

Tentative Rulings for December 1, 2021
Department 403

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

19CECG01806 *Chase v. State of California Dept. of State Hospitals* is continued to
Thursday, January 20, 2022 at 3:30 p.m. in Dept. 403

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Tentative Ruling

Re: **FCERA Realty Group, LLC. v. Boardwalk at Palm Bluffs, LP, et al.**
Superior Court Case No. 19CECG01169

Hearing Date: December 1, 2021 (Dept. 403)

Motion: Defendants B&L Mechanical, Inc., Westech Systems, Inc., Johnson Fire Protection Incorporated, Peters Roofing, Inc. and Meyers Constructors, Inc.'s demurrer to the Second Amended Complaint's ninth and tenth causes of action. Defendants B&L Mechanical, Inc. and Westech Systems, Inc.'s motion to strike portions of the Second Amended Complaint

Tentative Ruling:

To sustain the demurrers to the Second Amended Complaint's ninth and tenth causes of action. (Code Civ. Proc., § 430.10, subds. (e) and (f).) To grant the motions to strike. (Code Civ. Proc., §§ 435 and 431.10, subd. (b).) To grant leave to amend. Should plaintiff desire to amend, the Third Amended Complaint shall be filed within ten (10) days from the date of this order. The new amendments shall be in **bold print**. Should plaintiff elect not to amend, defendants shall file responsive pleadings within thirty (30) days from the date of this order.

To overrule plaintiff's objections as not relevant to the rulings.

Explanation:

Demurrer

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v Poag* (1984) 150 Cal.App.3d 541, 545.) The truth of the facts alleged in the complaint are assumed true as well as the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 2 Cal.4th 876, 883; see also *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1168 [actual reliance in support of a fraud claim reasonably inferable from the plaintiff's complaint]; Code Civ. Proc., 452 ["In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."].)

Furthermore, "[t]his rule of liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.) Nevertheless, "[t]he courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Fraud: Causes of Action Nine and Ten

“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.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, citations omitted.) In addition, “[t]he elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true.” (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184-185.)

In addition “[c]auses of action for intentional and negligent misrepresentation sound in fraud and, therefore, each element must be pleaded with specificity.” (*Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1166.) And “[o]ne purpose of the specificity requirement is to inform the defendant about the charges that must be met.” (*Murphy v. BDO Seidman* (2003) 113 Cal.App.4th 687, 693.) The complaint must thus provide enough information for the defendants to know what conduct or statements constitute the alleged falsehood. (*Ibid.*)

General and conclusory allegations are therefore insufficient. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.) Accordingly, “[t]he specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.” (*Ibid.*)

Furthermore, “[i]f a representation is made with ‘intent to defraud ... a particular class of persons,’ the one making such a representation is deemed to have intended ‘to defraud every individual in that class who is actually misled by the deceit.’” (*Varwig v. Anderson-Behel Porsche/Audi, Inc.* (1977) 74 Cal.App.3d 578, 580, citation omitted; see also *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [“‘An action for deceit does not require privity of contract.’ [Citation.]”].)

Generally, “to be actionable, a misrepresentation must be of an existing fact, not an opinion or prediction of future events.” (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769.) There are exception to this rule which arise “ ‘(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former’s superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.’” (*Ibid.*, citation omitted.) Nevertheless, statements with regard to values subject to the power of public officials may not justifiably be relied upon. (*Holder v. Home Sav. & Loan Assn.* (1968) 267 Cal.App.2d 91, 106-107 [addressing property assessments and levies of taxes].)

Here, plaintiff has alleged that it asked that each contractor and tradesmen be paid the prevailing wage. (SAC, ¶ 30.) Plaintiff also alleges that, in response to that

request the demurring defendants provided the subject price increases (SAC, ¶¶ 107-114), which plaintiff paid. (SAC, ¶¶ 29-30.) Specifically, the principals of each demurring defendant are identified, as is each demurring defendant's respective price increase. (SAC, ¶¶ 107-114.) Therefore, considering the allegations that the price increase was in direct response to plaintiff's request to include prevailing wages, the price increase was made by principals and "authorized personnel," and paid by plaintiff, the price increase can be reasonably interpreted as something more than an opinion or prediction. (See *Brakke v. Economic Concepts, Inc.*, *supra*, 213 Cal.App.4th at p. 769; see also *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1530 ["[I]t is not always necessary that a fraudulent misrepresentation be made to the intended actor."].)

Also, a contractual relationship may be unnecessary where a plaintiff falls within the class of persons defrauded. (*Varwig v. Anderson-Behel Porsche/Audi, Inc.*, *supra*, 74 Cal.App.3d at p. 580; see also *Lingsch v. Savage*, *supra*, 213 Cal.App.2d at p. 736 ["'An action for deceit does not require privity of contract.' [Citation.]"]). Here, plaintiff alleges that defendants acted to "deceive and defraud plaintiff and induce plaintiff to act in reliance on these representations" (SAC ¶ 114.) In other words, plaintiff has sufficiently alleged that it was within the class of persons to whom defendants' actions were directed. Accordingly, plaintiff's ninth and tenth causes of action are not defective due to the lack of contractual privity.

Similarly, the complaint contains allegations sufficient to establish the existence of a purchase – as opposed to option – contract. (See *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349 ["'The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified.'" Citations omitted].) Here, the complaint describes the parties to the contract, the subject property, and payment. (SAC ¶¶ 29-30.) Furthermore, there is no connection with the scope of the subject contract to plaintiff's allegation that defendants' price increase was fraudulently inflated. In other words, whether or not the contract was an option contract does not, by itself, render plaintiff's ninth and tenth causes of action defective.

Nevertheless, the Second Amended Complaint does not provide a factual basis to support the conclusion that the price increase was "significantly inflated." Particularly, there are no facts or calculations supporting plaintiff's allegation of significant inflation; nor are there allegations how the increases differed from the true prevailing wage. Similarly, there is no allegation how plaintiff arrived at its alleged damages of at least \$405,670.00. (SAC, ¶ 117.) Consequently, the Second Amended Complaint lacks the specificity required to allege falsity and entitlement to relief. (See *Furia v. Helm* (2003) 111 Cal.App.4th 945, 957 [although a specific dollar amount is not "necessarily fatal" there must be facts pleaded which "entitle the plaintiff to relief."].)

In addition, without an explanation how plaintiff calculated its damages, it cannot be determined whether defendants knew or acted in conscious disregard of the discrepancy or whether the discrepancy was to an extent that plaintiff's reliance was reasonable. (See *Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475 ["Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact."].)

Therefore, the second amended complaint is insufficient to state causes of action for intentional or negligent misrepresentation, and demurring defendants' general demurrers are sustained. (Code Civ. Proc., § 430.10, subd. (e).) Because this is plaintiff's first opportunity to respond to a demurrer on these causes of action, leave to amend is granted. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment."].)

Special Demurrer

Special demurrers for uncertainty are "disfavored." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) They are "strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures" (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616), and "should be overruled when the facts as to which the complaint is uncertain are presumptively within the defendant's knowledge." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) In essence, "any mere ground of special demurrer for uncertainty will be resolved in support of the complaint and the demurrer overruled, when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication." (*Hunter v. Freeman* (1951) 105 Cal.App.2d 129, 133.)

Although demurring defendants make multiple contentions concerning the clarity of plaintiff's complaint, it is reasonably deducible from the complaint that the reference to the expectation that the damages will exceed \$405,670.00 is in reference to the subcontractor defendants in the aggregate. In addition, plaintiff has filed a Notice of Errata clarifying that it paid \$6,196,180.00 plus \$807,732.00 for the purchase of the property. (See Notice of Errata filed March 3, 2021, ¶2.) Plaintiff's filing of the Notice of Errata indicates an acceptance that particular allegations in the second amended complaint are uncertain, but curable through amendment. Accordingly, the special demurrers are sustained, but to the extent any lingering uncertainties can be clarified through amendment, plaintiff is granted the opportunity to do so. (*Estate of Holdaway* (2019) 40 Cal.App.5th 1049, 1057.)

Motion to Strike

A motion to strike can be used to cut out any "irrelevant, false or improper" matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc., § 431.10, subd. (b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient (and hence improper) and therefore may be stricken. However, if looking to the complaint as a whole, sufficient facts are alleged to support the allegations, then a motion to strike should be denied. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) There must be clear and convincing evidence that

