

No. 18-7546

IN THE
SUPREME COURT OF THE UNITED STATES

SHERMAN VICKERS,
Petitioner,
v.
MARINA DEL REY MARINA, LLC,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Read broadly, *In Pro. Per.* Petitioner asks this Court to review and correct alleged factual and procedural errors in the California state courts' application of California state law. The specific questions on which Petitioner seeks this Court's review are unclear, but what is clear is that the issues decided below do not touch upon any federal questions. They are not appropriately within the discretionary exercise of the United States Supreme Court's appellate jurisdiction.

A more accurate representation of the questions presented is:

1. Does the Supreme Court of California's denial of review of the California Court of Appeal's decision dismissing Petitioner's appeal due to failure to comply with California Rule of Court 8.220 give rise to a federal question?
2. Should the United States Supreme Court review a decision of the Superior Court of California for Los Angeles County to grant Respondent's Motion for Judgment on the Pleadings?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states as follows:

1. Almar Management, Inc., has no parent company. No publicly held company directly or indirectly owns 10% or more of the stock of Almar Management, Inc. Almar Management, Inc., is not a public company and is not traded on any stock exchange.
2. Marina Del Rey Marina is a wholly owned subsidiary of Almar Management, Inc. It is not a public company, and no publicly held company directly or indirectly owns 10% or more of the stock of Marina Del Rey Marina.

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STATEMENT OF THE CASE

I. Factual History

The underlying action arose out of the sinking and disposition of Petitioner Sherman Vickers's ("Petitioner" or "Vickers") 29' boat.

Vickers alleged that he entered into a written agreement for lease of a slip from Marina del Rey Marina ("MdRM") as a live-aboard tenant. Almar Management ("Almar") later took over management of the lease.

On September 4, 2014, Vickers' houseboat took on water and sank at the slip. Vickers was advised by the marina to have the vessel removed as soon as possible so as to avoid damage to property and the environment. Vickers failed to haul out the houseboat or make arrangements for the haul out, and it was subsequently removed by MdRM.

On September 4, 2015, Vickers filed a complaint on the docket of the Superior Court of the State of California for Los Angeles County, alleging that his property—the boat and its contents—was illegally taken by MdRM and/or Almar. Vickers alleged California state law claims of (1) conversion; (2) fraudulent / negligent misrepresentation; (3) intentional infliction of emotional distress; and (4) breach of implied covenant of quiet enjoyment.

II. Procedural History

On Almar's demurrer, the initial September 4, 2015, complaint was dismissed, and plaintiff filed a First Amended Complaint ("FAC") on November 4, 2015. Almar again demurred. On March 22, 2016, the Superior Court sustained Almar's demurrer to

each cause of action in the FAC and struck a Second Amended Complaint (“SAC”) as improperly filed without leave of court.

On April 6, 2016, Vickers filed a Third Amended Complaint (“TAC”). On September 12, 2016, Almar’s Motion for Judgment on the Pleadings was granted and the TAC was dismissed without leave to amend. Appendix (“App.”) A.

OPINIONS BELOW

Vickers appealed to the Court of Appeal for the State of California. He requested and was granted multiple extensions of time within which to file his opening brief. On April 4, 2018, after having missed his filing date per the Court of Appeal’s most recent extension, his appeal was dismissed pursuant to California Rule of Court 8.220(a) because he failed to timely file his initial brief. App. B.

Vickers filed a motion to set aside the dismissal on May 4, 2018. The motion to set aside the dismissal was denied on May 8, 2018. App. C.

Thereafter, Vickers filed a discretionary petition for review to the Supreme Court of California. Vickers’ petition for review was denied on June 13, 2018. App. D.

REASONS TO DENY THIS PETITION

A. Petitioner has Failed to Raise a Federal Question.

Petitioner has never identified any federal question that would be reviewable by the Supreme Court pursuant to its jurisdiction arising under 28 U.S.C. § 1257.

For the Court to have jurisdiction to review a state court judgment or decision, the judgment or decision must do one of the following: (1) call into question the validity of a federal statute; (2) find a state statute repugnant to the Constitution or law of the United States; or (3) address a claim that a title, right, privilege or immunity “set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.” 22 Moore's Federal Practice – Civil § 403.02 (2019); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178 (1988); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979).

The requirements of 28 U.S.C. § 1257(a) are further clarified in Rule 14 of the Rules of the Supreme Court, stating that:

1. A petition for a writ of certiorari shall contain, . . . :

* * *

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e. g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Rule 14(1)(g)(i), Rules of the Supreme Court of the United States.

In the case at hand, Petitioner fails to identify any federal questions at all, much less any that were raised and preserved at the lower court levels. There is no federal statute at issue in the underlying case, nor has Petitioner identified any statute in conflict with federal law. The substance of Petitioner's claim for review appears to be that he is unsatisfied with the outcome of the underlying case.

Petitioner's claims of judicial bias and vague allegations of due process violations likewise do not raise any federal questions. Even if they did, they

were not properly preserved for review since they were not previously raised at any level. Petitioner never filed any appellate briefs – defaulting on his appeal when he failed to file his opening brief – thus, no questions of any type were presented to any appellate court, let alone any federal questions.

Petitioner cannot cite to any instance in the record where he raised a federal question or due process issue.

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had “a fair opportunity to address the federal question that is sought to be presented here,” *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

Adams v. Robertson, 520 U.S. 83, 86-87, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997).

Petitioner bears the burden of preserving a federal question for appeal to the Supreme Court. Petitioner also bears the burden of identifying in his petition for *certiorari* precisely where the issue was raised at the state court level. Petitioner further bears the burden of demonstrating that the state court had a fair opportunity to address the federal questions. Petitioner has failed to meet any of these burdens here and, consequently, the petition for *certiorari* should be denied.

B. Petitioner Improperly Seeks Fact-Finding and Error Correction.

The petition for *certiorari* should also be denied because Petitioner improperly urges the Court to engage in fact-finding and error correction of state court decisions.

“Error correction is . . . outside the mainstream of the Court’s functions and . . . not among the ‘compelling reasons’ . . . that govern the grant of *certiorari*.” Shapiro et al., Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013). Furthermore, “[a]s this Court’s Rule 10 informs, ‘[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.’” (quoting S. Ct. Rule 10).

Petitioner urges the Court to engage in fact-finding even though his claims did not survive the initial pleading stage. Vickers’ claims were dismissed as a matter of law for failure to state legitimate, actionable claims. There can be no reconsideration of fact-finding as no fact-finding was done in the first instance. This Court is not a trial court except in *extremely* limited circumstances involving diplomatic matters and matters in which individual states are parties.

Petitioner also urges this Court to review the dismissal of his appeal by the California Court of Appeal. However, the Court of Appeal simply applied California Rule of Court 8.220(a), by the plain language of which the court may dismiss an appeal where the appellant’s opening brief is not timely submitted. Petitioner makes no coherent claim that this law was somehow misapplied but,

even if there was an alleged misapplication of the law, the fact that this rule of court is a properly stated California law, applied by a state court, and implicating no federal law, all militate against the Supreme Court exercising its authority to allow discretionary review.

C. No Other Factors Warrant *Certiorari*.

Rule 10 describes the “compelling reasons” that warrant review on a writ of *certiorari*. S. Ct. Rule 10.

None of those “compelling reasons” are present here. There is no split of authority among the federal courts of appeal on the same important matter. S. Ct. Rule 10(a). Nor did the California Court of Appeals or the California Supreme Court make any decision on an important federal question, much less “... in a way that conflicts with the decision of another state court of last response or a United States court of appeals”. S. Ct. Rule 10(b). Nor have those courts decided any important question of federal law in such a way that they conflict with the relevant decisions of this Court. S. Ct. Rule 10(c). Petitioner fails to identify any “compelling reason” to warrant granting *certiorari* in this case.

CONCLUSION

For the foregoing reasons, Vickers' petition for writ of *certiorari* should be denied.

March 27, 2019 Respectfully submitted,

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APPENDICES

1a

APPENDIX A

2a

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*Superior Court of California
County of Los Angeles*

*FILED
SEP 12 2016*

RULING
JUDGE DALILA C. LYONS
DEPARTMENT 20

Hearing Date:	Monday, September 12, 2016
Case Name:	<u>Vickers v. Marina del Rey Marina, LLC, et al.</u>
Case No.:	BC593803
Motion:	Judgment on the Pleadings as to the Third Amended Complaint
Moving Party:	Defendant Almar Management, Inc.
Responding Party:	Plaintiff Sherman Vickers
Notice:	OK

Ruling: Defendant Almar Management, Inc.'s motion for judgment on the pleadings is GRANTED WITHOUT LEAVE TO AMEND as to the Third Amended Complaint.

BACKGROUND

On September 04, 2015 the Complaint was filed. On November 04, 2015 Plaintiff Sherman Vickers ("Plaintiff" or "Vickers") filed the First Amended Complaint ("FAC") against Defendants Marina del Rey Marina, LLC ("MdRM"), Almar Management, Inc. ("Almar"), MDR Marina, L.P. ("MDRMLP"), MDR Marina, LLC ("MDRMLLC") IWF MDR Hotel, LLC ("IWF MDR LLC"), Pacific Marina Development, Inc. ("PMDI"), IWF MDR Hotel, LP ("IWF MDR LP"), and Invest West Financial, LLC ("IWF LLC") for (1) conversion, (2) fraudulent intentional or negligent misrepresentation, (3) intentional infliction of emotional distress, and (4) implied covenant of quiet enjoyment.

Plaintiff alleges he entered into a written agreement to rent a dock slippage as a permanent live-aboard tenant with MdRM, which Almar later began management of the lease.. Plaintiff alleges his right to possess his property was interfered with and the defendants took Plaintiff's property and converted it for their own use. Plaintiff further alleges facts were intentionally or negligently misrepresented, such as that Plaintiff's lease expired and the nature of a decision rendered by the Los Angeles Superior Court to the Department of Motor Vehicles, so that the defendants could forcibly evict Plaintiff and conduct a lien sale of Plaintiff's property. Plaintiff alleges he was promised he could return to his slip once maintenance was complete, but this was to induce Plaintiff into vacate so that defendants could seize Plaintiff's property.

On March 22, 2016 the Court sustained the demurrer of IWF MDR LLC, IWF MDR LP, and IWF to the FAC and each cause of action stated within and struck the Second Amended Complaint as improperly filed without leave of the Court. On April 06, 2016 Plaintiff filed the Third Amended Complaint ("TAC") and eliminated the cause of action for "fraudulent intentional or negligent misrepresentation." On June 03, 2016 the Court sustained the demurrer

of IWF MDR LLC, IWF MDR LP, and IWF to the TAC without leave to amend. On July 21, 2016 the Court sustained the demurrer of PMDI, MDRMLP, and MDRMLLC without leave to amend. The only remaining defendant is Almar, the moving party.

MOVING PARTY POSITION

Almar moves for an order for judgment on the pleadings as to each cause of action and request its dismissal from the action. Almar argues Plaintiff is now on his fourth operative pleading and attempts to omit allegations to survive the pleading stage when the Complaint, FAC, and SAC all contain allegations of actions that are privilege under Civil Code § 47(b). Almar also argues the claim for intentional infliction for emotional distress fails as it only relates to property damages and does not alleges sufficient facts and the claim for breach of the implied covenant of quiet enjoyment cannot be remedied by amendment.

Plaintiff opposes the demurrer on the grounds that each cause of action is properly stated.

ANALYSIS

I. Judgment on the Pleadings

A defendant may move for judgment on the pleadings if the complaint does not state facts sufficient to constitute a cause of action against that defendant. See CCP § 438(c)(1)(B). The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer. *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064. Thus, it may be granted if, from the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. CCP § 438 (d); *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2010) ¶7:292.

As such, a motion for judgment on the pleadings involves the same type of procedures that apply to a general demurrer. *Richardson-Tunnell v. School Ins. Program for Employees* (2007) 157 Cal.App.4th 1056, 1061; *Burnet v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064. In considering a motion for judgment on the pleadings, courts consider whether the factual allegations, assumed true, are sufficient to constitute a cause of action. *Fire Ins. Exchange v. Sup. Ct.* (2004) 116 Cal.App.4th 446, 452-453. Similar to a demurrer, a motion for judgment on the pleadings does not lie as to only part of a cause of action. *Fire Ins. Exch. v. Sup. Ct.* (2004) 116 Cal.App.4th 446, 452; Weil & Brown, Cal. Practice Guide: Civ. Pro. Before Trial (The Rutter Group 2008) ¶7:295.

A. Sham Pleadings

Plaintiff's prior operative complaints in the action were verified and made allegations that defendants secured the right to proceed with a lien sale by or through a proceeding before a court or the DMV Lien Department, but now such allegation is omitted which would negate the causes of action for conversion and intentional infliction of emotional distress. See FAC ¶32, SAC ¶

32. Plaintiff appears to delete such allegations in an attempt to defeat the demurser and such allegations are judicially noticed and Plaintiff cannot defeat the demurser by merely omitting allegations from the pleadings. Berman v. Bromberg (1997) 56 Cal.App.4th 936, 944; Owens v. Kings Supermarket (1988) 198 Cal.App.3d 379, 383-84; Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal.App.4th 929, 946.

B. Conversion

"The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Lee v. Hanley (2015) 61 Cal.4th 1225, 1240.

As discussed above, the prior allegations were that the alleged conversion was by acts pursuant to judicial or quasi-judicial proceedings. Such actions were privileged and not a wrongful act or disposition of property rights and thus the claim for conversion fails.

When the proposed amendments to the complaint fail to cure the deficiencies and there is no indication from the plaintiff that the complaint could be amended so as to state a cause of action, the trial court is justified in sustaining the demurser without leave to amend. See Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal.App.3d 220, 225-26 (proposed amendments failed to cure deficiencies and the record was devoid of any indication the complaint could be amended to state a cause of action); see also Goodman v. Kennedy (1976) 18 Cal.3d 335, 349 (the plaintiff bears the burden to show in what manner the complaint can be amended and how the amendment will change the legal effect of the complaint); Paterno v. State of California (1999) 74 Cal.App.4th 68, 110 (same); Hill v. Roll Intern. Corp. (2011) 195 Cal.App.4th 1295, 1307 (when a plaintiff merely requested that that "[a]ny defects in the [complaint] can be cured by amendment...saying so does not make it so, however, and it is [the plaintiff's] burden to show how she might amend to cure the deficiencies" and without the plaintiff setting forth how she might amend the complaint to cure the deficiencies, the trial court was justified to sustain the demurser without leave to amend) (emphasis in original). "It is not up to the judge to figure out how the complaint can be amended to state a cause of action." Medina v. Safe-Guard Products (2008) 164 Cal.App.4th 105, 112 n. 8. "Rather, the burden is on the plaintiff to show in what manner he or she can amend the complaint, and how the amendment will change the legal effect of the pleading." Id.

Accordingly, the demurrer to the Cause of Action for Conversion is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Intentional Infliction of Emotional Distress

"The essential elements of intentional infliction of emotional distress ["IIED"] are: (1) outrageous conduct; (2) intention of causing, or reckless disregard of the probability of causing emotional distress; (3) severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Girard v. Ball (1981) 125 Cal.App.3d 772, 786. "Extreme and outrageous conduct is conduct that is so extreme as to exceed all bounds of that usually tolerated in a civilized community and must be of a nature

which is especially calculated to cause, and does cause, mental distress." *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 86-87 (internal citations and quotations omitted). "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id.* at 87.

There are no allegations that Almar committed any actions which could be categorized as outrageous and extreme conduct that cannot be tolerated in a civilized community. As discussed above, the prior allegations were that the alleged conversion was by acts pursuant to judicial or quasi-judicial proceedings. Such actions were privileged and not a wrongful act or disposition of property rights and thus the claim for conversion fails. And Plaintiff alleges there were regular demands for slip payments and letters by mail seeking money. TAC ¶ 43. Such actions are not extreme and outrageous conduct.

Accordingly, the demurrer to the Cause of Action for Intentional Infliction of Emotional Distress is SUSTAINED WITHOUT LEAVE TO AMEND.

D. Implied Covenant of Quiet Enjoyment

"In every lease the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises." *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1034. "In California this covenant is partially expressed in Civil Code section 1927, which guarantees the tenant against rightful assertion of a paramount title." *Id.* "The statute provides: 'An agreement to let upon hire binds the hirer to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.' *Id.* quoting Civ.Code, § 1927. 'Beyond the statutory covenant, the landlord is bound to refrain from action which interrupts the tenant's beneficial enjoyment.' *Id.* 'Breach can take many forms, including actual or constructive eviction.' *Id.* at 1035.

Plaintiff fails to plead any existence of a contract between Plaintiff and Almar or the terms of such contract and whether the contract was oral or written. And as stated above, Plaintiff's prior allegations show that Almar's conduct was privileged and done pursuant to judicial or quasi-judicial proceedings.

Accordingly, the demurrer to the Cause of Action for Implied Covenant of Quiet Enjoyment is SUSTAINED WITHOUT LEAVE TO AMEND.

After three opportunities to cure defects identified by other defendants in other motions, Plaintiff's TAC continues to be defective as to all the causes of action against Almar.

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APPENDIX B

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

DIVISION 7

COURT OF APPEAL - SECOND DISTRICT

FILED

Apr 04, 2018

JOSEPH A. LANE, Clerk
O'Carbone, Deputy Clerk

SHERMAN VICKERS,
Plaintiff and Appellant,
v.
MARINA DEL REY MARINA, LLC.,
Defendant and Respondent.

B279466
Los Angeles County No. BC593803

THE COURT:

It appearing that the appellant is in default pursuant to Rule 8.220(a)(1), California Rules of Court, the appeal(s) filed December 2, 2016, and March 10, 2017, are dismissed.



Presiding Justice

NOTICE: This order becomes final in 30 days and thereafter is not subject to rehearing or modification. This time cannot be extended (Cal. Rules of Court, rule 8.264(b)(1)). Any party desiring reinstatement must file a motion within 15 days of the date of this order.

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APPENDIX C

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

COURT OF APPEAL - SECOND DIST.

F I L E D

May 08, 2018

JOSEPH A. LANE, Clerk

O'Carlyone, Deputy Clerk

SHERMAN VICKERS,
Plaintiff and Appellant,
v.
MARINA DEL REY MARINA, LLC.,
Defendant and Respondent.

B279486
Los Angeles County No. BC593803

THE COURT

Appellant's motion to set aside dismissal, received for filing on May 4, 2018 is hereby denied.

PERLUSS, P.J.

Presiding Justice

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APPENDIX D

SUPREME COUR^T
FILED

Court of Appeal, Second Appellate District, Division Seven - No. B279486 JUN 13 2018
S248826 Jorge Navarrete Cl

IN THE SUPREME COURT OF CALIFORNIA Deputy

En Banc

SHERMAN VICKERS, Plaintiff and Appellant,

v.

MARINA DEL REY MARINA, LLC., Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKUYE

Chief Justice