

JOHNSON v CITY OF ANGELS CAMP, et al

24CV47321

DEMURRERS AND MOTIONS TO STRIKE

On June 13, 2024, Plaintiff filed a First Amended Complaint (“FAC”) alleging “Intentional Tort” against City of Angels Camp (“City”), Mark Twain Elementary School District (“District”), Alvin Broglio (“Broglio”), Rebecca Callen (“Callen”), Jenny Eltringham (“Eltringham”), Scott McNurlin (“McNurlin”), Diane Bateman (“Bateman”), Christy Miro (“Miro”), Timothy Randall (“Randall”), and Paula Wyant (“Wyant”) (collectively “Defendants.”)

Now before the Court are two separate demurrers and motions to strike filed by: 1) Defendants City, Callen and Broglio, and 2) Defendants McNurlin, Bateman, Miro, Eltringham, Randall, and the District.

Defendants’ separate requests for judicial notice are granted.

Pursuant to Code of Civil Procedure section 430.10(f), a demurrer may be granted on the grounds that the complaint is uncertain. An “uncertain” complaint includes one that is ambiguous and unintelligible. (*Ibid.*) Generally, demurrers for uncertainty are not favored, “unless the pleading is so incomprehensible that a defendant cannot reasonably respond.” (*Lickiss v. Financial Industry Regulatory Authority*, (2012) 208 Cal.App.4th 1125, 1135.) Complaints which are disjointed and attempt to “state numerous causes of action in a very loose and rambling manner” may be considered uncertain. (*Craig v. City of Los Angeles* (1941), 44 Cal.App.2d 71, 73.)

Here, the FAC is devoid of any factual allegations including even a single allegation as to the identities of any of the named defendants. The FAC purports to be a single cause of action for “Intentional Tort” with multiple sub-claims thereunder, most of which are incoherently written. The FAC fails to apprise either Defendants, or the Court, as to the factual allegations, the legal causes of action, and against whom each cause of action is being brought. Accordingly, both **demurrers** are **SUSTAINED**, WITH 20 (twenty) days leave to amend. As the Court has sustained both demurrers, the **motions to strike** are **DENIED**, as moot, without prejudice.

The Clerk shall provide notice of the Ruling forthwith. No further formal Order is required.

BANK OF AMERICA, N.A. v GARCIA

19CF12836

DEFENDANT'S CLAIM OF EXEMPTION

On June 15, 2019 judgment creditor Bank of America ("BOA") obtained a judgment against Defendant Lucy D. Garcia ("Garcia") in the amount of \$20,525.79. After Los Angeles County withheld funds, Garcia filed a claim of exemption. BOA has filed an opposition.

Code of Civil Procedure section 706.050(a) states:

Except as otherwise provided in this chapter, the maximum amount of disposable earnings of an individual judgment debtor for any workweek that is subject to levy under an earnings withholding order shall not exceed the lesser of the following: (1) Twenty-five percent of the individual's disposable earnings for that week. (2) Fifty percent of the amount by which the individual's disposable earnings for that week exceed 40 times the state minimum hourly wage in effect at the time the earnings are payable.

As BOA points out in their opposition, Garcia has not provided any information about her income or expenses, nor has she traced any of her earnings to exempt sources. Garcia asserts that funds are exempt pursuant to Code Civil Procedure sections 704.070 (wages) and 704.110 (death benefits). However, it is impossible for the Court to determine the appropriate amount for withholding given the lack of any financial information provided. To the extent, however, any withholding would include social security or public retirement benefits, such earnings are exempt from garnishment.

Garcia's claim for exemption of social security and public benefits or death benefits is **GRANTED** in principle. However, Garcia is ordered to file and serve a financial statement by 3:00 p.m. on November 8, 2024, setting forth the source of her monthly income and whether she is paid monthly, bi-weekly, or weekly so the Court may determine the amount of withholding to be ordered. Any response by plaintiff must be served and filed by 3:00 p.m. on November 15, 2024. The hearing on this matter is continued to November 22, 2024, at 9:00 a.m. in Department 2.

The Clerk shall provide notice of the Ruling forthwith.

ONEMAIN FINANCIAL GROUP, LLC v NASTASIA

20CF13146

PLAINTIFF'S MOTION TO VACATE PRIOR ORDER OF DISMISSAL AND FOR ENTRY OF JUDGMENT PURSUANT TO STIPULATION OF THE PARTIES

On or about March 30, 2021, Plaintiff Onemain Financial Group ("Plaintiff") and Defendant Lacey Chauntae Natasia ("Defendant") entered into a verbal agreement for a "Stipulation for Entry of Judgment" to settle this case. (Declaration of Fanny Wan ("Wan Decl.") ¶ 3.) The agreement was reduced to writing and signed by the parties. (*Ibid*; Ex. 1.)

According to the settlement agreement, Defendant owed Plaintiff \$5,243.19, but Plaintiff would accept \$4,938.05 so long as Defendant paid \$100 monthly starting on April 20, 2021 until the debt was paid in full. (Wan Decl. ¶ 3.) Additionally, the parties agreed that so long as payments were timely made, no judgment would be entered against Defendant.

Defendant's last payment was October 12, 2021. (Wan Decl. ¶ 6, Ex. 2.) Plaintiff now moves the Court for an Order Setting Aside and Vacating its Prior Order of Dismissal and for Entry of Judgment for the amount prayed for in its complaint, less credit for payments received, plus previous court costs.

The settlement agreement contains the following language:

Should defendant default in the payment of any monthly installment, Plaintiff will be entitled to proceed with a noticed motion to enter judgment pursuant to this stipulation, to enter judgment in favor of Plaintiff and against Defendant in the full amount of the balance due as described in Paragraph 1 of this stipulation, less payments received plus court costs (including Defendant's first appearance fees and any motion filing fee, if applicable) incurred in obtaining the judgment, without further notice to Defendant being required.

The agreement further provides:

This is a judicially supervised settlement as described in and in accordance with the provisions of the California Code of Procedure §664.6. The parties expressly agree that the court shall retain jurisdiction over the parties to enforce the settlement performance in full of the terms hereof.

Pursuant to Code of Civil Procedure section 664.6:

- (a) If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Defendant has not filed any opposition.

The Court finds that the parties stipulated to settlement of the case and further that they stipulated to the Court retaining further jurisdiction pursuant to Code Civil Procedure section 664.6. Accordingly, as Defendant has defaulted on payments, the Court **GRANTS** plaintiff's motion.

The Clerk shall provide notice of the Ruling forthwith. The Court intends to sign the submitted Order and Judgment.

**CALIFORNIA FAIR PLAN ASSOCIATION, et al v VACASA,
LLC**

23CV46841

**PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

This is a subrogation action arises from a fire-related property damage incident that occurred on or about March 22, 2022, at the residence of Plaintiff California FAIR Plan Association's ("FAIR") Insureds, Richard Quosig Jr. and Andrea Quosig (collectively "Quosigs"), located at 2324 Mokelumne Drive, Arnold, California 95223 ("Property").

Plaintiffs allege that catastrophic fire loss occurred ("fire loss incident") at the Property when a maid from Defendant Vacasa LLC ("Vacasa") used a combustible oven cleaning fluid ("cleaning fluid") in the broiler space of the cooking range ("range"). According to Plaintiffs, the cleaning fluid flowed into the vent holes in the bottom panel of the range and when the maid turned the oven on, the vapors from the cleaning fluid ignited a fire that spread causing extensive damage.

Plaintiffs filed their Complaint on July 25, 2023, then filed a First Amended Complaint ("FAC") on July 27, 2023, due to inadvertently omitting Exhibit "A" from the original filing. Defendant filed an Answer on December 15, 2023. On June 14, 2024, Defendant filed a Cross-Complaint against Electrolux Home Products, Inc. ("Electrolux"). On August 12, 2024, Electrolux filed its own Cross-Complaint against Vacasa.

Now before the Court is Plaintiffs' motion for leave to file a Second Amended Complaint ("SAC"). Plaintiffs assert that it is necessary because they failed to include the necessary facts to support their claim for Gross Negligence and the appropriate cause of action for Plaintiffs' general claim for damages under Private Nuisance.

California Code of Civil Procedure section 473(a) provides:

(1) The Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

There is, at present, no trial date set. Pursuant to CRC 3.1324, the moving party must: (a) specify in the moving papers by page, paragraph, and line number the allegations proposed to be added and/or deleted; and (b) include with the moving papers a copy of the proposed amended pleading and a declaration specifying (1) the effect of the amendment(s); (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request was not made earlier. Here, Plaintiffs have submitted the supporting declaration of attorney Dominic J. Fiore that complies with the requirements of CRC 3.1324.

A court will generally permit amendment if the proposed amendment relates to the same general set of facts and “it is irrelevant that new legal theories are introduced as long as the proposed amendments ‘relate to the same general set of facts.’” (*Atkinson v. Elk Corp.* (2003) 109 Cal. App. 4th 739, 761.) Further, motions for leave to amend a pleading are directed to the sound discretion of the court. (CCP §§ 473(a)(1) and 576.) This discretion, however, is to be exercised liberally in favor of allowing amendments. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428; *Central Concrete Supply Co v. Bursak* (2010) 182 Cal.App.4th 1092, 1101- 1102.) Courts may permit amendments at any stage in the proceedings, up to and including trial, so long there is no prejudice to the adverse party. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.)

No opposition has been filed.

Accordingly, the Court **GRANTS** plaintiff’s motion. Plaintiffs to file SAC within 10 (ten) calendar days, and effectuate service on all defendants.

The Clerk shall provide notice of the Ruling forthwith. The Court intends to sign the submitted Order.

RICE, et al v NELSON, et al

24CV47449

DEFENDANT WENDY McCORMICK'S DEMURRER AND MOTION TO STRIKE

On June 18, 2024, Plaintiffs filed their Complaint against Defendants Sharon Nelson and Mark Nelson (collectively, "Sellers") and Wendy McCormick ("McCormick") arising out of a real estate transaction between Plaintiffs and Sellers.

Defendant McCormick demurrers and moves to strike portions of the Complaint. As set forth below, the demurrer is sustained in part and overruled in part. The motion to strike is granted in part and denied in part.

I. FACTS AND PROCEDURAL HISTORY

In February of 2021, Plaintiffs were looking to purchase a new home using McCormick as their real estate agent. McCormick became aware of a property for sale at 974 Laurel Lane, Murphys, California ("Property"). Because of pandemic restrictions, McCormick video walked Plaintiffs through the subject property informed Plaintiffs that the Property was so well maintained that no inspection would even be needed. Plaintiffs insisted on an inspection and used inspector Mark Adelhelm ("Adelhelm"). During the inspection, Plaintiffs learned that Adelhelm was McCormick's spouse which they found alarming because of potential conflicts of interest.

The inspection revealed issues that raised concerns for the Plaintiffs. Sometime around March 3, 2021, a meeting was set up by McCormick where Plaintiffs could meet with Sellers. Plaintiffs' concerns included the working of the solar alarm system, garage door, alarm system, cracks in the pavement outside the garage, stereo wiring, and kitchen appliances. According to Plaintiffs, Sellers reassured them, but failed to tell Plaintiffs about certain repairs, including to the deck, stucco, retaining wall, and irrigation system. According to Plaintiffs, Sellers strategically placed deck furniture and other items to cover up apparent issues.

On March 9, 2021, Plaintiffs and Sellers entered into a contract to purchase the Property and Plaintiffs moved in on March 10, 2021.

In 2022, the area was subjected to significant rainstorms and Plaintiffs began to notice water intrusion at the rear of the Property. Plaintiffs had two contractors inspect and were told the water intrusion was due to the moisture barrier behind the stucco which

was not prepared properly. At that time, Plaintiffs also became aware of some structural issues with the deck.

In January 2023, the Plaintiffs reached out to Adelhelm, and showed him the leaks that ran along the back of the house, the hollow posts in the deck and how they had been filled in, the leaking windows and the falling retaining wall. After a brief inspection Adelhelm suggested that Plaintiffs contact their homeowners insurance company and also a local contractor to look into the issues. After Plaintiffs had another contractor inspect the Property, they learned that the entire deck and retaining walls were failing. Plaintiffs soon learned that in or about 2015, Sellers made some repairs or renovations to the deck without permits. Thereafter, Plaintiffs learned of other significant damage, including mold and water in the foundation. Plaintiffs have been told that the cost of repairs would be nearly \$200,000.00.

As against McCormick, Plaintiffs bring causes of action for constructive fraud, negligent misrepresentation, and breach of fiduciary duty. The parties have engaged in sufficient meet and confer efforts.

II. LEGAL STANDARD FOR DEMURRER

“A demurrer tests the sufficiency of a complaint and admits all facts properly pleaded.” (*Setliff v. E.I. Du Pont de Nemours & Co.* (1995) 32 Cal. App. 4th 1525, 1533.) The court assumes the truth of the allegations asserted but does not assume the truth of “contentions, deductions, or conclusions of law.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal. App. 4th 242, 247.) The court can further look at those facts that “reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken.” (*MKB Management, Inc. v. Melikian*, (2010), 184 Cal.App.4th 796, 802.) If a complaint does not sufficiently state a cause of action, “but there is a reasonable probability that a defect can be cured by amendment, leave to amend must be granted.” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 38.)

Defendant asserts that Plaintiffs’ Complaint is subject to demurrer pursuant to Civil Code 430.10 (e) (failure to state a claim).

III. ANALYSIS

A. Civil Code 2079

Plaintiffs’ Complaint contains a cause of action for violation of Civil Code section 2709 as against Sellers. However, McCormick demurs to said cause of action because the allegations thereunder clearly are made against her in her capacity as a real estate agent.

Pursuant to Civil Code section 2079, a real estate broker or salesperson owes a duty, to the prospective buyer, to “conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in connection with that broker to find an obtain a buyer.”

Plaintiffs’ complaint does not allege that McCormick has either a “written contract with the seller to find or obtain a buyer” or that McCormick “is a broker who acts in connection with that broker to find and obtain a buyer.” Accordingly, the Complaint does not allege a duty on the part of McCormick towards the Plaintiffs.

McCormick’s demurrer as to the third cause of action for violation of Civil Code section 2079 is **SUSTAINED**, with leave to amend, including clarification as to against which defendants it is asserted.

B. Constructive Fraud

Constructive fraud is a “ ‘unique species of fraud applicable only to a fiduciary or confidential relationship.’ [citation].” (*Salahuddin v. Valley of California, Inc.*, (1994) 24 Cal.App.4th 555, 562.) The failure of a fiduciary to disclose a material fact which is known (or should be known) to the fiduciary may be constructive fraud, as may be a “ ‘careless misstatement... *even though there is no fraudulent intent.*’ ” (*Id* [citations omitted] [emphasis in original].) Constructive fraud allows for recovery for negligent omissions that constitute a breach of fiduciary or confidential duty. (*Tyler v. Children’s Home Society* (1994) 29 Cal.App.4th 511, 548–49.)

The elements of constructive fraud include “(1) a fiduciary or confidential relationship, (2) nondisclosure (breach of fiduciary duty), (3) intent to deceive, and (4) reliance and resulting injury (causation).” (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131.) This must be plead with specificity. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 434.)

Here, Plaintiffs allege that McCormick was their real estate agent and owed them a fiduciary duty. They allege that she breached that duty when she became aware of the various defects on the property (after the inspection) but failed to appropriately advise the Plaintiffs to seek an independent qualified professional to assess the situation and failing to inform them of the costs, risks, and benefits of the situation so that they could make an informed decision. Plaintiffs allege that rather than helping them determine whether the Property in fact was in good condition, McCormick simply urged them to make the purchase. Finally, Plaintiffs allege that McCormick used her spouse as the home inspector, which, at the least, presented the opportunity for a conflict of interest. Plaintiffs allege that they relied on McCormick, and their long-standing relationship, to advise them according to their best interest and she failed to do so, causing them significant damage.

When taking all the allegations in Plaintiffs' complaint as true, Plaintiffs state sufficient facts to allege the constructive fraud cause of action. (Civ. Code § 1573.) Accordingly, McCormick's demurrer as to the sixth cause of action for constructive fraud is **OVERRULED**.

C. Negligent Misrepresentation

The elements of a cause of action for negligent misrepresentation are (1) misrepresentation of a material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1060.) "A negligent misrepresentation claim 'requires a positive assertion,' not merely an omission." (*Lopez v. Nissan N. Am., Inc.*, (2011) 201 Cal.App.4th 572, 597.) Furthermore, negligent misrepresentation, like causes of action for fraud, must be pleaded with particularity. (*Small v. Fritz Cos., Inc.*, (2003) 30 Cal.4th 167, 184.)

Plaintiffs allege that when McCormick first contacted them about the Property, she stated (without reasonable ground for believing it to be true) that the Property was "so clean and well maintained that no inspection was needed and the Plaintiffs should finalize the deal." (Complaint ¶ 10.) Plaintiffs allege that after a home inspection done by McCormick's spouse, McCormick should have known that the Property had multiple issues that could affect the use and value of the home. Plaintiffs allege that as the spouse of the home inspector, and as an experienced real estate agent, McCormick was in a better position to know the true impact of the concerns laid out in the inspection report and that she did know them but failed to impart that information to the Plaintiffs.

For purposes of a demurrer, Plaintiffs have sufficiently alleged a cause of action for negligent misrepresentation. Accordingly, Defendant's demurrer as to the seventh cause of action is **OVERRULED**.

D. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach. [Citations Omitted.] (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.)

As set forth above, Plaintiffs sufficiently alleged a breach of fiduciary duty as part of their constructive fraud claim. Accordingly, Defendant's demurrer as to the eighth cause of action is **OVERRULED**.

IV. MOTION TO STRIKE

Filed concurrently with her demurrer, McCormick also moves to strike portions of the Plaintiffs' complaint.

A motion to strike lies either to strike: (1) any "irrelevant, false or improper matter inserted in any pleading"; or (2) any pleading or part thereof "not drawn or filed in conformity with the laws of this state, a court rule or order of court." (CCP § 436.) A motion to strike may also be used to strike allegations related to an improper request for relief. (*Saberi v. Bakhtiari* (1985) 169 Cal.App.3d 509, 517.) A motion to strike can be used to attack the entire pleading, or any part thereof—i.e., even single words or phrases. (*Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 Cal.App.3d 24, 40.)

A. Attorney's Fees

Code Civil Procedure section 1021 states that attorney's fees are recoverable either pursuant to an applicable statute or based on the parties' contract. Plaintiffs do not identify either a statute or a contractual provision entitling them to attorney's fees. Accordingly, the motion to strike is **GRANTED** as to references to attorney's fees, with leave to amend.

B. Punitive Damages

Punitive damages are recoverable where a plaintiff proves "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294.) Relevant to this case, "malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of rights or safety of others. (*Ibid.*)

Plaintiffs have not alleged any conduct that could be considered despicable or in conscious disregard for Plaintiffs rights or safety. Accordingly, the motion to strike references to punitive damages is **GRANTED**, with leave to amend.

C. Potential Loss of Property/Loss of Equity/Costs of Repairs

Defendant moves to strike Plaintiffs' requests for damages for loss of property or cost of repairs on the grounds that such damages are only recoverable where the real estate agent defrauds the plaintiff. As set forth above, Plaintiffs have sufficiently alleged causes of action for constructive fraud and negligent misrepresentation. Accordingly, the motion to strike as to these types of damages is **DENIED**.

D. General Damages

Defendants move to strike all references to general damages on the grounds that McCormick did not owe Plaintiffs any duty as to their emotional condition and did not

cause any physical injury or threat of physical injury. Defendants further argue that Plaintiffs are limited to out of pocket damages pursuant to Civil Code section 3343.

Here, Plaintiffs allege that they suffered damages as a result of McCormick's fraudulent activities taken in violation of her fiduciary duties. Where damages arise out of a fiduciary relationship, the Plaintiffs are not limited to out-of-pocket expenses and may seek damages generally available for torts. (*Strebel v. Brenlar Investments, Inc.*, (2006) 135 Cal.App.4th 740, 746.)

Accordingly, McCormick's motion to strike references to general damages is **DENIED**.

E. Disgorgement of Fees

A broker who obtains secret profits must return them to the principal on the theory that all profits in the transaction, without full disclosure and a specific agreement to the contrary, belong to the principal. (*Menzel v. Salka* (1960) 179 Cal. App. 2d 612.) Plaintiffs do not make any allegation that McCormick made any profits, let alone secret profits, arising out of her conduct.

Accordingly, Defendant's motion to strike references to disgorgement of fees is **GRANTED**, with leave to amend.

F. References to Irrigation System

Defendant moves to strike all allegations related to the broken irrigation system because such allegations are purportedly barred by the statute of limitations.

Plaintiffs allege that they discovered the irrigation system was broken on May 19, 2022. Under Code Civil Procedure section 339, Plaintiffs had two years to bring their Negligent Misrepresentation claim as to the irrigation system. However, Plaintiffs did not file their Complaint until June 2024, more than two years after the discovery of the broken system.

Plaintiffs do not dispute the timing nor that the Complaint was filed more than two years after discovering the irrigation system was broken. Accordingly, negligent misrepresentation claims related to the irrigation system are time-barred and Defendant's motion to strike those claims is **GRANTED**, Without leave to amend.

V. CONCLUSION

Defendant's demurrers is **SUSTAINED**, WITH leave to amend, as to the third cause of action for violation of Civil Code section 2079, and **OVERRULED** as to the remaining causes of action.

The motion to strike is **GRANTED** as to attorney's fees, punitive damages, and disgorgement of fees, WITH leave to amend. The motion to strike is **GRANTED** with regards to references to the irrigation system, WITHOUT leave to amend. The motion to strike is **DENIED** as to property loss/cost of repairs and general damages.

All allowed amendments must be filed within 20 (twenty) calendar days.

The Clerk shall provide notice of the Ruling forthwith. Defendant to prepare a formal Order conforming to this Ruling pursuant to Rule 3.1312.

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