

# ANDREWS v. ANDERSON et al

23CV46644

## DEFENDANTS' DEMURRER TO FAC

This is a dispute between homeowner and contractor regarding an oral agreement to construct a residence. According to plaintiff, defendants agreed to construct the residence (including various property improvements) within six months for \$102,634.00, but ultimately failed to deliver on either promise.

Before the Court is a demurrer filed by defendants Heather Ugale and David Anderson dba Anderson Construction. The demurrer is directed at the operative First Amended Complaint, and all five causes of action stated therein.

Short of the merits, this Court noted that defense counsel has failed to faithfully discharge his statutory obligation to file with the demurrer a declaration attesting to a meet and confer. The declaration filed fails to identify how the meet and confer conference took place, and fails to provide any details relating thereto. Given the date of service for the FAC, and the statutory timeline for the 430.41 effort, this Court is hard pressed to believe that a genuine "good faith attempt" was made. Nevertheless, this Court will press forward to resolve the dispute on the merits.

Plaintiff's **first** cause of action is for breach of the oral agreement to construct the residence for a fixed price within a fixed period of time. Whether written, oral, or implied, the elements for breach of contract are: (1) parties capable of contracting, (2) mutual consent, (3) a lawful object, (4) sufficient cause or consideration, (5) plaintiff's performance or excuse for failure to perform, (6) defendant's breach, and (7) damage. (Civil Code §§ 1550, 1605, 1614; *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453; *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 525.) Precision or *in haec verba* is not required: pleading the legal effect (i.e., enough facts to show actionable breach of an enforceable agreement) is good enough. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402; see *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 284.)

Defendant Ugale demurs to this cause of action on the basis that she, in fact, is not a "party" to the contract but instead a "mere employee" of the company. This is a factual dispute, but as alleged in the operative pleading Heather was plaintiff's primary contact – negotiating the contract, collecting money, and speaking on behalf of the company. Since the "company" is a mere dba and not an existing entity, Heather may indeed qualify as a "party" to the contract as an ostensible agent. This will be subject to discovery but is sufficiently pled at this stage. Demurrer OVERRULED.

Defendants demur to the first cause of action on the basis that it is barred by the applicable two-year statute of limitations. A demurrer on the ground of the bar of

statute of limitations will not lie where the action may be, but is not necessarily barred. It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42; *Silva v. Langford* (2022) 79 Cal.App.5th 710, 715; *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1324.) Plaintiff alleges that she paid defendants pursuant to the contract on 08/18/21, and commenced this lawsuit on 03/17/23 – well within the two year period. Although there was an anticipatory breach in defendants’ failure to complete the project in the stated 6 months, without a “time is of the essence” clause plaintiff was entitled to rely on defendants’ promises to keep working to complete the project in a “reasonable” amount of time. Even if the time to sue for breach of the original oral contract expired, later promises to complete the project could be treated as new contracts, and the claims of faulty construction (i.e., negligence) would still survive either way. Demurrer OVERRULED.

Plaintiff’s **second** cause of action is for fraud. Fraud must be plead with particularity rather than with general or conclusory allegations. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were made. (*Morgan v. AT & T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1261–1262.) Although plaintiff generally alleged a number of unfulfilled promises by defendants, the crux of a fraud claim is that there must have been a promise made with no intention to perform at the time the promise was made – rather than simply dereliction thereafter. The economic loss rule “precludes recovery for purely economic loss due to disappointed expectations, unless the plaintiff can demonstrate harm above and beyond a broken contractual promise. Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.” (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988-989; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514-516.) As such, plaintiff must allege something more particular about the representation made for which defendants had no intention of performing. Demurrer SUSTAINED, with 20 days leave to amend.

Plaintiff’s **third** cause of action is labeled “conspiracy.” Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514; in accord, *Stueve Bros. Farms, Inc. v. Berger Kahn* (2013) 222 Cal.App.4th 303, 323-324; *Arei II Cases* (2013) 216 Cal.App.4th 1004, 1022; *Brown v. Professional Community Management* (2005) 127 Cal.App.4th 532, 540; *Everest Investors 8 v. Whitehall Real Estate Ltd. Partnership XI* (2002) 100 Cal.App.4th 1102, 1106-1107.) Plaintiff is free to include conspiracy allegations within a tort claim,

but not as a separate cause of action. Demurrer SUSTAINED, with 20 days leave to amend.

Plaintiff's **fourth** cause of action is for accounting. Although this is an independent cause of action, the nature of this claim is akin to discovery. In other words, the purpose of this cause of action is to secure from a party in sole possession of books the detail about what is owed on the debt. (See *Fleet v. Bank of America* (2014) 229 Cal.App.4th 1403, 1413; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 910; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Since this is not a claim involving an unpaid debt, or unsatisfied bailment, this Court finds that there is no legal basis upon which to plead a cause of action for accounting. Demurrer SUSTAINED, with 20 days leave to amend.

Plaintiff's **fifth** cause of action is for financial elder abuse. Defendants' demurrer is based not on specific pleading concerns, but rather on a general concept that since other claims were defective so too is this one. Not necessarily so. Pursuant to W&I §15610.30(a), a person may be liable for financial elder abuse if he or she "takes, secretes, appropriates, obtains, or retains" property of an elder (1) for a wrongful use, (2) with intent to defraud, OR (3) by undue influence. These are three distinct versions. (See *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1355; *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 165.) As such, it is not necessary to successfully plead breach of contract or fraud to state financial elder abuse.

Nevertheless, the allegations are certainly imprecise. It appears to this Court that plaintiff is claiming that the entire contract was driven by an intent to defraud or an intent to exert undue influence over her based on either a fiduciary relationship or a grossly oppressive and unfair advantage of plaintiff's necessities. (Civil Code §1575.) Undue influence is marked by an imbalance of power, which can be supported by evidence relating to the following elements: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive." (*Myerchin v. Family Benefits, Inc.* (2008) 162 Cal.App.4th 1526, 1540.) Plaintiff needs to allege more facts to support the cause of action. (See *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1316; *Holbert v. Fremont Inv. & Loan* (2009) 179 Cal.App.4th 1067, 1070; in accord, *O'Brien v. Continental Casualty Company*, WL4396761 at \*4-5 (N.D. Cal. 2013).) Demurrer SUSTAINED, with 20 days leave to amend.

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.

