



# In re ESTATE OF SILVEIRA

21PR8424

## OBJECTOR'S DEMURRER AND MOTION TO STRIKE CLAIMANT'S §850 PETITION

This action involves a petition for probate and letters of administration commenced by David Silveira on behalf of his deceased mother Carolyn. David was not nominated in Carolyn's will to serve as executor, but the individual who was (his sister Francille) has allegedly failed to act, reportedly consumed with a separate §850 petition (21PR0357).

David commenced this probate petition on 08/24/21.

On 09/20/21, David's brother Manuel filed a creditor's claim asserting an interest in APN 048-025-031 and 048-025-040 (collectively hereinafter "the Ranch"), as well as a right to reimbursement for expenses associated with improvements thereto. He valued his claim at \$508,110.00. That same day, he also filed a petition to determine his ownership interests therein. The salient foundation for both the claim and the petition is as follows:

After serving two tours of duty in Iraq, Manuel returned stateside to serve in the Air Force Reserves and work as a pharmacist in Texas. His mother (Carolyn) and father (David Sr.) were too old/feeble to continue working the Ranch, and so they made him an offer: *leave your life in Texas and come live/work on the Ranch, contributing labor and finances as needed, and we will leave the Ranch to you.* Manuel accepted the offer in 2008, moving to the Ranch. Unbeknownst to Manuel, on 08/02/16 his mother Carolyn executed various deeds moving the Ranch into her separate property revocable trust. Carolyn since passed away, thereby negating the oral promise to deed the Ranch to Manuel.

### **The demurrer and motion to strike are procedurally defective.**

First, pursuant to CCP §§ 430.41 and 435.5, before filing either the demurrer or motion to strike, the moving party shall meet and confer in person or by telephone with the opposing party to discuss the specific averments and causes of action which are claimed to be defective, and to provide legal support for the positions taken. (See *Dumas v. Los Angeles County Board of Supervisors* (2020) 45 Cal.App.5th 348, 355.) The goal of the meet and confer requirement is to see if the parties can resolve the pleading concerns without judicial intervention. Here, counsel for moving parties provides only that he "met with" opposing counsel and was unable to secure an agreement to supplement the petition. That is not sufficient.

Second, every demurrer and motion to strike must include a notice of motion. (CRC 3.1320(c) and 3.1322(a).) The notice of motion must state with precision the nature of the relief sought and the grounds therefore. (CCP §1010; CRC 3.1110(a).) The purpose of the notice requirements is to cause the moving party to sufficiently define the issues for the information and attention of the adverse party and the court. (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277.) A trial court is not free to grant relief which is different, or based on different grounds, than that set forth in the notice of motion. (*Luri v. Greenwald* (2003) 107 Cal.App.4th

1119, 1124; *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4<sup>th</sup> 719, 726.) There is no notice of motion here.

Third, where there are several grounds for demurrer, each must be stated in a separate paragraph. (CRC 3.1320(a).) Unless the grounds for a demurrer are distinctly specified, it may be disregarded. (CCP §430.60.) There is no designation of the causes of action under attack in this demurrer.

Despite the foregoing, and although the claimant is correct that the demurrer is technically untimely, since claimant made no effort to default the parties after 30 days, this Court is free to consider the demurrer on the merits. (See *Jackson v. Doe* (2011) 192 Cal.App.4<sup>th</sup> 742, 750.)

**Turning to the merits, the demurrer should be SUSTAINED in part and OVERRULED in part.**

The 3<sup>rd</sup> claim for “specific performance” is a remedy, not an independent cause of action. (See *Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4<sup>th</sup> 425, 433; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4<sup>th</sup> 11, 49.) Demurrer sustained without leave to amend as a cause of action, but with leave to append as a remedy to an existing cause of action.

The 5<sup>th</sup> claim for “constructive trust” is a remedy, not an independent cause of action. (See *Reid v. City of San Diego* (2018) 24 Cal.App.5<sup>th</sup> 343, 362; *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4<sup>th</sup> 1451, 1485; *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4<sup>th</sup> 1018, 1023.) Demurrer sustained without leave to amend as a cause of action, but with leave to append as a remedy to an existing cause of action.

The 7<sup>th</sup> claim for “unjust enrichment” is a remedy, not an independent cause of action. (See *Everett v. Mountains Recreation and Conservancy Authority* (2015) 239 Cal.App.4<sup>th</sup> 541, 553; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4<sup>th</sup> 221, 231.) Demurrer sustained without leave to amend as a cause of action, but with leave to append as a remedy to an existing cause of action.

Although objectors incorrectly argue that the 6<sup>th</sup> cause of action for declaratory relief is not a real cause of action, pursuant to CCP §1061 the cause of action ought to be disregarded because declaratory relief is only proper where the controversy between the parties has not yet blossomed into a cognizable claim under the law. (See *Olszewski v. Scripps Health* (2003) 30 Cal.4<sup>th</sup> 798, 807-808; *Osseous Technologies of America, Inc. v. Discoveryortho Parnters LLC* (2010) 191 Cal.App.4<sup>th</sup> 357, 366-369.) In other words, if there exists a straightforward civil remedy for the alleged wrong, declaratory relief is generally not warranted (see CCP §1061) even if the claim is technically well-pled. (See *Filarsky v. Superior Court* (2002) 28 Cal.4<sup>th</sup> 419, 433; *DeLaura v. Beckett* (2006) 137 Cal.App.4<sup>th</sup> 542, 546–547.) There are civil and equitable remedies available to claimant for the issues plead herein, thereby negating any bona fide basis for a separate declaration of rights. The declaration, if any, will be made as part of the petition itself. Demurrer sustained without leave to amend.

To the balance of the operative pleading, objectors contend that the claims are barred by the statute of frauds. Where the pleading seeks to enforce an agreement required to be in writing under the statute of frauds, but nonetheless alleges the agreement was oral, a general demurrer will lie because a bar to recovery has been disclosed within the four corners of the pleading. (See *Jacobs v. Locatelli* (2017) 8 Cal.App.5<sup>th</sup> 317, 325-326; *Rossberg v. Bank of*

*America, N.A.* (2013) 219 Cal.App.4<sup>th</sup> 1481, 1503.) Here, claimant alleges an oral agreement to convey by will the referenced parcels of real property collectively known as the Ranch, but further asserts that no writing is required because he fully performed his side of the contract in reliance thereon. Demurrer to the 2<sup>nd</sup> cause of action for breach of oral contract is sustained; however, the demurrer to the 1<sup>st</sup> and 4<sup>th</sup> causes of action are overruled.

The doctrine of promissory estoppel makes a promise binding under certain circumstances, without consideration. Under this doctrine, a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. (*Garcia v. World Sav.*, FSB. (2010) 183 Cal.App.4<sup>th</sup> 1031, 1039-1041.) To be enforceable, the promise must be clear, unambiguous and definite enough that a court can determine the scope of obligations assumed and a rational basis for the assessment of damages. (*West v. JPMorgan Chase Bank* (2013) 214 Cal.App.4<sup>th</sup> 780, 803-804.)

The promises subject to the doctrine are often oral, and are sometimes subject to the Statute of Frauds under Civil Code §1624. In order to invoke the doctrine of promissory estoppel to avoid the statute of frauds, a plaintiff must show more just the oral promise: he must plead facts demonstrating “unconscionable injury” to the promisee or “unjust enrichment” to the promisor. Whether estoppel applies in a given case is generally a question of fact, likely subject in some aspect to the heightened “clear and convincing” standard. (See *Monarco v. Greco* (1950) 35 Cal.2d 621, 623-624 [oral promise to devise farm is step-son worked the farm for free]; *Smyth v. Berman* (2019) 31 Cal.App.5<sup>th</sup> 183, 198-199 [oral promise to extend right of first refusal if tenant continued occupancy]; *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4<sup>th</sup> 218, 223 [oral promise to modify loan if borrower voluntarily dismissed bankruptcy petition]; *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4<sup>th</sup> 1031, 1044 [oral promise to delay foreclosure if borrower encumbered unrelated property to generate funds]; *Estate of Housley* (1997) 56 Cal.App.4<sup>th</sup> 342, 355-357 [oral promise to devise property if daughter provided care to decedent]; *Byrne v. Laura* (1997) 52 Cal.App.4<sup>th</sup> 1054, 1068-1069 [oral promise to deed property or give lifetime estate if partner remained by decedent’s side]; *Porporato v. Devincenzi* (1968) 261 Cal.App.2d 670, 678-679 [oral promise to devise property if plaintiff remained local].)

Here, claimant alleges that he gave up a life and practice in Texas to move to Calaveras County to help decedent run the Ranch. Decedent had health issues and was unable to keep up with either the labor needed or the costs incurred to keep the Ranch. Although decedent had five children, claimant was apparently the only one willing to surrender a life of independence to benefit the decedent and in pargate part decedent’s estate. According to claimant, the only job he could find as a pharmacist required him to drive to Sacramento on a regular basis, which this Court notes is no small feat, particularly while also overseeing the daily operation of a cattle ranch.) There is no question that claimant has at least alleged enough facts to survive a pleading attack on statute of frauds grounds.

Finally, objectors request an order striking the prayer for attorney fees. As a general rule, each party to litigation must bear its own attorney fees. (*Hyduke’s Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4<sup>th</sup> 430, 434.) However, a prevailing party may be entitled to recover attorney fees if authorized by contract, statute or law. (CCP §1033.5(a)(10).) When authorized, attorneys fees are “costs” (*Martinez v. LA County Metro Trans Authority* (2011) 195 Cal.App.4<sup>th</sup> 1038, 1041) and as such need not be pled at all to still be recoverable. (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4<sup>th</sup> 469, 497; *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4<sup>th</sup> 1794, 1797-1798.) Here, creditor explains that his prayer for fees is based on

Probate Code §9354(c), which provides that “the prevailing party in [an action on a creditor claim] shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded reasonable litigation expenses, including attorney's fees.” Objectors contend that as a matter of fact creditor cannot recover fees because there was no “rejection” of the creditor claim. While the petition was indeed filed prematurely by some standards, recovery is a question of fact to be determined. Motion to strike the prayer for attorney’s fees is denied.

**In conclusion:**

- 1<sup>st</sup> COA for §850 – demurrer overruled;
- 2<sup>nd</sup> COA for breach of oral contract – demurrer sustained without leave;
- 3<sup>rd</sup> COA for specific performance – demurrer sustained with 20 days leave to plead as a remedy;
- 4<sup>th</sup> COA for promissory estoppel – demurrer overruled
- 5<sup>th</sup> COA for constructive trust – demurrer sustained with 20 days leave to plead as a remedy;
- 6<sup>th</sup> COA for declaratory relief – demurrer sustained without leave
- 7<sup>th</sup> COA for unjust enrichment – demurrer sustained with 20 days leave to plead as a remedy;
- Motion to strike prayer for legal fees – denied.