

1. CAIN v. MENDONSA, PC20200644**(A) Demurrer to Third Amended Complaint****(B) Motion to Strike Portions of Third Amended Complaint**

Plaintiff Christine Cain commenced this action in December 2020, asserting a single cause of action for fraud against defendant Cheryl Mendonsa. Plaintiff also filed a Notice of Related Case, *Cain v. Mendonsa*, El Dorado County Superior Court Case No. PC20190308 (filed June 13, 2019). The notice states that the related action is still pending and involves the same parties and is based on the same or similar claims.

On February 26, 2021, the court sustained defendant's demurrer to the original complaint, with leave to amend. Plaintiff timely filed a First Amended Complaint. The parties then stipulated to allow plaintiff to file a Second Amended Complaint. On June 18, 2021, the court sustained defendant's demurrer to the Second Amended Complaint, with leave to amend. Plaintiff's Third Amended Complaint ("TAC"), filed July 6, 2021, asserts a single cause of action for promissory fraud.

Before the court is defendant's demurrer to the TAC and motion to strike portions of the TAC.

A. DEMURRER TO THIRD AMENDED COMPLAINT**1. STANDARD OF REVIEW**

A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code of Civ. Proc. § 430.30(a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Comm'n on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213.) All properly pleaded allegations of fact in the complaint are accepted as true, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*)

2. Discussion

Defendant's demurrer is made on the basis that the TAC's single cause of action for promissory fraud fails to state facts sufficient to constitute a cause of action against defendant because the claim lacks the requisite specificity.

“The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.’ [Citations.] [¶] ‘Promissory fraud’ is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

“[E]very element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint.” (*Cooper v. Equity Gen. Ins.* (1990) 219 Cal.App.3d 1252, 1262.) “[T]he rationale for this ‘“strict requirement[] of pleading” ’ [citation] is not merely notice to the defendant. ‘“The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense.” ’ [Citation.] Thus ‘“the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.” ’ [Citation.] [¶] This particularity requirement necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’ [Citation.]” (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 [emphasis in original].)

Plaintiff's TAC alleges, inter alia: Decedent Richard Mendonsa was at all times 65 years of age or older and a dependent adult (TAC, ¶ 2); he had physical limitations that restricted his ability to carry out normal activities (*ibid.*); plaintiff was decedent's

only child and they were very close to one another (*id.*, ¶ 3); defendant (decedent's spouse) made false representations to plaintiff over the course of Richard's final illness that she "would take care of and comfort" Richard (*id.*, ¶ 5); more specifically, defendant misrepresented that she "would attend to and advocate for Richard's care at each meeting with his doctors and that she would ensure he was taken to all care appointments in a timely manner" (*id.*, ¶ 16); defendant "communicated" to plaintiff that she would care for decedent at home and assured plaintiff of her ability to meet Richard's specific needs, "which meant that she would not physically abuse him, and that she would consistently ensure his physical needs would be met, which included, but was not limited to, regularly preparing and serving nutritionally adequate meals, physically assisting him to use the restroom, bathing him, administering enemas and suppositories, and ensuring his foley catheter was regularly changed and functioning properly" (*id.*, ¶ 17); defendant did not intend to perform this promise when made, as evidenced by her conduct, continued social engagements, and other activities that took her away from caretaking for decedent (*id.*, ¶ 6); defendant intended that plaintiff rely on this promise, which would remove plaintiff from a caretaking position for her father and would prevent plaintiff from interfering with defendant's lifestyle and inhibiting defendant's disregard and mistreatment of decedent (*id.*, ¶ 7); plaintiff reasonably relied on defendant's continuing promise that decedent's needs would be met and that he would spend his end-of-life stage in a loving and nurturing environment (*id.*, ¶ 8); believing defendant's promise to be true, "in lieu of moving in to the Mendonsa house to care for her father, or arranging proper care outside of the home," plaintiff agreed to defendant assuming responsibility for decedent's care (*id.*, ¶ 30); plaintiff was harmed emotionally and financially after her discovery that defendant's promise was a misrepresentation that she had relied on (*id.*, ¶¶ 10, 36–40); defendant's conduct was a substantial factor in causing harm to plaintiff (*id.*, ¶¶ 11, 42–45).

As the court previously found with regard to plaintiff's prior complaints, these allegations lack the requisite specificity for a fraud cause of action. "To sufficiently plead the first requirement, that the defendant made a promise, the complaint must state '“facts which ‘show how, when, where, to whom, and by what means the representations were tendered.’” [Citation.] [Citation.]’" (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 [emphasis in original].)

Here, plaintiff's allegations concerning defendant's promises that she would "care for Richard," that his "physical needs would be met," that he would be in a "caring and nurturing environment," and that he would be taken to his appointments lack the type of who-what-where-when-how facts required. In the TAC, plaintiff added that "caring for" and meeting Richard's physical needs "meant" that defendant would, for example, cook healthy meals, bathe him, help him use the restroom, and administer enemas, but the TAC does not assert that defendant actually promised to perform those specific actions, as opposed to plaintiff's interpretation of what "caring for" meant to her. These alleged promises or representations are not clear or adequately definite in their terms, and the limits of defendant's expected performance are not sufficiently defined to put defendant on notice or to prepare her defense. (*See Ladas v. Cal. State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 770 ["To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."].) "Promises too vague to be enforced will not support a fraud claim any more than they will one in contract." (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216, disapproved of on another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

Furthermore, plaintiff has not adequately pleaded damages to her as a result of defendant's conduct. "“ ‘In an action for ... fraud, damage is an essential element of the cause of action.’ [Citation.] ‘Misrepresentation, even maliciously committed, does

not support a cause of action unless the plaintiff suffered consequential damages.’ ” ’
[Citation.]” (*Beckwith, supra*, 205 Cal.App.4th at p. 1064.)

In the TAC, plaintiff alleges for the first time that she missed out on a business opportunity (a plan to open a bakery) as a result of defendant’s misrepresentations. (TAC, ¶ 40.) “If the existence—and not the amount—of damages alleged in a fraud pleading is ‘too remote, speculative or uncertain,’ then the pleading cannot state a claim for relief.” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 202, quoting *Block v. Tobin* (1975) 45 Cal.App.3d 214, 219 [finding fraud plaintiff could not recover lost profits because no facts were alleged showing plaintiff would have made a profit absent the fraud].) These damages are too speculative since there were only plans to open a bakery, and there are no facts alleged showing that, absent defendant’s representations, the business would have been operational and profitable.

Defendant’s demurrer on the basis that the TAC fails to state facts sufficient to constitute a cause of action against defendant because the promissory fraud claim lacks the requisite specificity is sustained. Plaintiff has had four opportunities to sufficiently allege fraud and has failed. There does not appear to be a reasonable possibility that the pleading can be cured by further amendment, and plaintiff has not sufficiently explained how the TAC can be amended to cure the defect. (*See Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321.) Leave to amend is denied.

B. MOTION TO STRIKE THE THIRD AMENDED COMPLAINT

Because the demurrer was sustained without leave to amend, the motion to strike is moot.

TENTATIVE RULING # 1: DEFENDANT’S DEMURRER IS SUSTAINED WITHOUT LEAVE TO AMEND. DEFENDANT’S MOTION TO STRIKE PORTIONS OF THE THIRD AMENDED COMPLAINT IS MOOT.

2. TAHOE KEYS MARINA v. TAHOE KEYS POA, SC20170140

Defendant's Motion for Attorney Fees and Costs

**TENTATIVE RULING # 2: ON THE COURT'S OWN MOTION, MATTER IS
CONTINUED TO 1:30 P.M., FRIDAY, OCTOBER 22, 2021, IN DEPARTMENT
FOUR. THE COURT APOLOGIZES TO THE PARTIES FOR ANY
INCONVENIENCE.**

3. JOHNSON, ET AL. v. JOHNSON, SC20180141**Referee's Petition for Instructions**

This matter is on for the referee's petition for instructions from the court. First, the referee asks whether this action is stayed during the pendency of defendant's appeal to the Court of Appeal for the Third Appellate District. Second, he asks: "How to proceed with the sale given the chilling effects of [defendant's] allegations on the willingness of Realtors to enter into a listing agreement?"

Is the Action Stayed on Appeal from the Interlocutory Judgment?

"The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, *unless an undertaking in a sum fixed by the trial court is given that the appellant or party ordered to sell, convey or deliver possession of the property will not commit or suffer to be committed any waste thereon*" (Code of Civ. Proc. ("CCP") § 917.4 [emphasis added].)

Defendant's appeal is from the interlocutory judgment directing the sale of real property. Accordingly, CCP § 917.4 applies, which means the action was not automatically stayed once defendant filed his appeal. Furthermore, defendant did not post an undertaking after filing the appeal. Therefore, this action is not stayed.

How to Proceed With the Sale Given the Chilling Effects of Defendant's Actions?

The court emphasizes that the referee is authorized by statute (CCP § 873.110) and the court's statement of decision and interlocutory judgment to enter into and execute contracts for services of real estate brokers and others as necessary to effect the sale of the property. The referee is not personally liable on such contracts. (CCP § 873.160.) In addition, the referee, and not the parties, must execute the deed conveying the property to the purchaser. (CCP § 873.790(a).)

Any potential sale must be properly noticed (CCP § 873.640(a)) and is subject to confirmation by the court (CCP § 873.720(a)). At the confirmation hearing, the sale may be vacated if the court finds, among other things, that the sale proceedings were unfair, notice of sale was not properly given, or the sale price is disproportionate to the property's value. Accordingly, the partition statutes provide various mechanisms to ensure the sale is properly and fairly consummated.

An order confirming the sale in a partition action authorizes the conveyance upon the specified terms and conditions in the sale agreement. (*Scott v. Staggs* (1954) 129 Cal.App.2d 54, 59.) If the sale is confirmed, by doing so the court also ratifies the actions of, in this instance, the referee and an agent acting on his behalf. (*Bechtel v. Wier* (1907) 152 Cal. 443, 445.) “The word ‘ratify’ means to approve and sanction, to make valid, to confirm, to give sanctions to, or to authorize or otherwise approve retroactively an agreement or conduct either expressly or by conduct.” (2B Cal.Jur.3d (Aug. 2021 Update) Agency, § 89.) The court’s ratification of the sale provides assurances to the referee, real estate brokers, escrow agents, purchasers, and others involved in the sale that the sale was properly and fairly made in accordance with the law and, thus, protects such persons from liability to the parties based on their roles in assisting in the sale of the property.

The court cautions the parties not to engage in conduct that could be construed as, inter alia, obstruction or sabotage of the marketing or sale of the property; intimidation of the referee, the real estate brokers or agents, the purchasers, or others involved in the sale; or waste of the real property, as doing so could be construed as a violation of the court’s orders and could potentially result in contempt or other appropriate proceedings to compel compliance with the court’s orders.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 8, 2021, IN DEPARTMENT FOUR.

4. WAHLE v. SIERRA GARDEN APTS., ET AL., SC20190035**Defendants' Motion for Summary Judgment/Adjudication**

In 2017, plaintiff Linda Wahle slipped and fell on ice at the bottom of a staircase. Plaintiff's complaint, filed in 2019, alleges negligence and premises liability against defendants Sierra Garden Apartments, Pacific Development Group, and Saint Joseph Community, LLC.¹ At the time the complaint was filed, plaintiff was represented by counsel. On March 18, 2021, the court issued an order granting plaintiff's counsel's motion to be relieved as counsel of record.

On August 9, 2021, the court issued an ordering granting defendant St. Joseph's motion for summary judgment.

Pending is the defendants Sierra Garden Apartments and Pacific Development Group's motion for summary judgment or, alternatively, summary adjudication. Plaintiff did not oppose the motion.

STANDARD OF REVIEW

The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) "The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the

¹ Erroneously sued as St. Joseph Community Land Trust.

party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

REQUEST FOR JUDICIAL NOTICE

Defendants' request that the court take judicial notice of the following is granted: (1) plaintiff's complaint (filed Feb. 7, 2019); (2) defendants' answer to the complaint (filed July 15, 2021); and (3) the court's order (entered Feb. 21, 2020) granting St. Joseph's motion deeming as admitted all matters specified in its request for admissions to plaintiff (set one). (Evid. Code §§ 452(d)(1), 453; Defs. Separately Bound Volume of Evid., Exs. A–C.)

DISCUSSION

In ruling on defendants' motion, the court reviewed the following documents: (1) plaintiff's complaint; (2) defendants' answer to the complaint; (3) defendants' notice of motion and motion for summary judgment or, alternatively, summary adjudication; (4) memorandum of points and authorities in support of motion; (5) separate statement of undisputed material facts in support of motion ("UMF"); (6) declaration of Steven A. Scordalakis in support of motion; (7) separately bound volume of evidence in support of motion; (8) request for judicial notice in support of motion; and (9) proofs of service of the moving papers.

The proofs of service to the moving papers declare that plaintiff was served by FedEx overnight delivery on July 22, 2021. To date, plaintiff has not opposed defendants' motion, or otherwise filed any type of response or evidentiary objection, and she did not request either a continuance of the hearing or permission to file a late opposition. Plaintiff's opposition was due no less than 14 days before the hearing.

Even when no opposition is filed, the moving party bears the initial burden of establishing evidentiary facts demonstrating that party's entitlement to summary judgment. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 59–60.)

Plaintiff's complaint alleges negligence and premises liability against all remaining defendants. "The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

After reviewing and considering defendants' moving papers, the court finds that defendants have met their initial burden of establishing they are entitled to judgment as a matter of law. (UMF ¶¶ 6–14.)²

The burden now shifts to plaintiff to demonstrate there are triable issues of material fact. Because plaintiff did not oppose the motion or submit any evidence or evidentiary objections in opposition, she has failed to demonstrate there are triable issues of material fact. Accordingly, defendants' motion for summary judgment is granted.

TENTATIVE RULING # 4: DEFENDANTS SIERRA GARDEN APARTMENTS AND PACIFIC DEVELOPMENT GROUP'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

² These paragraphs are repeated three times in the UMF and are identical.

5. HOWARD v. MAGANA, SC20200037

(1) Motion to Compel Defendant's Discovery Responses

(2) Motions to be Relieved as Counsel of Record

TENTATIVE RULING # 5: JOE LAUB'S AND PATRICIA SUDA'S SEPARATE MOTIONS TO BE RELIEVED AS COUNSEL OF RECORD FOR DEFENDANT ARE GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. AT THE PARTIES' REQUEST, THE MOTION TO COMPEL DISCOVERY RESPONSES IS CONTINUED TO 1:30 P.M., FRIDAY, NOVEMBER 19, 2021, IN DEPARTMENT FOUR.

6. BARACKMAN v. TEAZ N PLEAZ, INC., ET AL., SC20200179

Motion for Preliminary Approval of Class Action Settlement

TENTATIVE RULING # 6: MOTION FOR PRELIMINARY APPROVAL IS GRANTED AS REQUESTED. APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 8, 2021, IN DEPARTMENT FOUR, WITH REGARD TO SELECTING A HEARING DATE FOR FINAL APPROVAL OF THE SETTLEMENT.

7. DEPPE, ET AL. v. TAHOE TRANSPORTATION, ET AL., SC20210030

- (A) Motion to Compel Plaintiff Sarah Deppe's Responses to Form Interrogatories**
- (B) Motion to Compel Plaintiff Sarah Deppe's Responses to Request for Production**
- (C) Motion to Compel Plaintiff Evan Deppe's Responses to Form Interrogatories**
- (D) Motion to Compel Plaintiff Evan Deppe's Responses to Request for Production**

This action arises from a collision of motor vehicles in the Smart & Final parking lot in South Lake Tahoe. Pending are defendants' four motions to compel discovery responses from plaintiffs Sarah Deppe and Evan Deppe.

On May 25, 2021, each plaintiff was served by regular mail via their attorney of record with a set of Form Interrogatories (Set One) and Request for Production (Set One). (Declarations of Gregory A. Nelson in Support of Motions, ¶ 3 & Ex. 1.) Plaintiffs did not serve any responses by the deadline and did not request an extension of time to respond. (*Id.*, ¶¶ 4–6; Code of Civ. Proc. §§ 2030.260(a) & 2031.260(a).) Although not required to do so, on July 13, 2021, defendants' counsel sent a meet and confer letter by facsimile and regular mail to plaintiffs' counsel. (Nelson Decl., ¶ 7 & Ex. 2.) As of the date of filing of the instant motions, no response was received as to the meet and confer letter and no discovery responses were served. (*Id.*, ¶¶ 7–8.) To date, plaintiffs have not filed opposition briefs to the motions.

Good cause appearing, the motions are granted. (*See* Code of Civ. Proc. §§ 2030.290(a), (b), & 2031.300(a), (b).) Having reviewed and considered defendants' counsel's declaration concerning fees, the court finds that a total of \$975.00 (\$195.00/hour x 5 hours) is a reasonable sanction under the Discovery Act.

TENTATIVE RULING # 7: DEFENDANTS' MOTIONS ARE GRANTED. PLAINTIFFS SARAH DEPPE AND EVAN DEPPE MUST EACH SERVE VERIFIED RESPONSES, WITHOUT OBJECTIONS, TO DEFENDANTS' (1) FORM INTERROGATORIES (SET ONE) AND (2) REQUEST FOR PRODUCTION (SET ONE) AND PAY DEFENDANTS \$975.00 IN SANCTIONS NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER.

8. MATTER OF EARL, SC20210152

OSC Re: Name Change

There is no Proof of Publication and no printout of petitioner's CLETS/CJIS record in the court's file.

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 8, 2021, IN DEPARTMENT FOUR.

9. BANK OF AMERICA, N.A. v. NICHOLSON, SCL20210055**(1) Motion for Order to Deem Matters Admitted****(2) Motion to Continue MSC**Motion for Order to Deem Matters Admitted

This is a debt collection action. Plaintiff's complaint asserts a single cause of action for common counts. On May 12, 2021, plaintiff served defendant by regular U.S. Mail with Requests for Admissions (Set One). (Mot., Supporting Declaration of Adam Kidd, ¶ 2 & Ex. A.) Defendant did not serve any verified responses by the deadline. (*Id.*, ¶ 3.) There is no meet and confer requirement for a motion to deem matters admitted. (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 777–778.)

Having reviewed and considered plaintiff's moving papers, and good cause appearing, the motion is granted.

Motion to Continue MSC

Appearances are required.

TENTATIVE RULING # 9: PLAINTIFF'S MOTION TO DEEM MATTERS ADMITTED IS GRANTED. APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 8, 2021, IN DEPARTMENT FOUR REGARDING THE MOTION TO CONTINUE THE MANDATORY SETTLEMENT CONFERENCE.