiracy claim].) The "wrongful act" referenced in the third element is the commission of the underlying tort.

Based on the foregoing principles, our analysis of the allegations in Grayson's second cause of action will include an inquiry into whether Grayson sufficiently alleged the elements of an independent tort done in furtherance of the conspiracy.

B. Contents of the Second Cause of Action

Grayson labeled its second cause of action as a conspiracy to commit and commission of fraudulent conveyance to hinder or defeat a creditor's execution. In addition, Grayson included one sentence, bolded headings in its pleading, which summarized the more detailed allegations set forth in the number paragraphs.

1. Summary of Conspiracy Allegations

Based on the bolded headings, Grayson's conspiracy theory can be summarized as follows.

At the time of Grayson's first levy in May 2006, Core Energy conspired with its attorneys and Wells Fargo to obtain control over New Chaparral's certificates of deposit. A goal of the conspiracy was to convince DOGGR that Core Energy owned the certificates of deposit and could use them to collateralize Core Energy's bonding obligation.[9] Core Energy and New Chaparral convinced Wells Fargo to assist them in the conspiracy and Wells Fargo agreed. The conspirators lied to DOGGR and concealed facts from it, which induced DOGGR not to return the certificates of deposit to New Chaparral. Wells Fargo created, signed, and transmitted a false letter to aid the conspiracy by convincing DOGGR that Core Energy had obtained the certificates of

[9] Public Resources Code section 3204 addresses the indemnity bond that an operator drilling or deepening an oil or gas well must file with DOGGR for each well. Public Resources Code section 3205 addresses the use of blanket indemnity bonds.

deposit as part of a federal court order. The conspiracy succeeded in that DOGGR refused to release the certificates of deposit to New Chaparral or Grayson.

As another part of the conspiracy, Wells Fargo (1) lied on its June 2006 memorandum of garnishee responding to Grayson's levy and (2) sent interest held in New Chaparral's accounts to another creditor.

2. Particular Allegations Regarding Interest Accounts

Grayson expanded upon its allegations concerning Wells Fargo's false memorandum of garnishee as follows.

Grayson alleged that, as part of the conspiracy, Wells Fargo, with actual knowledge of the plan to defraud Grayson by concealing New Chaparral assets for the benefit of Core Energy, lied on its June 6, 2006, memorandum of garnishee and concealed the fact that New Chaparral had over $8,000 in one account and over $5,000 in another account at the moment of Grayson's May 2006 levy. Wells Fargo also concealed the existence of the certificates of deposit, the account titling of both certificates of deposit, and the interest accruing on the certificates. In addition, Wells Fargo concealed the fact it had sent over $8,000 from a New Chaparral account to another creditor, Stranberg.

3. Particular Allegations Regarding Certificates of Deposit

Grayson alleged that (a) on July 6, 2006, as part of the conspiracy to conceal assets of New Chaparral, Wells Fargo executed, through managing officer and agent Billy Espindola, a false letter stating that the two certificate of deposit accounts had been transferred to Core Energy; (b) Wells Fargo executed the letter with actual knowledge of the plan to defraud Grayson by fraudulently concealing the assets of New Chaparral; and (c) the only purpose for which the letter was drafted was to convince DOGGR that Core Energy had obtained the certificates of deposit. Grayson attached a copy of the letter to the second amended complaint as exhibit 10.

Grayson further alleged that (a) the conspiracy succeeded because DOGGR was convinced not to release the certificates of deposit to Grayson or New Chaparral; (b) DOGGR continues to refuse to release the certificates of deposit to the sheriff despite a separate 2008 levy; and (c) DOGGR's refusal was based on the ground that Core Energy was using the certificates of deposit to collateralize its bonding obligation.

Paragraph 50 of the second amended complaint alleged:

> "Pursuant to a conspiracy to conceal the subject CDs and their accrued interest from levy and execution by GRAYSON, defendants and each of them participated in a scheme to fraudulently transfer ownership of the New Chaparral accounts to Core to defraud and hinder GRAYSON's collection efforts, and defendants actually committed the tort of fraudulent conveyance."

Paragraph 52 alleged that Wells Fargo "actually conveyed full control over the subject CDs to CORE with the intent to Defraud Grayson from execution, and further fraudulently concealed assets of New Chaparral by its conduct set forth in paragraphs 16-40."

Paragraph 53 of the second amended complaint alleged that Grayson's judgment against New Chaparral had not been satisfied, that Grayson had been damaged in part by the amount outstanding under the judgment, and that Grayson also had been damaged by the acts of fraudulent conveyance by the expenditure of attorney fees.

C. Trial Court's Rulings

The trial court addressed the sufficiency of Grayson's claim regarding the alleged conspiracy in three separate orders: the order sustaining the demurrer to the first amended complaint, the order sustaining the demurrer to the second amended complaint without leave to amend, and the order denying the motion for new trial.

When the trial court sustained the demurrer to the first amended complaint with leave to amend, it stated that the cause of action involving the conspiracy allegations was insufficient because it failed to allege (1) Wells Fargo had actual knowledge of the wrongful acts of its alleged coconspirators, (2) any recognizable tortuous conduct by the

bank, and (3) any damage sustained by Grayson as a result of anything the bank did or did not do.

Subsequently, the trial court sustained a demurrer to the second cause of action set forth in the second amended complaint, which contained further allegations about a conspiracy. The court stated its order was based on the first three grounds enumerated in the demurrer. Those grounds were that (1) Grayson has suffered no damages, (2) Grayson alleged an unsuccessful fraudulent conveyance rather than a completed transfer, and (3) Grayson failed to plead actual knowledge with specificity.

The trial court denied Grayson's motion for new trial and stated that the order sustaining the demurrer was correct. The court concluded that Wells Fargo could not be held liable for participating in a conspiracy to violate the UFTA, because (1) the statute concerned transfers made by debtors, not third parties, and (2) the statutory remedy was not damages, but the right to levy against the fraudulently transferred funds or property. The trial court did not discuss whether the second cause of action stated a claim under any other legal theory of recovery.

On appeal, Grayson argues that the second cause of action stated a claim under three different legal theories of recovery. First, Grayson argues that the trial court erred in determining a claim under the UFTA had not been stated. Second, Grayson asserts the allegations in the second cause of action also stated a tort claim for fraud and for conversion. As support for these latter two theories, Grayson argues that the nature of the cause of action does not depend upon the label attached by the pleading, but is determined by the facts alleged.

Based on Grayson's arguments, we will address whether the second cause of action has alleged facts sufficient to state a legally cognizable claim for (1) a violation of the UFTA, (2) fraud, or (3) conversion.

D. Violation of UFTA

The remedies for a creditor asserting a fraudulent transfer in violation of the UFTA are set forth in Civil Code section 3439.07. Where the creditor has obtained a judgment against the debtor, "the creditor may levy execution on the asset transferred or its proceeds." (Civ. Code, § 3439.07, subd. (c).) Other relief available under the UFTA includes avoiding the transfer, an attachment against the asset transferred, an injunction against further disposition by the debtor or transferee of the asset transferred or its proceeds, or the appointment of a receiver. (Civ. Code, § 3439.07, subd. (a).)

Grayson's opening appellate brief mentions the scope of the relief provided by the UFTA in the following argument:

> "[Wells Fargo] cannot legally cram Grayson's pleadings in a box defined by the parameters of *Civil Code* section 3439.07, the Uniform Fraudulent Transfer Act. [Its] success in convincing the trial court to label Plaintiff's underlying tort as *only* a UFTA claim, as opposed to a general fraud and deceit claim—that involved a fraudulent conveyance—is a hollow victory."

Immediately after this argument, Grayson asserts that its complaint is not limited by the labels used for the second cause of action.

Nowhere, however, does Grayson explicitly counter the trial court's point regarding the absence of a remedy in the UFTA that can be enforced against Wells Fargo in this case. Consequently, on this particular point Grayson has failed to carry the burden imposed on appellants to affirmatively show the trial court committed error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appellant must affirmatively demonstrate error].) Moreover, our independent review of the second amended complaint does not reveal factual allegations that, if true, would provide a basis for imposing the type of relief authorized by the UFTA against Wells Fargo in this case.

In summary, we conclude that the second cause of action does not allege sufficient facts to state a legally cognizable claim for relief under the UFTA.

E. General Fraud Theory

There is no single, fixed rule defining fraud because the concept embraces a range of deceitful conduct. (34A Cal.Jur.3d (2008) Fraud and Deceit, § 1, pp. 364-365.) The breadth of the concept is illustrated by Civil Code section 1709, which provides that "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." The range of deceitful conduct encompassed by the tort of fraud and deceit includes, but is not limited to, false representation (asserting as a fact that which is not true by someone with no reasonable ground for believing it to be true) and concealment (suppressing a fact by one who is bound to disclose it). (Civ. Code, § 1710.)

The California Supreme Court has adopted the rule that fraud actions are subject to strict requirements of particularity of pleading—that is, "fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded by statute on another ground as stated in *Californians for Disability Rights v. Mervyn's, LLC*. (2006) 39 Cal.4th 223, 227.) Thus, every element of the cause of action must be alleged factually and specifically (i.e., the general pleading of legal conclusions is insufficient) and the general policy of liberal construction of pleadings does not apply. (*Ibid*.)

The allegations in the second cause of action will be examined to determine if they sufficiently allege fraud under either a false representation or a concealment theory. The elements for pleading each theory are different and, therefore, we will consider the two theories separately.

1. <u>False Representation</u>

A tort claim for fraud and deceit based upon a false representation requires the plaintiff to plead and prove the following elements: (a) A false statement by the defendant, (b) the defendant's knowledge of its falsity (sometimes called "scienter"), (c)

the defendant's intent to defraud—that is, intent to induce reliance, (d) justifiable reliance on the false statement by the plaintiff, and (e) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Furthermore, the requirement that fraud be pled with particularity """necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered."""" (*Id.* at p. 645.)

Ordinarily, when an appellant argues on appeal that its pleading states a claim under a legal theory not identified or pursued before the trial court, the appellant will enumerate the elements of its new legal theory of recovery, cite the authority that establishes those elements, and reference the paragraphs of its pleading that satisfies each element. This approach to appellate advocacy is particularly useful when the elements of the cause of action must be pled specifically.

In this case, Grayson has not followed this approach. Our review of the second cause of action shows it does not include an allegation that Grayson *justifiably relied* on a particular false statement by one of the coconspirators. Therefore, under the strict pleading requirements imposed on fraud claims, the second cause of action fails to state facts sufficient to constitute a cognizable claim for fraud by false statement.

2. Concealment

A tort claim for fraud and deceit based upon concealment requires the plaintiff to plead and prove the following elements: "'(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]' [Citation.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 665-666.)

The second cause of action does not include a specific allegation that a coconspirator was under a duty to disclose to Grayson a fact that had been concealed or suppressed. Therefore, the second cause of action fails to allege all of the elements required for a tort claim of fraud by concealment or suppression of a fact.

F. Conversion

Generally speaking, the tort of conversion is the wrongful exercise of dominion over the personal property of another. (*Fremont Indem. Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 119.) The essential elements of the tort of conversion are "(1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Ibid*.) These elements also have been described as the plaintiff's ownership or right to possession of the property *at the time of the conversion*; the defendant's conversion by a wrongful act or disposition of property rights; and damages. (*Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 835.) The element concerning the wrongful disposition of property rights can be met without a manual taking of the property. (*Ibid*.)

Unlike fraud, the tort of conversion can be pled with general factual allegations. (*Lowe v. Ozmun* (1902) 137 Cal. 257, 260.) This difference in the specificity required to allege a claim for fraud and a claim for conversion is significant in this case.

In this case, Grayson's allegations were sufficient to state that (1) it had a right to possess the funds in New Chaparral's accounts at Wells Fargo at the time when Grayson's levies were served in May 2006 and September 2008, (2) Wells Fargo wrongfully disposed of the funds in the interest accounts, and (3) Grayson was damaged because it did not get possession of those funds. Thus, the allegations in the second cause of action were sufficient to allege the elements necessary to state a legally cognizable claim for conversion. Accordingly, we will reverse the order sustaining the demurrer to the second cause of action.

DISPOSITION

The judgment of dismissal is reversed and the matter remanded to the trial court with instructions to vacate its prior orders (1) granting the motion for judgment on the pleadings as to the first cause of action in the second amended complaint and (2) sustaining the demurrer to the second cause of action in the second amended complaint.

Grayson shall recover its costs on appeal.

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Franson, J.

WE CONCUR:

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Gomes, Acting P.J.

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Kane, J.