COURT OF APPEAL – SECOND DIST.
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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EVERLOVING HOME HEALTH, INC., et al., Plaintiffs, Cross-defendants and Appellants, v. JOSEPH AMIRIAN, Defendant, Cross-complainant and Respondent; JOSEPH AMIRIAN PHYSICAL THERAPY et al., Defendants and Respondents.	B349733 (Los Angeles County Super. Ct. No. 19STCV36658)

APPEAL from the judgments and an order of the Superior Court of Los Angeles County, Gail Killefer, Judge. Reversed with directions.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication with the exception of Discussion, part A.

The Law Offices of Ronald Richards & Associates, Ronald Richards and Morani Stelmach for Plaintiffs, Cross-defendants and Appellants.

Adli Law Group, Dariush Adli and Jacob I. Mojarro for Defendants, Cross-complainants and Respondents.

Pursuant to a plea agreement, a criminal court convicted respondent Joseph W. Amirian (Amirian) of unlawfully impersonating a licensed physical therapist, including while working as a physical therapist for appellant Everloving Home Health, Inc. (Everloving). It ordered Amirian to pay $240,000 in restitution to Everloving. Amirian and Everloving stipulated to this amount in lieu of holding an evidentiary hearing on the extent of Everloving's losses. Years later, after Amirian had paid the amount in full, a criminal court vacated Amirian's conviction and the related restitution order under Penal Code section 1473.7,[1] because Amirian had not been properly informed of the immigration consequences of his plea.

Everloving and its owners, appellants Ehsan Doroudi and Shaida Moghaddam (collectively, the Everloving parties) sued Amirian, as well as respondents Joseph Amirian Physical Therapy, JA Services, Inc. (JA Services) and Silva Amirian (collectively, the Amirian parties) for fraud and related causes of action. Amirian filed a cross-complaint for unjust enrichment, seeking return of the $240,000 he had paid Everloving. The court sustained a demurrer to Everloving's third amended complaint without leave to amend.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

The court held a bench trial on Amirian's unjust enrichment claim and ruled in Amirian's favor, awarding him $240,000.

The Everloving parties appeal (1) the dismissal of their operative complaint, without leave to amend, (2) the judgment ordering, based on unjust enrichment, the return of the $240,000 Amirian paid as restitution in the criminal case, and (3) the order denying their motion for a new trial.

We hold the court reversibly erred in sustaining the demurrer as to the Everloving parties' fraud claim, and in concluding the vacatur of the restitution order and conviction established Amirian's right to recover on his cross-claim. Accordingly, we (1) vacate the judgment of dismissal on the Everloving parties' complaint on the basis that the court erred in sustaining the demurrer as to the fraud claim, (2) affirm the court's demurrer rulings in all other respects, (3) reverse the judgment on Amirian's cross-claim, (4) need not address the new trial motion ruling.

BACKGROUND

A. Amirian Pleads Nolo Contendere to Criminal Charges and Pays Restitution to Everloving

On December 4, 2017, the California Department of Consumer Affairs charged Amirian with several crimes, alleging he had impersonated a licensed physical therapist and provided physical therapy services to seniors at Everloving's facility although he had no license to do so.

Pursuant to a plea agreement, the prosecution dismissed all charges except one under section 530.5, subdivision (a), to which Amirian pleaded nolo contendere. (See § 530.5, subd. (a) ["willfully obtain[ing] personal identifying information . . . and us[ing] that information for any unlawful purpose, including to

obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person," punishable by a fine and/or imprisonment in a county jail not to exceed one year].) On June 28, 2018, the court accepted Amirian's plea and convicted him. During that same hearing, the court sentenced him to a period of house arrest and probation and ordered him to "make restitution to [the] victim pursuant to . . . section 1202.4[, subdivision] (f) in an amount and in the manner prescribed by the probation officer," or subject to a hearing if requested. (Capitalization omitted.) (See § 1202.4, subd. (f) ["in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims"].)

At a February 22, 2019 restitution hearing, the parties stipulated to a restitution amount of $240,000, payable in installments. Given the stipulation, the court did not require, and Everloving did not provide, any evidentiary showing to support the restitution amount. (See § 1202.4, subd. (f) [restitution may be "in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court"].) Amirian completed all installment payments on August 7, 2019.

B. The Everloving Parties Sue the Amirian Parties

On October 11, 2019, the Everloving parties filed a complaint against the Amirian parties and Does 1 through 200, alleging six causes of action: conversion; fraud; breach of fiduciary duty; defamation; breach of the covenant of good faith and fair dealing; and intentional infliction of emotional distress (IIED). Attached as an exhibit to the complaint is an

August 1, 2016 "contract agreement for professional services" (capitalization omitted) between "JA Physical Therapy" a "qualified licensed physical therapy company" and Everloving requiring JA Physical Therapy to perform "PT services" for Everloving's patients (the agreement). The signature on behalf of JA Physical Therapy on the agreement itself is illegible. Everloving alleged that Amirian entered into this business arrangement and executed the agreement not as Amirian, but "by and through his alter ego(s) and aliases, including but not limited to Josef Hochleitner, and . . . JA Physical Therapy."

In response to the Everloving parties' complaint, Amirian filed a cross-complaint alleging multiple causes of action. He ultimately dismissed all except the unjust enrichment cause of action, through which he sought return of the $240,000 he had paid in restitution.

C. The Court Sustains Multiple Demurrers and Dismisses the Everloving Parties' Operative Complaint Without Leave To Amend

The court sustained demurrers to the Everloving parties' original complaint, first amended complaint, and second amended complaint, all with leave to amend.

On November 7, 2022, the Everloving parties filed a third amended complaint (TAC). The TAC named only Joseph W. Amirian and Silva Amirian as defendants and alleged the same six causes of action. Amirian demurred to the TAC. The Everloving parties filed an opposition seven days after the statutory deadline. (See Code Civ. Proc., §§ 1005, subd. (b), 1013, subd. (c).) The court declined to consider the untimely opposition, but heard oral argument from both parties at the hearing. The

Everloving parties did not request leave to, or proffer any allegation with which they could, amend the TAC.

Following the hearing, the court adopted its tentative ruling sustaining the demurrer to the TAC without leave to amend. The court noted it had repeatedly sustained demurrers based on deficiencies the Everloving parties still had not rectified.

On May 22, 2023, the court entered a judgment dismissing the Everloving parties' complaint.

D. Vacatur of the Criminal Conviction and Restitution Order

Section 1473.7 permits "[a] person who is no longer in criminal custody [to] . . . file a motion to vacate a conviction or sentence" for various reasons, including when "[t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence." (§ 1473.7, subd. (a) & (a)(1).) On July 12, 2024, a criminal court vacated Amirian's plea "pursuant to . . . section 1473.7, on the basis that there was a statutory and constitutional defect in the taking of the plea." (Capitalization omitted.) Specifically, "the court found that prior to entering the plea, . . . Amirian had not been properly advised as to the immigration consequences, including as to the restitution component of the sentencing." (Capitalization omitted.) The court granted Amirian's motion to vacate the restitution order "pursuant to section 1473.7." The court's written order states its rulings were "not based on, or arising out of equitable considerations."

"After the conviction was vacated, the charges were dismissed pursuant to . . . [section] 1385, in the interests of justice."

E. Amirian Prevails at Trial on His Unjust Enrichment Cross-Claim

1. *Amirian's Unjust Enrichment Theory and Evidence*

At the bench trial on Amirian's unjust enrichment cross-claim, Amirian argued the vacatur of the restitution order and conviction erased the only bases on which Everloving might justly retain those funds, because Everloving, as a result of the parties' stipulation in the criminal proceeding, had never proven that Amirian's conduct resulted in economic loss.

To support his cross-claim, Amirian offered exhibits documenting events in the criminal case—the plea, the sentence and restitution order, payments, vacatur of the conviction and restitution order, and the dismissal of charges. He also testified that he provided Everloving with a business license for JA Services, that he was the owner of that company, and that the documents he provided Everloving listed "Joseph Amirian" as the owner. He acknowledged, however, that he presented Everloving with a "falsified driver's license" when he executed the agreement and began working as a physical therapist there.

2. *Everloving's Unclean Hands Defense and Evidence*

Everloving's defense at trial was that Amirian had unclean hands that barred him from obtaining the relief he sought. Everloving presented evidence that Amirian impersonated a licensed physical therapist named Josef Hochleitner while

working for Everloving, and that he billed Medicare for services for which Everloving had already paid him.

Everloving presented this defense primarily through the testimony of Everloving administrative manager Sheena Fernandez, who has overseen all day-to-day operations, finances, and billing since 2012. Fernandez testified that Amirian had "presented himself as Josef Hochleitner," a licensed physical therapist, by providing "a copy of a driver's license . . . with his picture, but [bearing the name] Josef Hochleitner," as well as "proof of car insurance under Mr. Hochleitner's name" and a "certificate of insurance for liability that also is under Mr. Hochleitner's name." Amirian "presented himself as [the] owner" of JA Services, so Everloving understood "Josef Hochleitner" to be an owner of the company. Amirian did not have a physical therapist license. He nevertheless performed the physical therapy services for which Everloving paid JA Services pursuant to the agreement with JA Physical Therapy, all the while claiming to be Josef Hochleitner.[2]

Everloving ran a criminal background check on Hochleitner and verified the physical therapy license Amirian had provided bearing Hochleitner's name through the California Department of Consumer Affairs portal. Fernandez explained that individual therapists, not companies, receive physical therapy licenses, so Everloving only verified that JA Services had a valid business license.

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[2] The record does not explain the relationship between JA Physical Therapy, the named contracting party, and JA Services, the entity Everloving paid for services provided under that agreement. Fernandez explained only that JA Services was "the business" and the entity to which Everloving wrote checks.

Fernandez testified that Everloving had paid JA Services a total of $251,305.50 for services Amirian performed while impersonating Josef Hochleitner. Fernandez also testified to costs and losses Everloving incurred and that she attributed to Amirian's actions and criminal prosecution. "[P]hysicians" and other "direct resources" for Everloving's patient referrals "directly told" Fernandez they "did not want to do business with [Everloving] because they thought that [Everloving] [was] doing fraudulent" activities after Amirian was prosecuted, resulting in "an extreme decrease in [Everloving's] patient census." Based on accounts receivable documents in Everloving's business records, she calculated $70,892.37 in lost revenues associated with this drop in patient count. Everloving incurred $180,000 in advertising and marketing expenses attempting to regain the business it had lost in the year following Amirian's prosecution.

Fernandez testified that Amirian had charged Medicare for services Everloving provided to eight patients, resulting in Everloving "not getting paid for" $25,699.85 worth of services it had rendered. Fernandez referred to this as "overlap billing," because Everloving also paid JA Services for the treatment of these eight patients.

Through Fernandez's testimony, Everloving entered into evidence a document she created from Everloving financial and census reports in December 2018 (the accounting). The accounting documented the payments made to JA Services, the lost accounts receivable resulting from the drop in patient census, the marketing and advertising expenses, and the overlap billing.

Fernandez personally participated in the criminal proceedings, and confirmed Everloving agreed to accept $240,000

as restitution, although "there were more damages than $240,000."

3. *Judgment in Amirian's Favor*

On May 29, 2025, the court ruled in favor of Amirian on his unjust enrichment claim. It found that, because the criminal court had vacated Amirian's conviction under section 1473.7 and dismissed all charges under section 1385, "[Amirian] was in effect not convicted of a crime and there is no longer a legal basis for [Everloving] to receive restitution from Amirian." The court also rejected Everloving's unclean hands defense.

The court entered a "judgment after bench trial" awarding Amirian $240,000, to be paid jointly and severally by the Everloving parties. (Capitalization omitted.)

F. Motion for New Trial and Appeal

The Everloving parties timely moved for a new trial. The court denied the motion at the conclusion of the hearing thereon, reiterating the bases for the judgment and noting the Everloving parties had not made the showing necessary to justify a new trial.

The Everloving parties appealed the judgment dismissing their complaint, the judgment in favor of Amirian, and the order denying their motion for new trial.

DISCUSSION

The Everloving parties argue the court reversibly erred by (1) sustaining the demurrer to their operative complaint, or alternatively, denying leave to amend; (2) adjudicating Amirian's cross-claim in Amirian's favor, and (3) denying their motion for a

new trial. We address the first two arguments in turn below, but need not reach the third.

A. Demurrer Rulings on the TAC

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] . . . [Citation.] . . . [I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) The plaintiff bears the burden of establishing his ability to amend a complaint with allegations sufficient to address deficiencies identified in a demurrer ruling. (See *ibid.*) "If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*City of Stockton v. Superior Ct.* (2007) 42 Cal.4th 730, 747.)

We agree with the Everloving parties that the court erred in sustaining the demurrer as to their fraud claim, but otherwise agree with the trial court's demurrer rulings. We address each cause of action in the TAC in turn below.

1. *Rejection of Untimely Opposition*

The Everloving parties argue we should reverse the court's demurrer ruling because the court refused to consider their untimely filed opposition. They acknowledge that "a trial court has discretion to refuse an untimely brief under California Rules of Court, rule 3.1300(d)," but argue that "exercising that discretion to entirely disregard an opposition, while simultaneously denying leave to amend, creates an inherently one-sided proceeding that offends basic tenets of due process." Neither below nor on appeal do they offer any explanation for the untimeliness of their opposition. Nor do they cite any authority suggesting a court violates due process by ignoring an untimely document, the untimeliness of which the filing party does not even attempt to justify. Moreover, any erroneous refusal to consider written arguments below would be harmless; the Everloving parties presented oral argument in opposition to the demurrer, and we review the court's demurrer rulings de novo in any event.

2. *Conversion*

" ' " 'Conversion is the wrongful exercise of dominion over the property of another. 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.) The Everloving parties argue the court erred in deeming the TAC allegations insufficient to establish their "right to possession of" the money that is the subject of their conversion claim. They point to allegations that the Amirian parties "gave explicit assurances that at all times revenue generated by their billing practices for services rendered

were for the benefit and immediate possession of such revenue by the [Everloving parties]," "[s]uch revenue was anticipated to accrue to the amount of $475,000.00," and the Amirian parties "absconded, converted and stole such sum(s) from the [Everloving parties]." In the alternative, they argue the court erred in denying them leave to amend their conversion claim, proffering that they could allege Amirian's overlap billing constitutes conversion because it "divert[ed] specific, identifiable payments [from Medicare] that should have gone to Everloving."

Both theories rely not on the Everloving parties' ownership of the money at issue, but rather a contractual right to it. " '[A] mere contractual right of payment, without more, will not suffice' to support a claim for conversion." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 233 (*Rutherford Holdings*); see also *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 ["A 'generalized claim for money [is] not actionable as conversion' "].) Thus, the court correctly sustained the demurrer as to the conversion claim and did not abuse its discretion in denying leave to amend.

3. *Breach of Fiduciary Duty*

The court concluded the TAC "fails to sufficiently plead an existing fiduciary duty" Amirian owed Everloving, dooming the breach of fiduciary duty claim. The Everloving parties do not dispute that an independent contractor relationship does not generally give rise to fiduciary duties. Rather, they argue "a fiduciary or confidential relationship may arise anachronistically or within a contract where one party reposes a high degree of trust and confidence in another, and the other knowingly accepts that trust." (Citing *O'Byrne v. Santa Monica-UCLA Medical*

Center (2001) 94 Cal.App.4th 797, 811 (*O'Byrne*).) In order for a fiduciary relationship to arise in this manner, however, the Everloving parties must have alleged facts to support " ' "1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself." ' " (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1161 (*Persson*); accord, *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 387–388 (*Genetech*).) The Everloving parties' allegations that they entrusted Amirian with confidential information of Everloving patients does not reflect this type of vulnerability, and thus cannot establish a fiduciary duty.

Review of the specific holdings in the cases the Everloving parties cite reinforces that they do not apply here. In *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, the plaintiff contracted with the defendant to provide billing services for the plaintiff's medical practice and "retained the legal right to control the activities of" the defendant. (*Id.* at p. 1580.) This level of control set out an agency relationship and "circumstances and conduct of the parties reflect[ed] their acceptance" of that relationship. (*Ibid.*) The court held "a fiduciary relationship existed because [the defendant] and his professional corporation became the agents of [the plaintiff] and his professional corporation with respect to the handling of [the plaintiff's] accounts and collection of the proceeds those accounts engendered." (*Id.* at pp. 1575–1576.) The allegations in the TAC support neither this type of control, nor an agency relationship. In *Genentech, supra,* 43 Cal.4th 375, the Supreme Court considered whether

"a fiduciary relationship necessarily arose when [a hospital], in return for royalties, entrusted a secret scientific discovery to [a company with whom it contracted] to develop, to patent, and to commercially exploit." (*Id.* at p. 380.) The court concluded no duty arose, because the contractual provisions—like those here—did not "indicate[ ] that [one party] was to subordinate its interests to those of [the other party]." (*Id.* at p. 386.) Rather, as here, the contract was for the parties' mutual benefit. (*Ibid.*; see *id.* at pp. 387–388 [rejecting theory that parties' conduct created fiduciary relationship also because the requisite vulnerability and imbalance of power lacking]; see also *Persson, supra,* 125 Cal.App.4th at p. 1146 [no fiduciary duty based on de facto partnership or conduct "during arms-length business negotiations between the parties"]; *O'Byrne, supra,* 94 Cal.App.4th at p. 811 ["[F]iduciary responsibility [a hospital owes] is to the public, not to an individual physician seeking to obtain or retain a staff position." "In general, employment-type relationships are not fiduciary relationships"].)

The Everloving parties do not propose any allegations they could add to the complaint that would provide a sufficient factual basis for a fiduciary duty. Accordingly, the court did not err in sustaining the demurrer as to the breach of fiduciary claim without leave to amend.

4. *Defamation*

The TAC alleges the following defamatory statements: Amirian "made defamatory statements constituting libel per se by commenting and spreading false statements in the community of healthcare providers that the business practices and conduct of the [Everloving parties], [were] unlawful, fraudulent and otherwise impugned [their] interest in their good reputation

in the community as competent, honest and capable providers of home healthcare services. [The Amirian parties] violated and invaded [the Everloving parties'] interest in their good will, name and reputation in the community. [¶] . . . [The Amirian parties] made false representations concerning the honesty, integrity and reputation of the ethical and honest business practices of the [Everloving parties]." (Capitalization omitted.)

The court deemed these allegations insufficient to support a defamation claim, because they neither identify to whom the statements were made, nor describe the statements themselves. The Everloving parties counter that a plaintiff need not plead defamation with particularity. (See *Okun v. Superior Court* (1981) 29 Cal.3d 442, 458.) But the Everloving parties did not just fail to plead their defamation claim with particularity; they failed to identify even "the substance" of the statements. (*Ibid.*; see *ibid.* ["[n]or is the allegation defective for failure to state the exact words of the alleged slander . . . [citation], we conclude that slander can be charged by alleging the substance of the defamatory statement"].) The TAC also does not allege sufficient information about the recipients of the defamatory statements to facilitate preparation of a defense. (See *ibid.* [pleading alleging slander may provide "[l]ess particularity" in some circumstances, "so long as the pleading gives notice of the issues sufficient to enable preparation of a defense"].) For example, the Amirian parties cannot assess whether the alleged statements might be protected by the common interest privilege unless they have sufficient information to assess the relationship between Amirian and the unnamed members of "the community of healthcare providers" to whom he made the alleged defamatory statements. (See *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1196.)

In the absence of such additional information, we agree with the trial court that the TAC lacks sufficient allegations to state a defamation claim. Nor do the Everloving parties propose any allegation they might add to the complaint that would address this deficit. The court thus properly denied leave to amend as well.

5. *Breach of Implied Covenant of Good Faith and Fair Dealing*

The court sustained the demurrer as to the breach of implied covenant of good faith and fair dealing claim on the basis that JA Physical Therapy—no longer a defendant—was the contracting party, and thus Amirian could not be held liable for any implied contractual breach.

In arguing the court erred, the Everloving parties point to allegations that Everloving contracted with "*Joseph W. Amirian*, by and through his alter ego(s) and aliases, including but not limited to . . . JA Physical Therapy." (Italics added.) But " '[t]o recover on an alter ego theory, a plaintiff . . . must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor.' " (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 696.) The TAC includes no such allegations. (See *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415 [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its business decisions was not sufficient for alter ego liability]; *cf. Rutherford Holdings*, *supra*, 223 Cal.App.4th at p. 235 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant

as a "mere shell and conduit"].) The Everloving parties argue that this "is precisely the kind of defect amendment exists to cure," but neither below nor on appeal do they identify the allegations with which they would amend the TAC to cure the defect. The court did not err.

6. *IIED*

The elements of a cause of action for IIED are as follows: (1) defendant engaged in extreme and outrageous conduct with the intent to cause, or with reckless disregard to the probability of causing, emotional distress; and (2) as a result, plaintiff suffered extreme or severe emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) The TAC alleges that the Amirian parties' fraudulent conduct also supports a claim for IIED because they "knew that their fraudulent conduct would be personally and professionally offensive to [Doroudi and Moggadham] who had worked so hard to make and achieve success in the business that they were so proud to have formed from the ground up. . . . [¶] . . . [The Amirian parties] intentionally chose to perpetrate a criminal enterprise that could be associated with the good name, reputation, hard work and success achieved by [Doroudi and Moggadham], thus resulting in severe emotional distress to [them]." The court concluded the TAC failed to allege sufficiently outrageous conduct to support an IIED claim. We need not decide whether this is the case, however, because we conclude the IIED allegations fail to sufficiently allege the severe emotional distress element, which requires " 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.' " (*Bogard v. Employers Casualty Co.* (1985)

164 Cal.App.3d 602, 617.) The TAC includes only conclusory allegations that the conduct "resulted in severe emotional distress and other harms to plaintiff Ehsan Doroudi, in the amount of $1,750,000.00." (Capitalization omitted.) This is insufficient, and the IIED claim fails for this reason alone. (See *ibid.* [allegation of "severe emotional distress" insufficient absent allegations concerning nature or extent of mental suffering caused by alleged outrageous conduct]; *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 [describing emotional distress as "severe" is insufficient without additional factual allegations detailing nature of distress suffered].) Nor do the Everloving parties identify allegations with which they could correct this deficiency. The court did not err in sustaining the demurrer as to the IIED claim without leave to amend.

7. *Fraud*

The elements of fraud are: (1) a misrepresentation; (2) knowledge of falsity (scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173, italics omitted.) Fraud must be pleaded with particularity, meaning by alleging "facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation]." (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

The court concluded the TAC does not allege a misrepresentation with sufficient particularity. In arguing to the contrary, the Everloving parties point to the following allegations:

"Commencing on and after August 1, 2016, [the Everloving parties] and defendants Joseph W. Amirian, by and through his alter ego(s) and aliases, including but not limited to Josef

Hochleitner, and business name(s), defendant JA Physical Therapy, and DOES 1 through 200, entered into a business arrangement stated in a contract attached hereto as Exhibit 3, whereby the defendants agreed to provide competent, capable and professional home healthcare services to persons with chronic conditions, disabilities, illness, acute care needs and others. [¶] . . . Defendants Joseph W. Amirian, for himself and for the business entity which he intended to operate under, Joseph Amirian Physical Therapy and JA Services, Inc., and DOES 1 through 200, inclusive, made intentional, false misrepresentations to the [Everloving parties] with the specific intent that the [Everloving parties] would rely on such representations because . . . Amirian, for himself and for the supposed business entities that he was operating under, knew that the plaintiffs would have to rely on his representations, and knew that he would not be permitted to provide services to clientele and patients of the [Everloving parties] unless [they] relied upon such representations. The representations were as follows: [¶] . . . The defendants were not in fact who they said they were in the contract, Exhibit 4; [¶] . . . The defendants were not licensed physical therapist(s), doing business as a company or companies registered and licensed to provide physical therapy services; . . . defendant Amirian knew full well that it was unlawful and criminal in conduct to lie, deceive and enter into the contractual arrangement with the plaintiffs based upon his deception, deceit, and unlicensed status as a physical therapist to pretend to be a licensed physical therapist. . . . [¶] . . . [¶] . . . These representations were, in fact, false." (Capitalization omitted.)

The court deemed these allegations conclusory and thus insufficient to establish a specific misrepresentation. Amirian argues the allegations also do not identify when the misrepresentations were made or which of defendants made them. Rather, the TAC identifies numerous named and unnamed entities as making the misrepresentations and provides only the date of the agreement.

The TAC is not a model of clarity, but it does allege that Amirian (among others) misrepresented his true identity and falsely represented himself to be a physical therapist. One can also infer from the totality of all TAC allegations that Amirian (among others) did so beginning on the date of the agreement and continuously thereafter. Given the nature of the misrepresentations alleged here—Amirian presenting himself as a licensed physical therapist named Josef Hochleitner, and then continuing to allow Everloving to operate under the belief that he was Hochleitner—we do not view the lack of allegations as to specific language and dates as fatal to the claim. And the inclusion of multiple entities beyond Amirian himself as among those making the representation is imprecise, to be sure, but also understandable, given that uncertainty of identity lies at the heart of the fraud theory.

The court further concluded that the TAC fails to allege justifiable reliance, because it does not allege Everloving made any effort to verify Amirian's identity. We disagree. Everloving was not required to confirm Amirian was not lying about his identity in the absence of allegations suggesting some reason to believe he was not who he said he was.

Finally, the court concluded the TAC fails to specifically allege damages the Everloving parties suffered as a result of the

Amirian parties' misrepresentations. Again, we disagree. The TAC alleges these misrepresentations "resulted in the loss of revenue, clients, patients and other intangible harms, including but not limited to loss of reputation, good will in the community, and other harms, all to the actual, pecuniary and other damages to [*sic*] . . . Everloving . . . , in the amount of $1,750,000.00 or in an amount that will be stated in an amendment to the prayer to this complaint or according to proof at the time of trial." (Capitalization omitted.) These are nonconclusory allegations sufficient to support the damages element of the Everloving parties' fraud claim at the pleading stage.

Accordingly, we conclude the court erred in sustaining the demurrer as to the fraud claim in the TAC.

B. Amirian's Cross-Claim

Several courts, including this division, have held "unjust enrichment is not a cause of action." (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911; accord, e.g., *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387 (*McBride*).) Unjust enrichment is instead " ' " 'a general principle, underlying various legal doctrines and remedies' " ' " and "synonymous with restitution. [Citation.]' [Citation.]" (*McBride*, *supra*, at p. 387.) "Unjust enrichment has also been characterized as describing ' "the result of a failure to make restitution . . . ." ' [Citations.]" (*Ibid*.) Courts have sometimes recast a purported unjust enrichment claim as one seeking restitution. (*Rutherford Holdings*, *supra*, 223 Cal.App.4th at p. 231; accord, *McBride, supra*, at p. 387.) We so construe Amirian's cross-claim here.

"An individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] . . . [Citation.] . . . [Citations.] [¶] . . . The person receiving the

benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it. [Citation.]" (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662–1663, italics omitted; accord, *McBride, supra*, 123 Cal.App.4th at p. 388.) The court concluded the Everloving parties' retention of the $240,000 restitution payment would be unjust because, after Amirian made the payment, the criminal court vacated the restitution order and dismissed the underlying charges.

Deeming retention of the payment unjust on this basis effectively expands sections 1473.7 and 1385 to encompass relief the Legislature could have included therein, but chose not to. Section 1473.7 permits certain individuals to obtain vacatur of a conviction and/or sentence. (§ 1473.7, subd. (a).) Section 1385 permits a court to dismiss criminal charges or sentencing enhancements under certain circumstances. That is the only relief these sections authorize. The Legislature could have chosen to also include mechanisms through which, for example, a defendant can obtain compensation for time he or she spent in criminal custody as a result of a subsequently vacated conviction, or reimbursement of fines and fees the defendant paid as a result of that conviction. Indeed, the Legislature has provided for similar relief under different circumstances. (See § 4900, subd. (a) [permitting certain individuals convicted of crimes to "present a claim against the state to the California Victim Compensation Board for the injury sustained by the person through the erroneous conviction and imprisonment or incarceration"].) The Legislature was thus aware of this type of relief and chose not to provide it under the circumstances set forth in section 1473.7 and/or section 1385.

A court has broad discretion in equity, but acts outside the scope of that discretion when it applies equitable principles in a manner inconsistent with the " ' "legal principles governing the subject of its action." ' " (See *People v. Eubanks* (1996) 14 Cal.4th 580, 595; see *ibid.* [lower court discretion " ' "subject to the limitations of legal principles governing the subject of its action" ' "]; accord, *People v. Beaty* (2010) 181 Cal.App.4th 644, 652.) The court's analysis of Amirian's cross-claim here does precisely that. It relies on a section 1473.7 vacatur and section 1385 dismissal as bases for achieving relief the Legislature chose not to provide for in either section. This is an abuse of discretion.[3]

The long-standing principle that dismissal under section 1385 is intended to "wipe the slate clean as if the defendant never suffered the prior conviction in the initial instance" does not suggest a different result. (*People v. Barro* (2001) 93 Cal.App.4th 62, 67.) Both Amirian and the court cite this principle in analyzing the cross-claim. But the proverbial "slate" a section 1385 dismissal wipes clean is that of the defendant's *criminal record*, thereby ameliorating the negative effects a conviction can have on a defendant in the future. (See, e.g., *Barro, supra*, at p. 64 ["dismissal under section 1385 of

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[3] We would reach the same result, were we to analyze Amirian's cross-claim as one for unjust enrichment, because the case law recognizing such an independent cause of action likewise requires retention of the benefit be "unjust." (*Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661; *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238 ["[t]he elements of a cause of action for unjust enrichment are simply stated as 'receipt of a benefit and unjust retention of the benefit at the expense of another' "].)

the charge underlying a prior conviction which would otherwise qualify as a strike precludes the use of that prior conviction as a strike under the Three Strikes law"].) Such dismissal does not—nor could it realistically be expected to—erase the myriad of other effects a criminal conviction and/or prosecution can have on a defendant's life. This principle thus does not suggest the court must undo the effects of the restitution order or otherwise try to emulate an entire but-for world in which Amirian was never prosecuted. Consistent with this, Amirian cites no case, nor are we aware of one, applying the "wipe the slate clean" principle to wipe any "slate" except a criminal record "clean," and/or to facilitate monetary recovery from a private third party.

Finally, we note that the criminal court vacated the restitution order years *after* Amirian complied therewith and completed all payments. This means Amirian made—and the Everloving parties accepted—the $240,000 pursuant to what was at the time a valid court order. That remains the case, even though the criminal court later vacated the order and dismissed the underlying charges, because neither section 1473.7 nor section 1385 renders orders or convictions void *ab initio*.

The section 1473.7 vacatur of the restitution order and the section 1385 dismissal of charges are the sole bases on which the court concluded retention of the $240,000 would be unjust. Indeed, they are the sole bases on which Amirian argued it would be unjust and the *only* bases he offered evidence to support. Because we conclude the court abused its discretion in finding the injustice necessary to Amirian's cross-claim on these

bases, we reverse the judgment in his favor on that claim.[4] We thus need not and do not reach the Everloving parties' other arguments challenging that judgment, or their appeal from the order denying their motion for a new trial.

[4] Because we decide the issue on this basis, we deny the Amirian parties' motion, previously deferred to the panel, to provide supplemental briefing on an issue that would not affect our analysis. The motion sought the opportunity to respond to the Everloving parties' reply brief argument drawing an adverse inference from Amirian not having petitioned for a finding of factual innocence under section 851.8.

DISPOSITION

The judgment of dismissal of the Everloving parties' third amended complaint is vacated. The order sustaining the demurrer without leave to amend is reversed solely to the extent it sustains the demurrer as to the Everloving parties' fraud claim.

The judgment on Amirian's cross-claim is reversed.

Following remand, the court shall hold further proceedings on the Everloving parties' fraud claim in a manner consistent with this opinion and enter a new judgment in Everloving's favor on Amirian's cross-claim.

The Everloving parties are awarded their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, P. J.

We concur:

WEINGART, J.

M. KIM, J.