

**Tentative Rulings for September 28, 2023**  
**Department 403**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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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 above rule also applies to cases listed in this "must appear" section.*

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

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(Tentative Rulings begin at the next page)

## **Tentative Rulings for Department 403**

Begin at the next page

(44)

**Tentative Ruling**

Re: ***Anna Moukhtarian and Vatche Moukhtarian v. JDM Landscape, Inc. and Joshua Mitchell***  
Superior Court Case No. 21CECG02321

Hearing Date: September 28, 2023 (Dept. 403)

Motions: Defendants' Demurrer to Complaint and Motion to Strike Portions of Plaintiffs' Complaint

**Tentative Ruling:**

To sustain the general and special demurrers, with ten (10) days leave to amend which will run from service by the clerk of the minute order. New allegations/language must be set in boldface type.

To grant the motion to strike with ten (10) days leave to amend which will run from service by the clerk of the minute order. New allegations/language must be set in boldface type.

To find that defendants adequately attempted to meet and confer with plaintiffs' counsel, who effectively refused to do so.

**Explanation:**

The express basis for the defendants' demurrer is that the complaint and each of its causes of action fail to state sufficient facts to constitute a cause of action, based upon subdivision (e) of Code of Civil Procedure, Section 431.10 and are otherwise uncertain, based upon subdivision (f) of Code of Civil Procedure, Section 431.10.

*First Cause of Action (Breach of Contract):*

The essential elements of this claim are:

1. The existence of a [valid] contract between the parties;
2. Plaintiff's performance [unless excused];
3. Defendant's [unjustified] [or] [unexcused] failure to perform;
4. Plaintiff had the ability to perform;] [and]
5. Damages to plaintiff caused by the breach.

(1 Witkin, Summary of California Law (11th ed. 2017), Contracts §§ 9, 315, 872; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613.)

Plaintiffs allege that defendants breached an agreement pertaining to backyard landscape/remodeling, which allegedly provided that all services were to be performed properly, in a workmanlike manner, and consistent with applicable "codes". The

complaint references the agreement as attached as Exhibit A. Unfortunately, neither the actual agreement is attached, nor were the agreement's provisions alleged verbatim. Plaintiffs did not identify the specific "code" sections applicable to the job and which were purportedly violated. It is impossible to ascertain whether plaintiff is referring to city building codes or state statutes, although plaintiffs assert that drains were left unconnected and without proper slope and that unspecified "structures" were not "built to code". Finally, plaintiffs contend that defendants failed to properly complete "nearly all of the work".

Given the failure to identify the essential terms of the agreement, or to attach a copy of the written contract, and the lack of detail concerning the breach(es) thereof, the general and special demurrer (for uncertainty) are sustained with leave to amend. The first cause of action appears capable of being cured by an amendment providing these details.

#### *Second Cause of Action (Fraud):*

The elements necessary to state a claim for fraud include: a misrepresentation; knowledge of its falsity; intent to defraud; justifiable reliance; and resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

The second cause of action for fraud is inadequately plead. It alleges that defendants made false representations of fact concerning inspection by a city inspector, even going so far as to procure someone to pose as a city inspector, knowing that the individual lacked that authority. However, it remains unclear whether this conduct occurred after the work was performed and for the purpose of concealing issues with its quality, or before or after the payment was made, since plaintiffs allege that these statements were made to *induce* them to enter into the agreement. Plaintiffs aver that the misrepresentations were made with the intent to defraud or deceive them, causing them to invest \$200,000.00 into something which they subsequently were required to demolish.

The demurrers to the second cause of action for failure to state a claim and uncertainty are sustained with leave to amend.

#### *Third Cause of Action (Negligence):*

Negligence requires that a legal duty of due care is owed by defendant and that the legal duty is breached by defendant causing resulting injury. (*Royal Insurance Company v. Mazzei* (1942) 50 Cal.App.2d 549, 552.) Here, plaintiffs rely upon the agreement as the basis for a duty of due care. Plaintiff allege that defendants performed in an unreasonable and careless manner by failing to "properly perform virtually all of the improvements." Thus, the legal duty of care in the third cause of action for negligence is based on the contract between plaintiffs and defendants. Defendants appear to argue that maintaining both a contract and negligence claim simultaneously is improper. However, inconsistent legal theories may be pled as a matter of law. (*Home Budget Loans v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.)

Nevertheless, the cause of action fails because Plaintiffs have not explained which specific tasks were negligently performed by defendants. There is no averment that defendants agreed to grade, install drains, and build any particular structures and did so in a negligent manner. Instead, plaintiff generally pleads the conclusion that defendants failed to make the agreed improvements. The general and special demurrers are sustained with leave to amend.

*Motion to Strike:*

Defendants move to strike the portion of the complaint found at page 5, line 13, i.e., the prayer for punitive damages.

Code of Civil Procedure, section 436 provides: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading;

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

"To support punitive damages, the complaint asserting one of those causes of action must allege ultimate facts of the defendant's oppression, fraud, or malice." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1055.) Evidentiary facts are not required. 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.)

Here, the punitive damage claim (which is apparently predicated upon the cause of action for intentional misrepresentation) against defendants merely concludes that defendants acted with intent to deceive and to induce contract. As the Second Cause of Action for fraud was not adequately alleged, the claim for punitive damages likewise fails. Thus, the motion to strike is granted with leave to amend, as the defect may be cured with more specific pleading.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civ. Pro., § 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: JS on 9/26/2023.  
(Judge's initials) (Date)

(20)

**Tentative Ruling**

Re: ***Jordan v. Housing Authority of the City of Fresno, et al.***  
Superior Court Case No. 22CECG02640

Hearing Date: September 28, 2023 (Dept. 403)

Motion: Demurrer to Complaint by City of Fresno  
Demurrer to Complaint by Housing Authority of the City of Fresno

**Tentative Ruling:**

To sustain both demurrers to the Complaint, with plaintiff granted 10 days' leave to file an amended complaint. The time in which the Complaint may be amended will run from service of the order by the clerk. All new allegations shall be placed in **boldface** type.

**Explanation:**

**Housing Authority's Demurrer**

The Housing Authority of the City of Fresno demurs on the ground that plaintiff fails to plead compliance with the claim presentation requirements. The Complaint alleges that Fresno Housing Authority is a public entity. (See Complaint, ¶ 5(a).)

Compliance with the claim filing requirements (i.e., Gov. Code, §§ 910, 912.4, 912.8 and 945.4) is an essential element of a damages cause of action against a government entity. Consequently, plaintiff must allege facts demonstrating or excusing claim-filing compliance; otherwise, the complaint is subject to general demurrer for failure to state a cause of action. (*State of Cal. v. Superior Court* (2004) 32 Cal.4th 1234, 1239.) No suit may be brought against a public entity until a written claim has been presented to the public entity and has been acted upon by the Board, or has been deemed to have been denied by the Board. (Gov. Code, § 945.4.) Claims must be filed within 6 months of the accrual of the cause of action. (Gov. Code, § 911.2, subd. (a).)

The Complaint does not allege compliance with the claims statute. (See Complaint, ¶ 9.) Accordingly, the demurrer should be sustained with leave to amend<sup>1</sup>.

**City of Fresno's Demurrer**

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<sup>1</sup> Defendant did not take the step of showing that no claim had been presented, which might warrant sustaining the demurrer without leave to amend. (See *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 [taking judicial notice of absence of a claim in the State Board of Control's records].)

Ordinarily, negligence may be pled in general terms and the plaintiff need not specify the precise act or omission alleged to constitute the breach of duty. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795.) However, under the Act, all governmental tort liability must be based on statute; therefore, the general rule is that statutory causes of action must be pled with particularity. (*Ibid.*)

First, the demurrer is brought on the ground that a duty to install smoke alarms would be a duty owed by the property owner<sup>2</sup>. However, the Complaint clearly alleges that each defendant, including City of Fresno, "owned, maintained, managed and operated" the property. While it may seem unlikely that the City of Fresno owned or managed this apartment complex, that is what is alleged. It is not the function of a demurrer to challenge the truthfulness of the complaint; and for purposes of the ruling on a demurrer, all facts pleaded in the complaint are assumed to be true however improbable they may be. (See *Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280.) While overstating the facts and making allegations without evidentiary support might subject the pleader to sanctions. (See Code Civ. Proc., § 128.7), as it stands the allegations are sufficient with regards to the status of City of Fresno.

The City also contends that the Complaint is unclear as to the City's liability, merely asserting that under Section 815.2<sup>3</sup>, "...Defendants are further liable for Plaintiff's injuries proximately caused by the negligent conduct of its employees and/or agents of these public entities and acting within the course and scope of their employment where such negligent conduct occurred." (Complaint ¶ GN-1.) The City points out that this language does not identify any specific City employee nor does it identify any specific act or omission that plaintiff believes to be negligent, pointing out that the Legislative Committee Comments to Section 815.2 explain that while it is not necessary in every case to identify the particular employee upon whose act the liability of the public entity is to be predicated, it is necessary to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment under the circumstances where he would be personally liable.

Here, though, obviously the City can only act (or fail to act) through its employees. Any ambiguities can be clarified through discovery.

The City then contends that it cannot be held vicariously liable under section 815.2 because the negligent act/or omission, if any, with respect to smoke alarms on the subject premises is not committed or omitted in the employee's individual capacity. Since the employee would have been acting on behalf of the employer, the employee would have no individual liability, and therefore the City cannot be held vicariously liable. (Citing *Yee v. Superior Court* (2019) 31 Cal.App.5th 26.)

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<sup>2</sup> (See *Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 305-306 [landlord has duty to maintain the property in a reasonably safe condition].)

<sup>3</sup> "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

As a general rule, common law principles of respondeat superior apply to render government entities liable for their employees' torts: Under Gov. Code § 815.2, the entity may be vicariously liable for injury proximately caused by its employee's act or omission within the scope of employment if the act or omission would otherwise have given rise to a cause of action against the employee. (Gov. Code, § 815.2; see *State of Calif. ex rel. Dept. of Calif. Highway Patrol v. Sup.Ct. (Alvarado)* (2015) 60 Cal.4th 1002, 1009; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868.)

The liability question boils down to the factual analysis normally applied in *respondeat superior* cases (in particular, whether there was an employment relationship and whether the tortious act or omission occurred in the course and scope of employment). (See *State of Calif. ex rel. Dept. of Calif. Highway Patrol v. Superior Court*, *supra*, 60 Cal.4th at pp. 1012-1015 [remanded on question of employment relationship]; *Garcia v. W & W Comm. Develop., Inc.* (2010) 186 Cal.App.4th 1038, 1048-1049 [no public entity vicarious liability because no employment relationship with alleged tortfeasor].)

However, the plaintiff need not specify at the pleading stage which of the entity's employees committed the acts upon which the vicarious liability claim is predicated. (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th at p. 872; *Tom Jones Enterprises, Ltd. v. County of Los Angeles* (2013) 212 Cal.App.4th 1283, 1291-1293.)

Here, the basis for the City's liability is uncertain under this statutory framework. As the City points out, the City employee, as an independent individual, would have no authority to install and/or maintain a smoke alarm in a private building not owned by him. To that effect, a City employee is not independently liable for any negligent act or omission alleged in connection with the smoke alarms on the subject premises. As a result, it does not appear that the City would be held vicariously liable.

Moreover, the Complaint does not allege a statutory basis for direct liability. Government Code section 815 provides that "[e]xcept as otherwise provided by statute...[a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." In other words, "all government tort liability must be based on statute." (*County of San Bernardino v. Superior Court* (2022) 77 Cal.App.5th 1100, 1107 [emphasis added]; Gov. Code, § 810, et seq.) "[I]n the absence of some constitutional requirement, public entities may be liable only if a statute declares them to be liable." (*Id.* at p. 1108 [emphasis in original].) Here, the Complaint lacks reference to any statute imposing any duties relating to the injuries suffered. Accordingly, the court intends to sustain the demurrer.

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:** JS on 9/25/2023.  
(Judge's initials) (Date)

(37)

**Tentative Ruling**

Re: **John DeCampos v. Matthew Billingsley**  
Superior Court Case No. 23CECG00024

Hearing Date: September 28, 2023 (Dept. 403)

Motion: Defendant Amber Billingsley's Demurrer to the First Amended Complaint

**Tentative Ruling:**

To sustain the demurrer to the third, fourth, fifth, seventh, and eighth causes of action as to defendant Amber Billingsley. Plaintiffs are granted 10 days' leave to file the Second Amended Complaint, which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

**Explanation:**

*Demurrer Generally*

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 test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of his complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well established policy of liberality in reviewing a demurrer sustained without leave to amend, liberally construing the allegations with a view to attaining substantial justice among the parties. (*Glaire v. LaLanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 918.)

A cause of action is not subject to general demurrer if, on consideration of all the facts stated, it appears that the plaintiff is entitled to some relief, even if the facts are inartfully stated or intermingled with irrelevant facts. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110, 123.) Contentions, deductions and conclusions of fact or law are not presumed true on demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Adelman v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 352, 359.)

Leave to amend is routinely granted. Indeed, it is considered an abuse of discretion to deny leave to amend where it is possible plaintiffs can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 C.3d 335, 349.)

Here, the underlying allegations specific to Amber Billingsley are 1) that she acted on behalf of her marital community property with Matthew Billingsley (FAC, ¶ 2); 2) that plaintiffs were aware of disputes between Amber and Matthew Billingsley regarding certain accounts in their pending divorce (FAC, ¶¶ 19-20); 3) that plaintiffs believed the

dispute over the Principal Account was resolved between Amber and Matthew Billingsley (FAC, ¶ 24); and 4) that Amber was included in allegations for fraud relating to other loans in other legal matters (FAC, ¶26). Based on these allegations, plaintiffs assert causes of action for fraud—intentional misrepresentation, negligent misrepresentation, fraudulent concealment, conversion, and constructive trust against Amber Billingsley. Notably, none of these allegations allege any conduct or communication by Amber Billingsley **in** this case or regarding these plaintiffs. Looking to each cause of action alleged against Amber Billingsley, the statements contained in each regarding her participation are conclusory allegations which the court does not presume true on demurrer. (FAC, ¶¶ 49, 59, 66, 79, and 86.)

#### *Third Cause of Action*

Fraud by misrepresentation requires 1) a misrepresentation, 2) knowledge of its falsity, 3) intent to induce reliance, 4) justifiable reliance, and 5) resulting damage. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211.) Fraud must be pled with particularity, with less specificity required if the defendant would have greater knowledge of the facts than a plaintiff. (*Ibid.*) Here, no allegations address any misrepresentation made by Amber Billingsley to these plaintiffs. Allegations regarding possible creation of a document used to defraud alleged in other cases are insufficient to show the elements of fraud as to these plaintiffs. As such, the court sustains the demurrer as to this cause of action, with leave to amend.

#### *Fourth Cause of Action*

The elements of negligent misrepresentation are 1) the misrepresentation of a past or existing material fact, 2) without reasonable grounds for believing the fact to be true, 3) with intent to induce reliance, 4) justifiable reliance, and 5) resulting damage. (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50.) As discussed above, none of the allegations address any representation made by Amber Billingsley to these plaintiffs. Allegations regarding possible creation of a document used to defraud alleged in other cases are insufficient to show the elements of negligent misrepresentation as to these plaintiffs. As such, the court sustains the demurrer as to this cause of action, with leave to amend.

#### *Fifth Cause of Action*

Fraudulent concealment requires 1) defendant concealed or suppressed a material fact, 2) defendant had a duty to disclose the fact to plaintiff, 3) intentional concealment of the fact with intent to defraud plaintiff, 4) plaintiff was unaware of the fact and would not have acted as he or she did if the fact had been known, and 5) resulting damage. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131.) Here, plaintiffs acknowledge they have failed to allege a duty. The court would also note that none of the allegations address Amber Billingsley's intent to defraud these plaintiffs. Allegations regarding possible creation of a document used to defraud alleged in other cases are insufficient to show the intent as to these plaintiffs. As such, the court sustains the demurrer as to this cause of action, with leave to amend.

### *Seventh Cause of Action*

Conversion requires 1) plaintiffs' ownership or rights to possession of property at the time of the conversion, 2) defendant's conversion by wrongful act or disposition of property rights, and 3) damages. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451.) Physical taking is not required, but an assumption of control or ownership or applying the property to defendant's own use is required. (*Id.* at p. 451-452.) Here, plaintiffs have only made a conclusory allegation that Amber Billingsley took their property. However, there is nothing alleged that the funds ever went to Amber Billingsley, that she ever had any control over them, or how she may have used the funds. The court sustains the demurrer to this cause of action, with leave to amend.

### *Eighth Cause of Action*

Constructive trust is an equitable remedy that "compels a wrongdoer—one who has property or proceeds to which he is not justly entitled—to transfer same to its rightful owner." (*Shoker v. Superior Court of Alameda County* (2022) 81 Cal.App.5th 271, 278.) Again, plaintiffs have not alleged that Amber Billingsley was ever in receipt of the funds from the various loans alleged to have been obtained by Matthew Billingsley. The allegation that plaintiffs "reasonably believe" she acquired their property is conclusory in nature. (FAC, ¶ 86.) The FAC alleges plaintiffs' knowledge of the pending divorce and the disputes regarding various accounts, particularly the one used as collateral to secure the alleged loans, but nothing in the FAC alleges Amber Billingsley obtained the funds associated with these loans. The court sustains the demurrer as to the eighth cause of action, with leave to amend.

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:** JS **on** 9/26/2023.  
(Judge's initials) (Date)