CAPITAL ONE BANK (USA), N.A. v. PARK

21CF13686

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is a collections case. Before the Court is a statutory motion for judgment on the pleadings, filed by the plaintiff. The proof of service indicates that defendant was timely served with the motion, though no opposition has been filed.

This Court first notes a defect with counsel's attempt to exhaust the statutory meet and confer requirement for this motion, as set forth in CCP §439. Pursuant thereto, counsel's supporting declaration must demonstrate that defendant "failed to respond to the meet and confer request or otherwise failed to meet and confer in good faith." (CCP §439(a)(3)(B).) Counsel's declaration provides only that he placed one phone call, and elected not to leave a message when nobody answered the phone. That is hardly compliant with the spirit, if not the letter, of the statute. The statute specifically provides that if the parties are unable to meet and confer at least 5 days prior to the filing of the motion, the moving party shall be granted an automatic 30-day extension of time to continue meet and confer efforts. (CCP §439(a)(2).) Given the nature of the request made in this motion, a better effort to work with defendant is required.

This Court further notes that the motion as framed is imprecise. Pursuant to CCP §438(c), a motion for judgment on the pleadings brought by the plaintiff can only be granted if (1) the complaint states facts sufficient to constitute a cause of action against the defendant and (2) the answer does not state facts sufficient to constitute any defense thereto. The answer filed on 02/14/22 does not raise any affirmative defenses, and only prays that plaintiff take nothing. Thus, the propriety of the motion turns entirely on whether the Complaint – standing alone – demonstrates an indebtedness presently owing and overdue. (See *Kawasho Internat., U.S.A. Inc. v. Lakewood Pipe Service, Inc.* (1983) 152 Cal.App.3d 785, 793.) To determine if the facts stated are alone sufficient, it is necessary to consider each count. An **open book** is a detailed statement constituting the principal record of transactions between a debtor and creditor arising out of a contractual relationship between the two. (CCP §337a.) The complaint does not attach or incorporate any current billing statement showing the amount due and the lateness thereof. An **account stated** requires an agreement between the parties as debtor/creditor regarding an amount due and a promise of repayment. (See *Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786; *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 726.) The complaint does not attach the credit card agreement. An action for **money had** lies in cases where one person has in his possession money which in equity and good conscience he ought to pay over to another. (*Provident Mut. Building v. Davis* (1904) 143 Cal. 253, 256;

Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, 460.) Where the party seeking money has a contractual obligation that is still executory, he cannot plead a cause of action for money had (*Ferrero v. Citizens of National Trust and Savings Bank of Los Angeles* (1955) 44 Cal.2d 401, 409), and there is no averment that the agreement was rescinded or otherwise no longer executory.

This is not to say that the operative pleading must be amended to perfect the motion. What needs to happen is a proper effort to meet and confer on the motion, proof to this Court's satisfaction that defendant is aware of what is going on, and some points and authorities on the topic. Motion is DENIED, without prejudice to refile a motion providing a proper basis for the Court to rule on the merits.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further order pursuant to Rule of Court 3.1312 is required; however, defendant is ordered to personally serve defendant with this ruling as well.

GOLD CREEK ESTATES v. VALLEY SPRINGS GOLD CREEK

17CV42103

DEMURRER AND MOTION TO STRIKE

This is a construction defect action involving allegations of negligent design and implementation of common areas within a condominium complex. It took many iterations to finally reach a pleading that meets the standard of clarity and precision set forth in CCP §425.10(a)(1), but this 4th Amended Complaint finally passes muster. Nevertheless, defendants continue in their quest to help plaintiff build the perfect pleading by directing a demurrer and motion to strike at this now-operative pleading.

The operative pleading presently includes the following six causes of action: statutory Right to Repair Act; breach of written sales contracts; intentional concealment/nondisclosure, negligent nondisclosure, intentional misrepresentation, and negligent misrepresentation. Defendants contend that the nondisclosure and misrepresentation claims fail to include the requisite degree of particularity, and further that the misrepresentation claims are not well-pled because they relate to future events. Defendants separately move to strike references to punitive damages, which in general will rise or fall along with fraud claims.

CCP §430.41

Despite this Court's directive regarding the meet and confer requirement for pleading motions (see Ruling dated 05/20/22), the parties still refuse to "meet and confer in person or by telephone." Lawyering is a profession, one purpose of which is to guide individuals too personally entrenched in the dispute to rise above pettiness and hone in on what matters. In reviewing the lengthy letters back and forth between counsel, what started out as an attempt to "identify with legal support the basis of the deficiencies" and address ways "to cure any legal insufficiency," soon metastasized into disappointing name-calling. It is not the number of letters back and forth that make up a good faith meet and confer effort – it is the effort itself. Nevertheless, sending the parties to an actual conference room table would, in this Court's opinion, bear no fruit worth savoring.

Fraud-Based Particularity

Defendants contend that plaintiff has still not provided sufficient facts to support the essential element of scienter attendant the Fourth (concealment), Fifth (nondisclosure), Sixth (intentional misrepresentation), or Seventh (negligent misrepresentation) causes of action. As previously observed, this type of contention could, in theory, go on forever since plaintiff could never truly insert itself into defendants' subconscious to plead facts regarding scienter and intent without taking some leaps of faith.

Defendants claim (see Demurrer P&A 6:11-17) that this Court found the fraud-based claims to be "defective" or "deficient" in some way. This claim is not true. When the same concern regarding the depth of the averments was raised by defendants in the last demurrer, this Court found that the averments supporting the fraud-based claims were good enough, and the demurrer for failure to plead was overruled. (See Ruling dated 05/20/22.) Nothing new is presented with the current pleading attack, which naturally begs the question *why are we here again?*

To help drive the point home, the particularity requirement for fraud-based claims demands that a plaintiff plead facts showing how, when, where, to whom, and by what means the challenged representations were made or not made, as the case may be. Further, when a plaintiff asserts fraud against a corporation, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. California is a notice-pleading state, which means that so long as the defendant is fairly and adequately apprised of the facts and legal theories, the pleading is good enough. Although fraud-based claims warrant a more-strenuous pleading standard given to their attack on character and the potential for abuse, the basic element of fairness still controls. Thus, less particularity is required when (1) the facts lie more in the knowledge of the defendant or (2) it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy. (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 838; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 231.)

Given that plaintiff is an entity created by defendants many years *after* the underlying events took place (2004), and further that defendants retained control over plaintiff until most of the "drainage" work was completed (2008), this is precisely the landscape in which the "relaxed particularity" standard should apply. An entity only knows information which exists in the minds of the individuals in control thereof, and so it seems to this Court that plaintiff did not acquire independent critical thinking until defendant relinquished control in 2008 – which was long after the latent issues arose (see 4thAC Para 13, 38, 43). As a practical matter, the new-and-improved operative pleading does a good enough job of setting out many facts in support of the fraud-based claims, acquainting the defendants with the legal and factual basis for the claims against them, and satisfying this Court's basic gatekeeper function of ensuring that the claims being asserted are not being done purely for an improper purpose. To be clear, this Court is by no means passing on the merits of the fraud-based claims, which do seem to be something of an uphill battle if in fact the obstacles referenced therein were indeed cured (rather than simply swept under the hardscape). The standard at the demurrer stage is the much lower concern of whether the four corners of the pleading asserts a colorable claim, as the 4AC does.

Finally, defendants contend that the misrepresentation claims fail because they relate to future events, not an existing fact, and are therefore more akin to non-actionable opinions. In general, an actionable misrepresentation must be made about past or existing facts, and a representation involving a future occurrence does not involve a past or existing material fact. However, California law recognizes two exceptions to the rule. First, a promise of future conduct is actionable as fraud if made without a present intent to perform. This is sometimes referred to as false promise or promissory estoppel. Second, a false statement of future events, by one having unique and specialized knowledge of the subject, knowing others may rely on that, constitutes an actionable misstatement of fact. (See *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 331; *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 607; *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434; *Neu-Visions Sports v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309-310; *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080-1081.)

With reference to Paragraph 38, it does indeed appear that the misrepresentation claims relate to promises made in the sales contracts regarding how development will be handled in the future, including compliance with plans, reports and budgets. However, these are not representations of future events because the sales contract provides that the construction "will be" in accordance with the referenced plans, reports and budgets. This is a present intention to comply with an existing plan, report and/or budget. In addition, these, are not mere opinions because they came from the seller, who likely has unique and specialized knowledge about the construction plan that neither the HOA nor the ordinary homeowners would have. Again, without validating the claims themselves, the facts and theories are sufficient to survive demurrer – with one exception.

A careful read of the misrepresentation claims reveals that, to prevail, plaintiffs will have to show that defendants did not intend to build the properties in compliance with plans, reports and budgets. This could not occur by accident, or oversight, and as such there can be no viable claim for <u>negligent</u> misrepresentation of a future happening. (See *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 823; *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458; in accord, *Prime Healthcare Services, Inc. v. Humana Insurance Company*, 230 F.Supp.3d 1194, 1207-1208 (C.D. Cal. 2017).)

Defendants' request for judicial notice of various court filings is GRANTED.

Demurrer to the Fourth (concealment), Fifth (nondisclosure), and Sixth (intentional misrepresentation) causes of action is OVERRULED, whereas the demurrer to the Seventh (negligent misrepresentation) cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Regarding the motion to strike references to punitive damages, this motion is DENIED. Contrary to popular folklore, there is no true heightened pleading requirement for punitive damages, and it is generally understood that a fraud cause of action adequately

pled is equally adequate to support a prayer for punitive damages. (*National Seating & Mobility, Inc. v. Parry*, WL 3222195 at *5 (N.D. Cal. 2010).) Although conclusions of law without factual support are insufficient to support a prayer for punitive damages withstand pleading attack, conclusions of law (i.e., defendants intended to harm us) can suffice if other facts in the complaint give texture to the prayer. (See *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 650; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033; *Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 510.) While it is true the quantum of proof needed to secure punitive damages is different, that is a not a matter which can be resolved by way of demurrer.

Defendants to answer within 10 court days.

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