

COURT OF APPEAL  
FIFTH APPELLATE DISTRICT  
FILED

MAY 2 2011

By \_\_\_\_\_ Deputy

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

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

MICHAEL SCOTT IOANE, SR.,

Plaintiff and Appellant,

v.

TREBEL, LLC et al.,

Defendants and Respondents.

F060277

(Super. Ct. No. CV-269076)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Michael Scott Ioane, Sr., in pro. per., for Plaintiff and Appellant.

Joseph P. Hanson; Darling & Wilson and Joshua G. Wilson for Defendants and Respondents.

-ooOoo-

Michael Scott Ioane, Sr., appeals from a superior court order dismissing his complaint after the court sustained the demurrer of respondents Treble, LLC (Treble) and Robert E. Bell (Bell) to the complaint. He contends the court erred in sustaining the demurrer. We agree and reverse.

## FACTS AND PROCEDURAL HISTORY

Ioane's complaint for breach of contract alleges as follows. On or about June 9, 2009, Treble and Bell entered into a written contract with Mariposa Holdings, Inc. (Mariposa) in settlement of a business dispute. Under the terms of the agreement, Treble and Bell were to pay Mariposa a total of \$427,428.70, with monthly payments of \$5,000 to be made for six months, followed by payment of the remaining balance. The first payment of \$5,000 was made, but the next scheduled payment, due July 1, 2009, was not made, and no further payments have been made. Ioane alleges he is Mariposa's assignee. He alleges that Treble and Bell "breached the agreement by ... [r]efusal to make the agreed upon payments after the first payment."

Treble and Bell demurred to the complaint on the grounds that (1) the court has no subject matter jurisdiction (Code Civ. Proc., § 430.10, subd. (a)),<sup>1</sup> (2) the complaint does not state facts sufficient to constitute a cause of action (§ 430.10, subd. (e)), and (3) Ioane "lacks standing to sue." Treble and Bell asked the court to take judicial notice of a document entitled "Notice of Levy." The document purports to be an Internal Revenue Service document issued to Treble and Bell. It states that Mariposa, the "taxpayer," owes a "Total Amount Due" of \$4,043,521.00 in unpaid taxes. It further states: "This is not a bill for taxes you owe. This is a notice of levy we are using to collect money owed by [Mariposa]. [¶] ... [¶] This levy requires you to turn over to us this person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are already obligated to pay this person. However, don't send us more than the 'Total Amount Due.'" Treble and Bell assert that Treble was "served" with this Notice of Levy on June 16, 2009, that "Treble is the custodian of a taxpayer's property and has

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

been commanded by federal law to honor the levy” and, therefore, “Treble and Bell have a complete defense to the claims of Plaintiff ....”

The court overruled Ioane’s objection to the request for judicial notice, and ruled “the demurrer is sustained with 20 days leave to amend.” The court’s order did not specify which of the asserted grounds for demurrer the court was relying on for its ruling. Ioane did not amend, and the court dismissed the action.<sup>2</sup>

### DISCUSSION

Whenever a demurrer is sustained, the court must specify the grounds upon which the order is based, which was not done in this case. This requirement may be waived, however, by the aggrieved party. (§ 472d.) Because there is nothing in the record

---

<sup>2</sup> A March 18, 2010, minute order of the court reflects that the court overruled Ioane’s objection to the request for judicial notice and sustained the demurrer with 20 days to amend. A subsequent April 13, 2010, minute order of the court states that “time for amending the complaint has run” and “judgment for defendants Treble, LLC and Robert E[.] Bell ... court to prepare judgment of dismissal and give notice thereof.” No subsequent judgment appears in the record on appeal. Ioane appealed from this minute order. We asked Ioane why we should not dismiss this appeal as an attempt to appeal from a nonappealable order that is not the final judgment of the court. (See *Jordan v. Malone* (1992) 5 Cal.App.4th 18.) Ioane responded that even though the superior court’s minute order stated that the court would prepare a judgment of dismissal and give notice thereof, the court “has never done so - even to date - and apparently the court has no intention of doing so.”

Although the better practice would have been for appellant to prepare a final judgment of dismissal for execution by the court, and then to appeal from that final judgment, given the particular circumstances of this case we will deem the court’s April 13, 2010, minute order to incorporate a final judgment of dismissal and will interpret Ioane’s notice of appeal as an appeal from that final judgment. (See *California State Employees’ Assn. v. State of California* (1973) 32 Cal.App.3d 103, 106, fn. 1; and *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1395-1396.) Neither the parties nor the trial court should assume, however, that we will be so indulgent on future appeals. “[T]he proper role of an appellate court is to adhere to and apply Code of Civil Procedure section 904.1, not to devise and employ strategies for its wholesale avoidance.” (*Jordan v. Malone, supra*, 5 Cal.App.4th at p. 22, quoting *Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1075.)

indicating that loane brought this omission to the trial court's attention, loane waived this requirement. (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2.) “[T]he court’s ruling will be upheld if any of the grounds stated in the demurrer is well taken.” [Citation.]” (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 115.) Nor does it matter that the plaintiff chose not to amend his complaint and allowed entry of judgment and dismissal. He may stand on the complaint and appeal from the dismissal order. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

#### A. THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

Our standard of review of an order sustaining a demurrer on the ground that the complaint fails to state facts sufficient to constitute a cause of action is well settled. We review the sufficiency of the complaint de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) “We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “We also consider matters that may be judicially noticed.” (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083 (*Reynolds*), disapproved on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 12.)

“A cause of action for breach of contract requires pleading of a contract, plaintiff’s performance or excuse for failure to perform, defendant’s breach and damage to plaintiff resulting therefrom.” (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) Those elements indisputably appear in the complaint, and respondents do not

contend otherwise. Instead, relying on the rule that a court ruling on a demurrer may consider matters that may be judicially noticed (*Reynolds, supra*, 36 Cal.4th at p. 1083; see also § 430.30, subd. (a)), respondents contend that the court's taking of judicial notice of the document entitled "Notice of Levy" demonstrates as a matter of law that they did not breach the contract. A breach is an unjustified or unexcused failure to perform a contract. (Rest.2d Contracts, § 235, subd. (2); see also 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 847, p. 935.) Respondents contend that, as a matter of law, any failure to pay an amount due under the terms of the contract was justified, and therefore not a breach, because they were required by law to comply with the instructions on the Notice of Levy and to make the scheduled payments to the Internal Revenue Service instead of making payments to Mariposa or to Mariposa's alleged assignee (Ioane).

The parties have a great deal to say about whether the court erred in taking judicial notice of the "Notice of Levy." Even if we assume, however, without deciding the issue, that the court did not err in taking judicial notice of the document, the taking of judicial notice of the "Notice of Levy" still fails to demonstrate that respondents did not breach the contract.

First, taking judicial notice of the existence of the document does not establish that the document was actually served on Treble and Bell. "Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary [of the Treasury], surrender such property or rights (or discharge such obligation) to the Secretary ...." (26 U.S.C., § 6332, subd. (a).) Respondents want us to assume that a "demand" was made upon them, but that is a matter that is not established by the document itself. We note that the document itself does not include a proof of service, and that the terms of the document presented to the court appear to show that it is not the complete document. The one-page document entitled "Notice of Levy" states at

the bottom that it is "Part 1," and makes express reference to a "Part 2" and a "Part 3 of this form."

Second, even if we were to assume that a "demand" was in fact made, the mere making of the demand does not discharge from liability the person upon whom the demand was made. "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary ... shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment." (26 U.S.C. § 6332, subd. (e).) Nothing on the one-page "Notice of Levy" contains any indication that Treble and Bell made any payment to the Secretary or to anyone. The document does not show that Treble and Bell "surrendered" anything in response to it. There was thus nothing upon which the court could rely to conclude, as a matter of law, that defendants Treble and Bell did not breach the contract.

#### B. SUBJECT MATTER JURISDICTION AND CAPACITY TO SUE

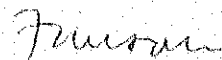
Treble and Bell demurred on the grounds the trial court lacked subject matter jurisdiction because the Internal Revenue Service levy issue conferred exclusive jurisdiction to the Federal Court. We disagree. Article 6, Section 10 of the California Constitution governs the subject matter jurisdiction of California courts. After pointing out that all state courts have original jurisdiction in a variety of specified proceedings, the section provides that "[s]uperior courts have original jurisdiction in all other causes." This is a suit for breach of a written contract. It is one of the "other causes" and thus was properly filed in superior court. (*United States F. & G. Co. v. Superior Court* (1931) 214 Cal. 468, 471.) Respondents argue that the federal courts have exclusive jurisdiction to adjudicate the validity and scope of an Internal Revenue Service levy, but loane's action

does not challenge any Internal Revenue Service levy. It is an action to recover damages on a written contract.

Treble and Bell also demurred under section 430.10, subdivision (b) (“[t]he person who filed the pleading does not have the legal capacity to sue”). Specifically, they argued that Ioane lacked *standing* to sue because he was not a party to the contract. Standing to sue is different from capacity to sue. Incapacity is a legal disability, such as infancy or insanity, which deprives the party of the right to come into court. Standing gives a plaintiff the right to relief if it alleges a beneficial interest in the claim that goes to the existence of a cause of action. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19.) Here, the complaint, and any matter of which the court took judicial notice, fails to show any lack of capacity of plaintiff Ioane to sue. Likewise, Ioane alleges he is Mariposa’s assignee, which negates any argument on demurrer that he lacks standing. Finally, respondents appear to have abandoned on this appeal any contention that the demurrer could properly have been sustained on legal capacity or standing grounds.


#### DISPOSITION

The order of dismissal and the order sustaining the demurrer are reversed and the matter is remanded to the trial court. Costs on appeal awarded to appellant.



Franson, J.

WE CONCUR:

  
Levy, Acting P.J.  
Cornell, J.