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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALEXANDER LEEDOM, Plaintiff and Appellant, v. ASHLEY ESSY et al., Defendants and Respondents.	A153987 (San Mateo County Super. Ct. No. C17-00582)

Under Civil Code section 49 (section 49), "[t]he rights of personal relations forbid [¶] . . . [t]he abduction or enticement of a child from a parent, or from a guardian entitled to its custody."

This appeal is from a ruling sustaining, without leave to amend, a demurrer to a complaint alleging the abduction of a child from its father by its mother, with the assistance of others, in violation of section 49, and/or as aiders and abettors of the commission of that tortious act.

The trial court concluded that "[t]his is simply a case of separation of a married couple, in which one parent took the child and promptly filed for custody order." According to the court, "[i]t is all too common that when parents of a minor child split up, one parent keeps the child temporarily, until a family law court can make orders . . . such conduct cannot constitute 'abduction' under [section] 49."

We shall affirm.

FACTS AND PROCEEDINGS BELOW

I.

Appellant Alexander Leedom and respondent Ashley Essy[1] were married on April 1, 2014. Nine months later, the couple had a son, and in March 2016, the family moved to Ohio. Several months later, Ashley informed Alexander she was unhappy with the marriage and wanted to return to California with their son and commence a dissolution action in California. Alexander asked that she not take their child with her, but Ashley did so with the assistance of her divorced parents, respondents Julia and Eddie Essy, and Terrance Murphy, Julia Essy's boyfriend. (Ashley, Julia, and Eddie Essy, and Terrance Murphy, who are sued jointly and severally, are hereafter collectively referred to as respondents.) According to the first amended complaint (complaint),[2] when Ashley brought the child to Alexander's residence to allow him to say goodbye to the child, Alexander "chose not to physically prevent [her] from taking their son as he did not want a physical altercation." "Nevertheless," the complaint alleges, Ashley then "abducted [the child] from the residence and custody of [Alexander]" and later flew to California where she resided at her mother's home in Walnut Creek. Ashley's father then flew from California to Ohio, and picked up Ashley's car and other possessions. Later, Ashley, the child, and Ashley's mother all moved to the residence of Terrance Murphy.

Alexander's complaint goes on to state that in August 2016, after finishing the final semester of graduate school, he moved from Ohio to San Diego, where he stayed with his parents. "Hoping to reach a resolution without the expensive and painful involvement of the courts," Alexander "repeatedly requested" that Ashley bring the child to him in San Diego, "but each time she refused." When he asked to be allowed to see

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[1] As is often done in domestic relations cases, we shall refer to the parties by their given names solely for the purpose of efficiency. No disrespect is intended.

[2] The superior court had previously sustained the demurrer to the original complaint (which also included causes of action for intentional infliction of emotional distress and aiding and abetting intentional infliction of emotional distress), allowing Alexander leave to amend only as to his abduction claim. In all other respects, the demurrer to the original complaint was sustained without leave to amend.

his son in Walnut Creek, Ashley also refused. Finally, desperate to see his son, Alexander told Ashley that the limitations she placed on his access to the child were unfair, and he demanded that she enable him to see his son.

After considering Alexander's demand for about an hour, Ashley sent him an email stating that she wanted a divorce providing her custody of the child but allowing him visitation rights, and attaching an unfiled dissolution petition, a request for temporary emergency orders, and a proposed stipulation regarding visitation. Alexander's amended complaint quotes the following portion of Ashley's email:

"In regards to custody, as you will see I am filing for emergency temporary full custody of [the child] based on the reasons noted in the petition. . . . You can come up and see [the child] whenever you would like as long as it is under supervision, and is temporary until we can get a court hearing where custody will be decided at that time. You will need to find your own accommodations as well. You may sign the paper attached under a notary stating that you agree to my terms, or you can decide not to, and we will move forward on Wednesday and put the petition before a judge where my reasons and the worries will be heard by a court. I am hoping you will just sign, and we can then set up a time for you to see [the child]."

According to the complaint, this email "dangled the opportunity for [Alexander] to finally see his son provided [he] would sign away his right to custody of and visitation with his son. Although desperate to see his son, [he] refused."

The complaint also alleges that after Ashley filed a petition for divorce in September 2017, she "continued to dictate the terms of [Alexander's] visitation with his son . . . but only for a few hours and only under the supervision of [respondents]. Later she allowed [Alexander] to see his son unsupervised by [respondents] but only for very limited times."

The complaint alleges that respondents all "had knowledge of and agreed to both the objective and course of action to injure plaintiff by abducting [the child] from [Alexander], depriving Alexander of custody of and visitation with his son, and limiting Alexander's custody of and visitation with his son, and thereafter [respondents]

committed acts to that end with the knowledge and intention that their actions would injure Alexander." Among other things, the complaint asserts that Ashley's parents and Terrance Murphy provided substantial financial assistance to Ashley and the child after the alleged abduction to "help with their living expenses," and that commission of the abduction constituted "willful and malicious actions done with oppression and malice," causing Alexander "to suffer severe emotional distress" warranting not only compensatory but also punitive damages.

II.

On August 10, 2017, after Alexander filed his first amended complaint alleging only two causes of action (i.e., violation of section 49 and aiding and abetting that violation), respondents demurred to both on the ground that the complaint fails to state facts sufficient to a cause of action for violation of section 49 (Code Civ. Proc., § 430.10, subd. (e)), and therefore concomitantly fails to state a cause of action for aiding and abetting such an act.

In support of their demurrer, respondents stated that, on August 16, 2016, when Ashley informed Alexander of her decision to terminate their marriage, he became violent and she called 911. After the police arrived, it was agreed that Ashley and the child would spend the night at a hotel and fly to California the next day to live with her mother in Walnut Creek. Less than 30 days later, she filed a dissolution action placing the issue of child custody before the superior court. The memorandum of points and authorities filed in support of the demurrer stated that at all times from August 18, 2016 to the present, Alexander "was kept aware of his son's whereabouts and is in touch with his son through the continuous efforts of Ashley," that the issues of child custody and visitation were before the court in the marital dissolution action Ashley commenced, and that the other respondents, who were not parties to the dissolution action, neither exercised custody of the child nor claimed a right to do so.

According to respondents, until Ashley filed the dissolution action and raised the issues of custody and visitation, to which Alexander responded, there were no court orders pertaining to those matters. Moreover, respondents stated, after the court in the

marital proceedings issued such orders, Alexander exercised visitation and, as he acknowledged in his complaint, Ashley "arranged for and facilitated" the court ordered visitation with K that he enjoyed. The demurrer asserted that "there are no facts alleged in the complaint which would constitute any interference with [Alexander's] custody of [the child]" Thus, the demurrer declared, the complaint "alleges facts on its face which indicate that Ashley has taken no action to 'interfere with legal custody of the child' " and the demurrer should be sustained as to the cause of action for abduction.

III.

In its ruling sustaining the demurrer to the first amended complaint without leave to amend, the court noted that it had sustained the demurrer to the original complaint on the grounds that Alexander had alleged nothing more than a child custody dispute.[3]

The court went on to note that, at oral argument on the demurrer to the first amended complaint, Alexander "candidly acknowledged that he was unlikely to be able to amend in a way that would state any actionable claim under the court's analysis. He announced his intention to amend simply to plead his best case for a potential appeal." The court observed that counsel's prediction was realized: "The [first amended complaint] adds a fair amount of factual detail not found in the original complaint, but the added facts merely reinforce what was already apparent: This is simply a case of a separation of a married couple, in which one parent took the child and promptly filed for a custody order. It is all too common that when parents of a minor child split up, one parent keeps the child temporarily, until a family-law court can make orders. As the prior

[3] The only hearings conducted in this case in the trial court occurred on July 21, 2017, when the court sustained the demurrer to the original complaint with leave to amend, and September 15, 2017, when the court sustained the demurrer to the first amended complaint without leave to amend. It is not clear from our record that a transcript was made of the proceedings at either hearing. But if so, neither transcript is part of our record. The burden of making a reporter's transcript and other documents a part of the appellate record rested with Alexander as the appellant, who had the burden of rebutting the presumption that the challenged ruling or judgment is correct. (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039, and cases there cited.)

ruling discusses, such conduct cannot constitute 'abduction' under Civil Code section 49. Indeed (as again discussed in the prior ruling), there is no more logic to Father's abduction claim than there would have been to Mother accusing Father of abduction, had he physically prevented the child's departure—other than the fact of one parent physically going and the other physically staying, which is not a basis for a per se rule under either family law or tort law as to which one should best have the child temporarily.

"Indeed, the first amended complaint compounds the faults of the complaint by seeking to add, as further facts in support of 'abduction,' that Mother has (in Father's eyes) succeeded in getting her way in family court. If there could conceivably be any tort of abduction in a situation like this, it would surely come to a sharp end as of the entry of the first family law custody order. It cannot be asserted that one 'abducts' a child by winning and enforcing a family law court order."

The judgment enforcing the order sustaining the demurrer without leave to amend is an appealable final judgment. (Code Civ. Proc., §§ 904.1, 906.)

DISCUSSION

A demurrer is properly sustained when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) Our review of a judgment of dismissal resulting from the sustaining of a demurrer is reviewed de novo to determine whether the facts alleged in the complaint are sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. When, as here, the demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

As the trial court indicated and the parties agree, the seminal case interpreting section 49 is *Rosefield v. Rosefield* (1963) 221 Cal.App.2d 431 (*Rosefield*). At the time the complaint in that case was filed in 1962, the allegedly abducted child was two and one-half years old. The parents had separated shortly after their marriage in 1959, before

the child was born. According to the complaint, the mother had physical custody of the child at all material times until the asserted abduction, which occurred in 1961. In 1960, the father induced his wife to enter a conditional reconciliation for the express benefit of the child. In February 1961, the father and his father, the child's grandfather and the named respondent, "willfully, fraudulently and maliciously abducted [the child] from her mother . . . and do now harbor, secrete and conceal her from [her mother], and do deprive [her mother] of the society and services of [the child]." (*Id*. at pp. 432-433.) Conspiracy to do these things was alleged in a separate count, and the complaint further alleged that the mother had been put to the expense of about $5,000 in efforts to locate the child, and would be put to additional expense. The superior court awarded the legal care and custody of the child to her mother in April 1961, but by that time the child had been taken away and concealed. (*Id.* at p. 433.) The child was apparently still missing at the time of the appellate proceedings.

Arguing that conspiracy is not an independent delict, and is actionable only if what was required to be done was itself a wrong, the grandfather maintained that a charge of conspiracy therefore "cannot be made against the party who agrees or contrives with the father to take the child." (*Rosefield, supra,* 221 Cal.App.2d. at p. 435.)

Rejecting this contention, the Court of Appeal reasoned that "it was a legal wrong for the husband and father to abscond with the child, and that respondent [grandfather] would be liable in damages even for the father's actions, if conspiracy were shown. Of course, not every transportation of a child by one parent causing the other parent some loss of custody and association with the child would be wrongful. If, however, one parent makes away with the offspring, removes it effectually from judicial control, conceals it, and leaves the other parent utterly bereft of the means of enjoying any of the privileges of parenthood, it is folly to say that the decamping parent is merely exercising his 'equal right' to the custody of the child. There is no equality about it." (*Rosefield, supra,* 221 Cal.App.2d at p. 435.)

Alexander takes the position that Ashley's conduct constituted a "legal wrong" that significantly diminished Alexander's "equal right" to custody of his child "because

Ashley initially refused to give him access at all, and then severely limited it." Alexander also contends that the statement in *Rosefield* that "[o]f course, not every transportation of a child by one parent causing the other parent some loss of custody and association with the child would be wrongful" is mere "dictum because the *Rosefield* court held that the grandfather could be held liable for the assistance he gave the child's father in abducting her."

Alexander's attempt to distinguish *Rosefield*—which is blind to the colossal difference of the facts in this case, *as described in his own complaint*, from those in *Rosefield*—cannot succeed.

We cannot say it better than the trial court. "Although the complaint uses tendentious terms such as 'abduct,' there is no allegation that this is the [type] of permanent absconding or concealment at issue in [*Rosefield*]. On the contrary, Mother brought the child by to say goodbye in Ohio, and allowed Father at least some restricted contact in California. And although the complaint uncandidly omits to mention it, Mother in fact filed a divorce/custody case in this county less than a month after she left Father—reasonably promptly after getting resettled in California. This is not 'mak[ing] away with the offspring, remov[ing] it effectually from judicial control, conceal[ing] it, [or] leav[ing] the other parent utterly bereft of the means of enjoying any of the privileges of parenthood,' nor is it 'mak[ing] ineffectual the later decree of the court.' (*Rosefield, supra,* 221 Cal.App.3d [at pp.] 432-444)."

We are also unmoved by Alexander's claim that, "by its own terms" section 49 does not say that the prohibited " 'abduction or enticement of a child from a parent' . . . must be of a certain duration, let alone be 'permanent,' as the [trial] court concluded." To begin with, the trial court did not suggest that the "abduction" contemplated by section 49 must be of a certain duration, let alone permanent. Moreover, according to the Oxford English Dictionary the common definition of the word "abduction"—"[t]he action of taking someone away by force or deception, or without the consent of his or her legal guardian, kidnapping"—cannot reasonably be applied to the conduct of Ashley

described in the amended complaint. Ashley did not employ "force or deception" and her challenged conduct certainly cannot be considered a "kidnapping."

For the foregoing reasons, the trial court did not err in sustaining respondents' demurrer without leave to amend.

Accordingly, the judgment is affirmed. Respondents are awarded costs on appeal.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

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