Tentative Rulings for November 17, 2021
Department 503

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).)

19CECG00501 ***Stamoulis v. Williams*** **(Dept. 503)**

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

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Los Arboles Family Apts., L.P. v. Orange Cove Amaya Assoc., et al.***
Superior Court Case No. 21CECG00620

Hearing Date: November 17, 2021 (Dept. 503)

Motion: Demurrer and Motion to Strike by Defendants Orange Cove Amaya Associates and AMG & Associates, LLC

Tentative Ruling:

To deny the motion to strike. (Code Civ. Poc., § 436.)

To overrule the general and special demurrers. (Code Civ. Proc., § 430.10, subd. (e), (f).) Moving parties shall file their answer(s) within 10 days of service of the minute order by the clerk.

Explanation:

Demurrer

Defendants Orange Cove Amaya Associates ("Amaya") and AMG & Associates, LLC ("AMG") (collectively referred to as "defendants" for purposes of these motions) demur to each cause of action of the complaint, both generally for failure to state a cause of action, and specially, for uncertainty. (Code Civ. Poc., § 430.10, subd. (e), (f).)

The court will quickly dispose of the special demurrer. A demurrer for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond; i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Defendants make no showing that the complaint is so vague that defendants cannot ascertain how to respond. In fact, the special demurrer receives little attention in defendants' points and authorities. The complaint is quite detailed in its allegations, it clearly sets forth the nature and substance of the claims, and defendants certainly had no difficulty ascertaining the nature of the claims against them and responding to those claims when opposing plaintiff's motion for preliminary injunction. Defendants have clearly demonstrated that they can attack the causes of action on the merits.

Defendants contend that every cause of action of the complaint is barred by the statute of limitations[1] because the Access Document was signed on October 31, 2007 by

[1] Regardless of the statute applicable to any particular cause of action, if the cause of action accrued on the signing or recording of the document, which occurred almost 14 years ago, each cause of action would be untimely, as the limitations periods are all for three to five years. (Code

plaintiff's general partner and recorded on December 12, 2007. Plaintiff alleges that the easement was not discovered until January 2021 (Complaint ¶¶ 51, 61), and filed the complaint on March 3, 2021.

"A demurrer on the ground of the bar of the statute of limitations lies where it "appear[s] clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred." (*Valvo v. Univ. of Southern California* (1977) 67 Cal.App.3d 887, 895; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1155.) Where a complaint discloses on its face that the statute of limitations has run on the cause of action stated in the complaint, it fails to state facts sufficient to constitute a cause of action. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833, rehg. denied, rev. denied.)

> [I]t may be difficult for a "demurrer[ ] based on the statute of limitations to succeed because (1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled."

(*Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, 1117, quoting *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420.) The court cannot say definitively that the statute of limitations expired prior to plaintiff filing the complaint. Questions surrounding the statute of limitations are permeated by disputed facts.

The complaint alleges facts describing why the Access Document was not discovered earlier. Plaintiff alleges that it was not until January 6, 2021, when defendant Amaya sent a letter stating that it intended to remove a fence on the Los Arboles property, and it was not until January 19, 2021, when Amaya wrongfully removed curbing and asphalt from the Los Arboles property. (Complaint ¶¶ 51, 61.) Plaintiff alleges that it did not know of the Access Document until this year, that its general partner in signing the Access Document may have been mistaken or misled by AMG about the document before it was executed, and that AMG knew or should have known that the Access Document was not binding unless the limited partner's consent was obtained. (Complaint ¶¶ 22, 52, 54.) These are issues of serious dispute in this action.

As the opposition points out, a party may not be held to constructive notice of recorded documents "because the purpose of the recording acts is to afford protection to bona fide purchasers not to those making fraudulent misrepresentations." (*Sullivan v. Dunnigan* (1959) 171 Cal.App.2d 662, 668.) The recording of the Access Document did not necessarily impart constructive notice of the claimed easement. Whether or not plaintiff was negligent in not discovering it is a factual issue that should not be resolved in an attack on the pleadings.

Civ. Proc., §§ 321 [quiet title], 337 [declaratory relief], 338, subd. (c)(1) [conversion], 370, subd. (d) [trespass].

Defendants argue that the limited partnership agreement ("LPA") did not require consent of the limited partner, and, if it did, plaintiff is nonetheless bound by the consent of its agent. However, there are multiple provisions of the LPA that can be read to require limited partner approval for signing the Access Document. Since defendants request judicial notice of the LPA, the court will consider it, although it is not attached as an exhibit to the complaint. Section 5.2C prevents plaintiff's general partner from creating or allowing to exist any "Lien" on the Property. (See RJN, Ex. A, § 5.2C.) Also, section 7.3(g) requires limited prior written consent from the limited partner to encumber or transfer any interest in the partnership. The LPA defines "Lien" as "any lien, mortgage[,] pledge, security interest, charge or encumbrance of any kind." (*See id.* at 9.) "Any type of easement or right of another to use the property constitutes an encumbrance[.]" (Miller & Starr, *Cal. Real Estate*, § 2:18.) Section 5.2G also prevents the general partner from amending or modifying any project-related documents, including documents relating in any way to the development, use or operation of the Los Arboles project, unless the limited partner's approval was obtained. (RJN Ex. A, § 5.2G.) This could include an easement giving access or control of portions of the property to a third party. Plaintiff has identified provisions in the agreement that can be read to require limited partner approval of the easement.

It is true that the general partner acted as plaintiff's agent, and ordinarily the principal will be bound by the acts of its agent. Defendants correctly point out that John Clem was the actual agent of Los Arboles because he was designated as the general partner (see Corp. Code, §15904.02), and therefore had authority to execute documents on behalf of plaintiff (see Civil Code, §§2304, 2315, 2316). However, an agent only has such authority as the principal confers upon him. (Civ. Code, § 2315.) An act of the general partner is binding "unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with whom the general partner was dealing knew, had received a notification, or had notice . . . that the general partner lacked authority." (Corp. Code, § 15904.02, subd. (a).) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities is binding "only if the act was actually authorized by all the other partners." (*Id.*, § 15904.02, subd. (b).) As set forth above, there are provisions of the LPA that required limited partner approval to encumber the property. Accordingly, the complaint does allege facts supporting the contention that plaintiff was not bound by the act of its general partner in signing the Access Document without limited partner approval. Factual disputes permeate these issues, rendering them incapable of resolution in the context of a demurrer.

Defendants contend that because the complaint alleges that the general partner's execution of the Access Document may have been the result of mistake or fraud (see, e.g., Complaint ¶ 23), the complaint is uncertain because plaintiff fails to plead fraud with specificity. "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (*See Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156, emphasis added.) This particularity requirement necessitates pleading facts which "show how, when, where, to whom, and by what means the representations were tendered." (*See Hills Trans. Co. v. Southwest Forest Industries Inc.* (1968), 266 Cal.App.2d 702, 707.)

First, the complaint alleges no cause of action for fraud. Defendants cite to no authority requiring pleading with particularity under the circumstances alleged here. Second, there is no shortage of detail in the complaint – defendants are fully apprised of the substance and nature of plaintiff's claims. Third, "less specificity is required of a complaint when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy; even under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of Calif.* (2016) 245 Cal.App.4th 821, 838.) Defendants would have more knowledge of what Alexis Gevorgian communicated to plaintiff's general partner. Further details can be obtained through discovery. (*See Alfaro v. Cmty. Hous. Improvement Sys. & Plan Ass'n, Inc.* (2009) 171 Cal.App.4th 1356, 1285.)

Defendants contend that the seventh cause of action for violation of Business and Professions Code section 17200 fails to allege the "unfair or fraudulent" conduct on which the cause of action is based. However, the cause of action incorporates by reference the factual allegations of the complaint (see Complaint ¶ 98), and alleges that the "unlawful, unfair, and/or fraudulent" was "causing execution of the unauthorized Access Document by Owner's non-profit general partner (if any) without Owner's limited partner's consent, in violation of Owner's partnership agreement, and prior similar deceitful conduct, was unlawful, unfair, and/or fraudulent, and constituted a violation of Business & Professions Code section 17200 et seq." (See Complaint ¶ 99.) The basis of the cause of action is clear.

Defendants also contend that the request for attorneys' fees in the seventh cause of action is vague and does not specify what important right affecting the public interest has been violated. This issue should have been raised in the motion to strike. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167.) Substantive defects in a portion of the pleading can be challenged by a motion to strike. (*Ibid.*) The court will not convert this demurrer into something akin to a summary judgment motion by assessing the evidentiary support for plaintiff's allegations. (See Reply, 4-5.) While the court can take judicial notice of a party's own affidavits that contradict the complaint (see *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 83-84), the reply makes clear that judicial notice of declarations was requested for the purpose of showing that plaintiff could not effectively amend the complaint. (See Reply, 4:25-27.) In light of the court's ruling overruling the demurrers, no amendment is necessary.

The court finds that each cause of action of the complaint alleges sufficient facts to state a cause of action, and the complaint is not uncertain. The demurrer is based on facts that are very much in dispute in this action, and will have to be resolved by the trier of fact.

The court notes that defendants' request for judicial notice of declarations filed in connection with plaintiff's motion for preliminary injunction is denied. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985)

39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) While the court can take judicial notice of court filings (Evid. Code, § 452, subd. (d)), the court cannot accept as true the contents of those documents. (See *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865.) These declarations cannot and should not be considered in the context of a demurrer.

Motion to Strike

A defendant may move to strike a pleading or allegations from a pleading in two situations: (a) the allegation is "irrelevant, false, or improper" or "superfluous" or "abusive" and (b) where the "pleading was not drawn in conformity with the laws of the state or a court rule." (Code Civ. Proc., § 436, subd. (a), (b).) "Irrelevant matter" is an allegation that is not essential to the statement of a claim or defense, or an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense. (Code Civ. Proc., § 431.10, subd. (b), (c).) As the opposition notes, a motion to strike is not meant to be a "line item veto" for a defendant (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683), and the court will not treat it as such.

Defendants move to strike paragraphs 26-29, 35-39 and 40-42 from the complaint on the ground that they contain irrelevant and improper material. Paragraphs 26-29 concern Alexis Gevorgian's prior history in entering into limited partnership agreements with plaintiff's limited partner's affiliates, in which agreements the limited partner was given the right to consent to any easement affecting the low-income housing tax credit property. While clearly not strictly necessary to state a cause of action, these allegations go to AMG's knowledge of plaintiff's general partner's authority to execute the Access Document. This is relevant to whether the act of plaintiff's partner is binding on plaintiff. (See Corp. Code, § 16301, subd. (1), (2).) It is also intended to provide support for plaintiff's contention that its general partner signed the Access Document as a result of mistake or fraud.

Paragraphs 35-39 allege execution of an unauthorized easement in another project involving Mr. Gevorgian and Amaya's current principal, Caleb Roope. According to plaintiff, the general partner admitted that it had been "misled" about the unauthorized easement. These allegations are also included to support plaintiff's allegations that the Access Document was improperly obtained for plaintiff's property and that defendants' agents had misled others in a similar manner.

Paragraphs 40-42 concern a consulting agreement signed by Mr. Gevorgian in 2005 with plaintiff's general partner relating to the Los Arboles property. Plaintiff alleges that "this 2005 Consulting Agreement (by which Mr. Gevorgian's entity purportedly obtained valuable rights in the Project, without the limited partner's knowledge or consent), may have contributed to, or been a factor in, any wrongful execution of the Access Document, without the limited partner's knowledge or consent." (Complaint ¶ 42.) Accordingly, there is a connection to the issues raised in this action. The extent to which this document is relevant will no doubt be addressed in discovery.

The court finds that the paragraphs challenged are pertinent to the claims raised in the complaint. Accordingly, the motion to strike is denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 11/15/2021 .
(Judge's initials) (Date)