

FILED

JUL 7 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON EUGENIO SANCHEZ
RITCHIE,

Plaintiff - Appellant,

v.

SEMPRA ENERGY,

Defendant - Appellee.

No. 15-56512

D.C. No. 3:10-cv-01513-CAB-
KSC

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted March 7, 2017
Pasadena, California

Before: PAEZ, BERZON, and CHRISTEN, Circuit Judges.

Ramon Eugenio Sanchez Ritchie appeals the district court’s grant of summary judgment to defendant Sempra Energy (“Sempra”) on Claim 7 of his Second Amended Complaint (“SAC”), alleging malicious prosecution. Sanchez

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Ritchie also appeals the district court's dismissal of Claims 1–6 and 8 of his SAC alleging state law claims for trespass, conversion, intentional interference with prospective economic advantage, unjust enrichment, imposition of a constructive trust, abuse of process, and unfair business practices in violation of California Business & Professions Code § 17200 *et seq.* We affirm in part and reverse in part.

1. The district court erred in prematurely granting summary judgment to Sempra based on its *sua sponte* observation that Sanchez Ritchie had failed to allege that Sempra was responsible for the acts of its subsidiary Energia Costa Azul (“ECA”). Sanchez Ritchie did not prove, or even allege, that ECA was the alter ego of Sempra, beyond a bare allegation in the SAC that Sempra “controlled” ECA. But Sempra did not raise the alter ego issue in its motion for summary judgment or its motion to dismiss; it only argued broadly that Sempra was “Not Liable for Malicious Prosecution,” a generic statement insufficient to raise the discrete alter ego issue.

Federal Rule of Civil Procedure 56(f) requires the court to give the parties “notice and a reasonable time to respond” if the court intends to grant summary judgment on grounds not raised by any party. The district court did not do that. It first raised the issue in its “tentative ruling” issued on September 1, 2015. That

was just two days before the scheduled hearing on Sempra's motion for summary judgment and three days before the district court issued its order granting summary judgment. That abbreviated time period was not sufficient to allow Sanchez Ritchie to address the complex factual and legal issue of whether ECA was the corporate alter ego of Sempra. Sanchez Ritchie's attorney stated at the summary judgment hearing that "I think that Rule 56 would require us to be allowed to meet [the corporate identity] question since it wasn't presented by Sempra in its motion, and accordingly, we would have sufficient time in which to respond." He also asked for a continuance to pursue evidence that Sempra controlled ECA "on a day-to-day basis." The district court erred in granting summary judgment to Sempra on the corporate identity theory without granting Sanchez Ritchie's requests for additional time to rebut it.¹

2. We conclude, however, that the district court's procedural error on the alter ego issue was harmless, because the court correctly held in the alternative that no genuine issue of material fact existed regarding the merits of Sanchez Ritchie's malicious prosecution claim.

To prevail in a malicious prosecution action, a plaintiff must prove that: (1)

¹ To be clear, we express no opinion on whether Sempra is, in fact, liable for the alleged tortious acts of its subsidiary. We hold only that Sanchez Ritchie was entitled to a sufficient opportunity to prove that Sempra is so liable.

the defendant commenced a prior action, or directed its commencement, and pursued the action to a termination favorable to the plaintiff; (2) the defendant lacked probable cause to pursue the action; and (3) the defendant initiated the action with malice. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 292 (2006) (citing *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 871 (1989)). Sanchez Ritchie does not contest that a February 2007 order from the Second Criminal Court in Ensenada, Mexico, finding probable cause that Sanchez Ritchie had committed the crime of dispossession of real property (“*despojo*”), would ordinarily immunize Sempra from a malicious prosecution claim. He nevertheless proposes that the February 2007 order and earlier interim orders were obtained by “fraud or perjury,” and therefore do not signify probable cause. *See Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 817 (2002).

In support of his fraud arguments, Sanchez Ritchie argues first that Sempra was aware as early as 2001 that he, as opposed to the sellers from whom Sempra purchased the property, was the rightful possessor of the property. For that proposition, Sanchez Ritchie relies on the factual findings from the March 10, 2010 Resolution of the Tenth District Court of Baja California. This argument fails. The findings suggest at most that Sempra knew there were two factions — one led by the sellers, Luis Armando Navarro Peña and Elodia Gomez Castañon,

and the other led by Sanchez Ritchie himself — each claiming ownership and possession of the property. “A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim.” *Wilson*, 28 Cal. 4th at 822.

Sanchez Ritchie next proposes that Sempra was aware of Gomez Castañon’s death at the time ECA pursued criminal charges against Sanchez Ritchie in 2006, and therefore was also aware that ECA’s purchase of Fraccion A was bogus. Sanchez Ritchie offers no admissible support for this allegation. The declaration from Sanchez Ritchie’s expert witness states only that ECA *should* have been aware of Gomez Castañon’s untimely death, had the company done due diligence. If credited, that declaration proves at most that ECA was negligent in its title search, not that ECA actually discovered Gomez Castañon’s death before filing its criminal complaint.²

Finally, Sanchez Ritchie proposes that Sempra knew that Navarro Peña and Gomez Castañon had unsuccessfully filed for a court order in 1999 seeking a

² Moreover, ECA purchased Fraccion B from Navarro Peña, not from Gomez Castañon. ECA therefore had an independent basis for pursuing *despojo* charges for trespasses occurring on Fraccion B, even if it had reason to know it did not have good title to Fraccion A.

declaration that they were the rightful possessors of Lot A-3, and that Sempra withheld such information from the attorney general's office. But Sanchez Ritchie's sole evidence that Sempra withheld knowledge of that unsuccessful application is that a document referencing the application was in Sempra's "business files" as of 2014, when it was produced in this litigation. Sanchez Ritchie provides no evidence that Sempra knew of the order *in 2006*, when the criminal complaint was filed.

In sum, the evidence presented by Sanchez Ritchie is insufficient to create a genuine issue of material fact as to whether the interim orders issued in ECA's favor by the Mexican courts were obtained by fraud or perjury. We therefore affirm the district court's grant of summary judgment on Claim 7 of the SAC.

3. The district court did not err in dismissing Claims 1, 3, 4, 5, and 6 of the SAC based on the local action doctrine. Nor did the district court err in dismissing Claim 8 based on the litigation privilege conferred by California Civil Code § 47(b). The district court erred, however, in dismissing Claim 2 of the SAC, alleging conversion of Sanchez Ritchie's personal property.

The local action doctrine "vests exclusive jurisdiction over specified types of actions involving real property in the forum where that property is located." *Eldee-K Rental Props., LLC v. DIRECTV, Inc.*, 748 F.3d 943, 946 (9th Cir. 2014).

“Under California law, there are three broad categories of local actions: (1) actions to recover or determine rights or interests in real property; (2) actions to remedy injuries to real property; and (3) actions to foreclose on liens and mortgages on real property.” *Id.* at 950; *see also* Cal. Civ. Proc. Code § 392. With the exception of Claim 2, all of Sanchez Ritchie’s first through sixth claims rest on his claim to ownership or possession of real property in Baja California and on Sempra’s allegedly unlawful possession of that property.

Moreover, the bulk of Sanchez Ritchie’s claims (including Claim 8, for abuse of process) are also barred by California Civil Code § 47(b), which provides that communications in any “(1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law” are privileged. That privilege extends to post-judgment acts necessarily related to the enforcement of an order procured by an allegedly wrongful communicative act. *See Rusheen v. Cohen*, 37 Cal. 4th 1048, 1063 (2006). As most of the torts alleged by Sanchez Ritchie arise out of ECA’s attempted post-judgment enforcement of a September 2006 preliminary order of eviction, they are barred by the litigation privilege.

Claim 2, however, is not barred by either the local action doctrine or the litigation privilege. Conversion of personal property, when stated as an independent cause of action, is generally considered a transitory rather than local

action. *See Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107–08 (1895); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 450 (2d Cir. 2000). And although ECA secured a court order in September 2006 evicting Sanchez Ritchie from the property, Sanchez Ritchie alleged in the SAC that the order did *not* authorize the taking of his personal property. We conclude that the district court erred in dismissing Sanchez Ritchie’s claim for conversion and therefore remand on this claim alone.³

For the foregoing reasons, we affirm the district court’s grant of summary judgment to Sempra on Sanchez Ritchie’s malicious prosecution claim, affirm the district court’s dismissal of Claims 1, 3–6, and 8 of the SAC, and reverse the district court’s dismissal of Sanchez Ritchie’s claim for conversion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Each party shall bear its own costs on appeal.

³ Sempra requests that we affirm the district court’s dismissal of Claims 1–6 and 8 of the SAC on two alternative grounds, raising the Act of State Doctrine and the *Noerr-Pennington* Doctrine as affirmative defenses. As the district court did not rule on either of these defenses, we decline to reach them. Sempra may raise either or both of these defenses on remand.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk