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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BOOLOON, INC. et al. Plaintiffs and Appellants, v. GOOGLE, INC. et al., Defendants and Respondents.	B236734 (Los Angeles County Super. Ct. No. BC438806)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rita Miller, Judge. Affirmed.

Qin Zhang, in pro. per., for Plaintiffs and Appellants.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy and Kevin L. Vick for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Qin Zhang (Zhang) and Booloon, Inc. (Booloon) appeal a judgment entered in favor of defendants and respondents Google, Inc. (Google) and Nick Mote (Mote). The judgment was entered after the trial court sustained defendants' demurrer without leave to amend to five of plaintiffs' eight causes of action, and then granted defendants' motion for summary judgment with respect to plaintiffs' remaining three causes of action. We affirm.

The gravamen of plaintiffs' suit is that Mote, an employee of Google, received "confidential information" from plaintiffs and then disclosed that information to Google, which used it in its web search engine. Each of plaintiffs' causes of action is based on these factual assertions.

In support of their motion for summary judgment, defendants produced evidence that Mote did *not* disclose any of plaintiffs' confidential information to Google, that Google did not use such information, and that Google independently developed its search engine. Plaintiffs did not produce any admissible evidence to the contrary and were unable to raise a triable issue of material fact. The trial court therefore correctly entered judgment in favor of defendants.

FACTUTAL AND PROCEDURAL BACKGROUND

1. *The Parties*

Zhang, an attorney, claims to have developed "technology in language processing that can be used in Internet search field." With her brother Hong Zhang, she formed Booloon, which was given a license to use the "technology" Zhang developed.

Google is a publicly traded Delaware corporation. Its services include a web search engine. According to five undisputed declarations by Google employees, Google distinguishes between employees working on the advertising side of the business and those working on the search engine.

Mote has worked at Google since 2006. He has spent his entire career at Google working on the advertising side of the business, and has never worked on a team involved with the search engine.

2. *Communications between Mote and Plaintiffs*

On Sunday, June 1, 2008, Mote met at a coffee shop with Zhang, Zhang's brother Hong Zhang, and her friend Kai He. Kai He and Mote attended the same church and were acquaintances. Mote agreed to attend the meeting with Zhang at Kai He's request. According to Mote, he did not attend the meeting acting or claiming to act as an agent or employee of Google. Rather, he did so as a "favor" to Kai He. Zhang contends that Mote's role at the meeting was to "give evaluation and/or advice" regarding her technology.

During the meeting Zhang showed Mote a demonstration software program and database. Mote was not given any copies of Zhang's materials. Zhang claims she disclosed "confidential information" to Mote. According to Mote, "[t]he Zhangs asked [him] for pointers so [he] referred them to some academic research that might address their problems."

Shortly after the meeting, Zhang called Mote and had a very brief conversation. Zhang claims that Mote refused to talk with her. Mote contends that Zhang asked to meet again or help her develop a search engine, but he declined. Mote did not have any further communications with Zhang.

3. *Allegations in the First Amended Complaint*

On May 28, 2010, plaintiffs filed a complaint against Google and Mote. Plaintiffs filed the first amended complaint (FAC), their operative pleading, on September 29, 2010.

The FAC alleges the following. Zhang "developed technology in language processing system that can be used for internet search ('The Technology')." Zhang licensed the Technology to Booloon.

Zhang, Hong Zhang and Kai He met with Mote on June 1, 2008, so that Mote "could help to further implement the Technology." At the meeting, Mote orally agreed to keep the information he received "confidential." Based on that promise, Zhang showed Mote "a demo software program to illustrate what the Technology can do." Zhang also "showed the display of the database structure" and disclosed "confidential information."

In violation of his oral agreement with Zhang, Mote "disclosed the confidential information" he obtained at the meeting to Google. Google used this confidential

information "in local business search and people search features, and in other related features." Indeed, a few months after the June 1, 2008, meeting, Zhang "started to see Google local business search and people search launched as general search features, and other changes in general searches."

Based on these allegations, the FAC set forth causes of action for (1) breach of confidence, (2) breach of oral contract, (3) breach of implied-in-fact contract, (4) fraud, (5) constructive fraud, (6) unjust enrichment, (7) constructive trust, and (8) invasion of privacy.

4. *Defendants' Demurrer to the First Amended Complaint*

Defendants filed a demurrer to the FAC on October 29, 2010. On December 2, 2010, the court sustained the demurrer without leave to amend with respect to the first, second, third, sixth and eighth causes of action, and overruled the demurrer with respect to the remaining causes of action. The court found that the first (breach of confidence), second (breach of oral contract), third (breach of implied-in-fact contract), and sixth (unjust enrichment) causes of action were preempted by the 1976 Copyright Act.[1] It did not state the reasons it overruled the demurrer to the fourth (fraud), fifth (constructive fraud), and seventh (constructive trust) causes of action and sustained the demurrer to the eighth (invasion of privacy) cause of action.

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[1] A state law claim is preempted by the 1976 Copyright Act if (1) the subject of the claim is a work fixed in a tangible medium of expression that comes within the scope of copyright protection and (2) the right asserted under state law is the equivalent to the exclusive rights contained in Title 17 United States Code section 106. (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520.) We do not reach the issue of whether any of plaintiffs' causes of action are preempted by federal copyright law because we affirm the judgment on other grounds.

5. *Plaintiffs' Ex Parte Application for Leave to Amend the FAC*

On March 3, 2011, plaintiffs filed an ex parte application for an order granting them leave to amend the FAC. The proposed second amended complaint included two additional causes of action, one for breach of implied-in-fact contract and another for negligent misrepresentation.[2] On April 6, 2011, the trial court issued a minute order denying the application (motion) "for reasons indicated on the record." Unfortunately, plaintiffs did not file a reporter's transcript, and thus the trial court's grounds for denying the motion are not in the appellate record.

6. *Google's Discovery Motion*

On April 4, 2011, Google filed a motion to compel further responses to its first sets of requests for production to Boonloon and Zhang. On April 28, 2011, the court granted the motion in part and denied it in part.[3]

7. *Defendants' Motion for Summary Judgment*

On April 8, 2011, defendants filed a motion for summary judgment or, in the alternative, summary adjudication of issues. In support of their motion, defendants filed a declaration by Mote, as well as declarations by other Google employees. Mote stated the following in his declaration regarding his communications with other people at Google: "I did not mention anything that was communicated at the June 2008 Meeting to anyone at Google until May 2010 when I was informed and believed that Ms. Zhang had sent a letter

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[2] The proposed breach of implied-in-fact contract cause of action was based on *Desny v. Wilder* (1956) 46 Cal.2d 715. Defendants contend plaintiffs were barred from asserting this cause of action under the sham pleading doctrine. According to defendants, all of the causes of action in the FAC were based on the factual assertion that Mote promised *not to disclose* confidential information to Google. But this cause of action, defendants contend, is based on Mote's alleged agreement that plaintiffs would be compensated *for Mote's disclosure* to Google. We do not reach the issue of whether the sham pleading doctrine applies because we conclude that plaintiffs forfeited arguments relating to their motion for leave to amend.

[3] Google also filed motions to compel further responses to interrogatories and requests for admission. The record, however, does not include copies of the moving papers or the trial court's rulings on the motions.

to Google's Chairman/CEO Eric Schmidt mentioning me and threatening to sue. At that point, I felt compelled to discuss the June 2008 Meeting with a few people in order to rebut Ms. Zhang's accusations."

Mote further stated: "I never discussed anything pertaining to the June 2008 Meeting with anyone on Google's 'search' side, which includes anyone who I know or believe to be responsible for creating, developing or modifying any of Google's local search features or search features for people."

Elizabeth Reid, a software engineer employed by Google in its group focusing on "local searches," stated that Google's local search services and features were created and developed "entirely in-house" by Google and have been available for public use since 2004.[4] Additionally, Reid stated that Mote had "not played any role in the creation or development of local search." Jonathan Carter Maslan, the Director of Product Management in Google's group focusing on local searches, made essentially the same statements in his declaration as Reid did in hers.

Bryan Horling, Ph.D., a software engineer employed by Google, stated that Google.com users have been able to run searches for people since the website was launched in or about 1997. Horling further stated that since he began working for Google in 2005, "Google's search features pertaining to people have been created and developed entirely in-house by Google." According to Horling, "Nick Mote has not played any role in the creation or development of the features of searches for people." David Bau, another software engineer employed by Google, made essentially the same statements in his declaration.

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[4] According to Reid: "The local search project is designed to make it easier for Google.com users to find local businesses and other places such as parks or landmarks. Local search seeks to improve the search results that a user gets when they type in queries that appear to be searching for local businesses and places. For example, a search for 'Los Angeles Italian restaurant' will provide a results page with many different Italian restaurants in Los Angeles and a map of Los Angeles with different restaurants plotted on the map with clickable links."

After a hearing, the trial court granted the motion for summary judgment on August 25, 2011. In its order granting the motion, the court found that plaintiff's three remaining causes of action were "preempted" by the California Uniform Trade Secrets Act, Civil Code section 3426 et seq. (CUTSA),[5] and that defendants were not liable for fraud, constructive fraud and constructive trust because Google "independently created the information alleged in the complaint to have been wrongfully obtained from plaintiffs."

8. *Judgment and Appeal*

On October 6, 2011, the trial court entered judgment in favor of defendants and against plaintiffs based on its rulings on defendants' demurrer and motion for summary judgment. Plaintiffs timely appealed the judgment.

CONTENTIONS

Plaintiffs' main arguments concern the substantive merits of their claims. They contend that the trial court erroneously sustained defendants' demurrer to five causes of action in the FAC and erroneously granted defendants' motion for summary judgment. Plaintiffs argue that defendants did not meet their initial burden of showing the nonexistence of a triable issue of material fact, that Google did not independently create its search related features, and that their claims are not preempted by the CUTSA or the 1976 Copyright Act. Additionally, plaintiffs argue that the trial court abused its discretion in denying them leave to amend their FAC. Finally, plaintiffs contend that discovery regarding their "technology" should have been limited by the trial court.

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[5] "[T]he doctrine of preemption concerns whether a federal law has superseded a state law or a state law has superseded a local law, not whether one provision of state law has displaced other provisions of state law." (*Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 247, fn. 5.) The issue here is whether the CUSTA "supersedes" plaintiff's state-law causes of action. (See *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 232, disapproved on other grounds by *Kwikset Corp. v. Superior Court* (2001) 51 Cal.4th 310, 337.) We do not reach this issue because we affirm the judgment on other grounds.

DISCUSSION

1. *The Trial Court Correctly Granted Defendants' Motion for Summary Judgment with Respect to Plaintiffs' Fraud, Constructive Fraud and Constructive Trust Causes of Action*

"A motion for summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' [Citation.] A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action in question cannot be established or that there is a complete defense thereto. [Citations.] The moving defendant also bears the initial burden of producing evidence to make a prima facie showing of the nonexistence of any triable issue of material fact. [Citation.] If the defendant meets his or her burden of production, the burden shifts to the plaintiff to produce evidence showing the existence of a triable issue of material fact. [Citation.]

"This court reviews an order granting a motion for summary judgment de novo. [Citation.] 'We apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [Citation.]" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931-932.)

a. *Constructive Trust*

The seventh cause of action in the FAC was for a constructive trust. The imposition of a constructive trust, however, is a remedy, not a cause of action. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 277, fn. 4.) Because a motion for summary judgment necessarily includes a test of the sufficiency of the complaint (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117), the trial court correctly granted defendants' motion for summary judgment with respect to the seventh cause of action in the FAC.

b. *Actual and Constructive Fraud*

The fourth and fifth causes of action of the FAC are for fraud and constructive fraud, respectively. An essential element of both causes of action is that the plaintiff sustained damages proximately caused by the defendant's fraudulent conduct.[6] (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364 [fraud]; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, fn. 4 [constructive fraud].)

Defendants met their burden of showing that plaintiffs cannot establish the element of damages. With sworn declarations, plaintiffs established that Mote never disclosed the so-called "confidential information" he obtained from plaintiffs to the employees of Google who created and developed its search engine and that Google independently developed local business search and people search features. This is a prima facie showing that defendants are entitled to judgment because defendants' allegedly fraudulent conduct did not cause plaintiff to incur damages.[7]

The burden thus shifts to plaintiffs to show with admissible evidence that Mote disclosed their confidential information to employees at Google involved with the search engine and that Google in fact used the confidential information in its search engine. As we shall explain, plaintiffs failed to make such a showing, and thus failed to raise a triable issue of material fact.

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[6] Constructive fraud depends on the existence of a fiduciary or special confidential relationship of some kind between the plaintiff and defendant. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 717, at p. 133.) Assuming plaintiffs' allegations are true, there was no such relationship between the parties here. Even if Mote agreed to keep the information he learned from plaintiffs confidential, at most there was an arms-length transaction between the parties. There are no facts in the FAC indicating that Mote was a fiduciary, employee or agent of plaintiffs or that Google had a relationship with plaintiffs of any kind. The constructive fraud cause of action therefore fails for the additional reason that plaintiffs did not have the requisite relationship with defendants.

[7] Plaintiffs do not dispute that their fraud, constructive fraud and constructive trust causes of action are predicated on Mote's alleged disclosure of "confidential information" to Google and Google's use of such information.

The only evidence plaintiffs cite is Zhang's August 11, 2011, declaration. In that declaration, Zhang stated in paragraph 9: "Defendant Google used the 'confidential information' Plaintiffs disclosed to defendant Mote. In its website, Defendant Google used the type of categorization (categorizing feature terms according to subject terms) on search terms that plaintiffs used in the 'confidential information' disclosed to Mote. See Exhibit B." Exhibit B, in turn, appears to be a print-out from a search conducted on "Google maps" on February 10, 2010, regarding Budget Truck Rental in Culver City.[8]

Defendants objected to paragraph 9 on, among other grounds, that Zhang lacked personal knowledge of the facts she stated and that she improperly testified regarding the contents of a document in violation of the secondary evidence rule. These objections are well taken. (Evid. Code, §§ 702, 1523.)

Defendants objected to Exhibit B on, among other grounds, that Zhang did not properly authenticate the document. This objection is meritorious. (Evid. Code, §§ 1400, 1401.)

Moreover, even assuming plaintiffs' evidence is admissible, it is insufficient. Plaintiffs did not present any evidence regarding "the type of categorization" Google used *before* plaintiffs allegedly disclosed "confidential information" to Google. Thus there is no basis to conclude Google changed its search engine as a result of any information it received from plaintiffs. Further, plaintiffs' description of their "confidential information" was vague, at best.[9] We cannot determine whether Google used plaintiffs' alleged confidential information by simply looking at Exhibit B, and Zhang does not explain how she can do so.

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[8] Under a subheading on the printed page it states: "**Categories**: Car Rental Agency, Services – Moving. Moving Companies, Services – Trucking, Transportation."

[9] Zhang stated in her declaration: " 'The CONFIDENTIAL INFORMATION includes methods of analyzing and processing human languages. More particularly, the CONFIDENTIAL INFORMATION includes the method of identifying subject terms and feature terms in human languages, the method of indexing webpages (or websites) according to subject terms and feature terms, and the database structure for the indexing process.' "

Accordingly, Zhang's conclusionary statements regarding Google's use of plaintiffs' confidential information does not raise a triable issue of material fact.

The trial court correctly granted defendants summary judgment with respect to plaintiffs' fraud, constructive fraud and constructive trust causes of action.

2. *The Judgment Was Correctly Entered with Respect to the Remaining Causes of Action in the FAC*

When the trial court sustains a general demurrer, we review the operative complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) The sufficiency of the complaint, however, is not the only thing we review in determining whether to affirm a judgment following an order sustaining a demurrer.

The California Constitution provides that no judgment shall be set aside unless the trial court's error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13.) In light of this principle, "a judgment correct in law will not be reversed merely because given for the wrong reason; we review the trial court's judgment, not its reasoning." (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.) Accordingly, even if a demurrer to a cause of action is erroneously sustained, the judgment must be affirmed if the plaintiff cannot prevail on that cause of action as a matter of law. (*Johnson Rancho etc. Dist. v. County of Yuba* (1963) 223 Cal.App.2d 681, 685 [Although court's ruling sustaining defendants' demurrer without leave to amend was erroneous, judgment of dismissal was affirmed because "an inevitable dismissal based upon a summary judgment motion would immediately follow the remittitur"]; *Anderson v. McNally* (1957) 150 Cal.App.2d 778, 784-785 [Although the court's ruling sustaining the defendant's demurrer without leave to amend was erroneous, the judgment was affirmed because there was no miscarriage of justice]; *People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 634 [granting of motion for judgment on the pleadings cannot be affirmed unless there was a miscarriage of justice].)

In this case, we do not reach the issue of whether the FAC fails to state a cause of action—due to preemption under federal copyright law or for some other reason— because we can affirm the judgment with respect to the remaining five causes of action without

determining the adequacy of the FAC. It is clear from the face of the FAC that each of the remaining five causes of action is predicated on plaintiffs' allegations that (1) Mote disclosed plaintiffs' confidential information to Google and (2) Google used that information to create and develop its search engine. As explained *ante*, however, defendants met their burden of showing these allegations are not true, and plaintiffs failed to raise a triable issue of material fact. Defendants therefore are entitled to judgment as a matter of law with respect to plaintiffs' causes of action for breach of confidence, breach of oral contract, breach of implied-in-fact contract, unjust enrichment and invasion of privacy.[10]

3. *Plaintiffs Forfeited Their Argument That the Trial Court Abused Its Discretion in Denying Their Motion for Leave to Amend the FAC*

We review a trial court's order denying a motion for leave to amend a pleading for abuse of discretion. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175.) Plaintiffs contend the trial court abused its discretion in denying their motion for leave to amend their FAC.

We cannot assess the merits of plaintiffs' argument because they did not provide a sufficient appellate record.[11] The minute order in the record simply states that the court

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[10] Plaintiffs' invasion of privacy cause of action is without merit for several more reasons. Booloon, as a corporation, cannot maintain a common law invasion of privacy cause of action as a matter of law. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1260; *Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 930.) Further, of the four distinct kinds of invasion of privacy, only one—public disclosure of private facts—ostensibly applies to Zhang. (C.f. *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129.) An essential element of this form of invasion of privacy is that the defendant's disclosure of private facts is "public." (*Ibid.*) This means the disclosure must be a "communication to the public in general or to a large number of persons as distinguished from one individual or a few." (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 828.) Mote's alleged disclosure of confidential information to Google employees working on Google's search engine does not, as a matter of law, constitute "public" disclosure.

[11] "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen;

denied plaintiffs' motion "for the reasons indicated on the record." This indicates that the trial court orally stated its reasons for denying the motion and that its statements from the bench were memorialized by the court reporter. Plaintiffs, however, did not include the reporter's transcript in the appellate record. Because it was their burden to provide a sufficient record, plaintiffs forfeited this issue on appeal. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [holding that challenge to order denying a motion for relief under Code of Civil Procedure section 473 was forfeited because plaintiff did not provide a transcript of the hearing on the motion].)

4. *Plaintiffs Forfeited Their Argument Regarding the Trial Court's Rulings on Discovery Motions*

Plaintiffs' final argument is that the trial court erroneously ordered them to disclose their confidential information and technology during the discovery process. Unfortunately, plaintiffs do not identify the specific discovery requests they are complaining about, make references to any orders in the record they contend are erroneous, or set forth a coherent legal argument regarding why the judgment should be reversed based on some sort of alleged error regarding a discovery dispute. Plaintiffs therefore forfeited this issue on appeal. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215 ["Contentions are waived when a party fails to support them with reasoned argument and citations to authority"]; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [same].)

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and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.