Tentative Rulings for March 22, 2022
Department 501

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.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

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(03)

Tentative Ruling

Re: ***Zart Transmission v. Leavitt***
Superior Court Case No. 20CECG01307

Hearing Date: March 22, 2022 (Dept. 501)

Motion: Demurrer of Aileen Leavitt to the Second Amended Cross-Complaint (the SACC) of Kenneth Loveman as Executor of the Estate of Rosalie Morton

Demurrer of Jared Ennis and Strong Holdings to the SACC

Tentative Ruling:

To sustain the demurrer of Leavitt as to the first, second and fifth causes of action in the SACC on the ground that there is another action pending between the parties on the same causes of action. (Code Civ. Proc. § 430.10, subd. (c).) To stay the first, second and fifth causes of action pending resolution of *Loveman v. Leavitt*, case no. 18STCV05817, pending the Los Angeles County Superior Court.

To sustain the demurrer of Leavitt to the third cause of action on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. §430.10, subd. (e).) To deny leave to amend, as the Estate has not shown how it could truthfully amend the SACC to state a valid claim for fraud.

To overrule the demurrer of Ennis and Strong Holdings as to the sixth and seventh causes of action. To order Ennis and Strong to file their Answer to the SACC within ten days of the date of service of this order.

Explanation:

Leavitt's Demurrer: Leavitt demurs to the first, second and fifth causes of action on the ground that there is another action pending between the same parties on the same causes of action. (Code Civ. Proc. § 430.10, subd. (c).) Leavitt points out that there is already an action pending between herself and Loveman as executor of the Estate of Morton in Los Angeles County Superior Court, which alleges the same causes of action regarding the same partnership and subject real property. (See Leavitt's Request for Judicial Notice and Exh. A to Rowell decl., First Amended Complaint in Los Angeles Superior Court case no. 18STCV05817, *Loveman v. Leavitt*.) The court intends to take judicial notice of the First Amended Complaint filed in Los Angeles Superior Court under Evidence Code section 452, subd. (d).) Therefore, Leavitt contends that the demurrer should be sustained as to the causes of action raised in the present case that are essentially the same as the claims raised in the Los Angeles action.

Indeed, it does appear that the Los Angeles action raises many of the same claims between the same parties arising out of the same subject matter, and therefore the court intends to sustain the demurrer to the first, second and fifth causes of action. Under Code

of Civil Procedure section 430.10, subdivision (c), a defendant may demur to a cause of action that there is another action pending between the same parties on the same cause of action.

"It is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim. The rule against splitting a cause of action is based upon two reasons: (1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action. Thus, it is said in *Bingham v. Kearney, supra*, at page 177: 'It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation.'" (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894–895, internal citations omitted.)

The defense of plea in abatement is an affirmative one and the burden is on the defendant to establish it. (*Paladini v. Municipal Markets Co*. (1921) 185 Cal. 672, 674.) "The plea is dilatory in its nature and is not favored. It may be made only when the face of the complaint shows that the causes of action and the issues in the two suits are substantially the same." (*Lord v. Garland* (1946) 27 Cal.2d 840, 848, internal citations omitted.) "As a test for determining whether the causes of action are the same or different, it is the universal rule that a plea in abatement may be maintained only where the claim sued upon in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication." (*Ibid*, internal citations omitted.)

Even if the two actions are substantially the same, the court should not dismiss the later-filed action; instead it should stay or abate the later-filed action until the earlier action has been resolved. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 335, fn. 2.) The judgment in the earlier-filed action can then be used as res judicata in the later action. (*Ibid*.)

Here, there is another action pending between the same parties regarding the same causes of action. The Los Angeles County action is also between Leavitt and Loveman as executor of the Morton Estate. (Los Angeles First Amended Complaint, ¶¶ 10-13.) It also concerns the same partnership and the same parcel of property. (*Id*. at ¶ 14.) It alleges that Leavitt mismanaged the property, leased the property negligently, and withheld property revenues from the Estate, as well as failing to pay taxes on the property. (*Id*. at ¶ 16.) It raises many of the same legal theories, including breach of fiduciary duty, negligence, and accounting. (*Id*. at ¶¶ 26-48, 62-67, 75-77.)

Thus, a judgment on the claims in the Los Angeles action would necessarily bar any future judgment on those claims in the later-filed Fresno action. The Estate has not filed any opposition or attempted to show that the claims in the Fresno action are not essentially identical to the claims in the Los Angeles action, or that a judgment in the Los Angeles action would not be res judicata as to the identical claims in the Fresno action. Consequently, the court intends to sustain the demurrer to the first, second and fifth causes of action on the ground that there is another action pending between the parties

on the same causes of action, and stay the Fresno claims until the Los Angeles claims have been resolved.

In addition, the court intends to sustain the demurrer to the third cause of action for fraud alleged against Leavitt for failure to state facts sufficient to constitute a cause of action and uncertainty.

"The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255, internal citation omitted.)

"Fraud must be pleaded with specificity rather than with 'general and conclusory allegations.' The 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. (*West v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 780, 793, internal citations omitted.)

Here, plaintiff alleges that, on October 9, 2015, at or near the KW Commercial office on 400 Main Street, Suite 110 in Visalia, California, Leavitt signed a four-page "Exclusive Right to Represent Owner for Sale or Lease of Real Property" document with KW Commercial on behalf of Aileen Leavitt/Rosalie L. Morton regarding the subject property. (SACC, ¶ 19.) Leavitt failed to disclose to the co-owner of the property [Morton] that she had entered into the exclusive representation agreement with KW Commercial. (*Ibid*.) Morton's Estate did not discover that Leavitt had entered into the exclusive representation agreement with KW Commercial until February of 2019, when Leavitt located or obtained a lessee for the subject property. (*Id*. at ¶ 20.) The Estate could not have discovered this information earlier. (*Ibid*.) These concealments prevented the Estate from discovering "certain facts", namely that cross-defendants had undertaken "such acts and/or omissions." (*Id*. at ¶ 21.) These concealments were likely to and did mislead Morton, who did not know the concealed facts. (*Ibid*.) "The true facts were Cross-Defendants, and each of them, failed to disclose to then co-owner of the Subject Property such concealments by Cross-Defendants, and each of them." (*Ibid*.) Cross-defendants knew that Morton was ignorant of the true facts and intended to deceive her. (*Id*. at ¶¶ 22-23.) Had she known the true facts, Morton would have acted differently, and would have "taken steps to rectify the acts and/or omissions by Cross-Defendants." (*Id*. at ¶ 23.) Her reliance was justified because Leavitt was her sister. (*Ibid*.) As a result, she incurred damages in excess of $25,000. (*Id*. at ¶ 24.)

Thus, the Estate of Morton has alleged the date, location and general nature of the concealments underlying her fraud claim, as well as the persons who were involved. However, the allegations regarding the nature of the concealed facts and how they were material and resulted in harm to the Estate are extremely vague and uncertain and fail to establish the required elements of a fraud claim. It is unclear why it was important for Morton or her Estate to know about the representation agreement, how the alleged concealment of the exclusive representation agreement with KW Commercial resulted

in any harm to the Estate, or what Morton or the Estate would have done differently if they had known of the agreement earlier. There are no specific facts alleged that would show the required elements of reliance, causation, or resulting damages. Thus, the fraud cause of action is uncertain and fails to state facts sufficient to constitute a claim for fraudulent concealment. Consequently, the court intends to sustain the demurrer to the third cause of action as to Leavitt. Furthermore, the court intends to deny leave to amend the third cause of action, as the Estate has not filed any opposition or met its burden of showing how it could amend the cross-complaint to state a valid claim for fraud against Leavitt.

Ennis and Strong's Demurrer: Ennis and Strong demur to the SACC's claims that have been alleged against them on the ground that they fail to state facts sufficient to constitute a cause of action. They contend that the negligence and breach of fiduciary duty claims fail to state a cause of action because they owed no duty to the Estate of Morton as a matter of law, as the Estate was not their client and they had no agency or other relationship with the Estate. They claim that they simply carried out the instructions of their client, Leavitt, and thus they cannot be held liable to the Estate for any harm that resulted from the lease of the subject property. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 580-581; *Giacometti v. Bulla, LLC* (2010) 187 Cal.App.4th 1133, 1139; *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court* (2004) 117 Cal. App. 4th 158 ("*Salazar*"); *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal. App. 4th 69.)

"To state a cause of action for professional negligence, a party must show '(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.' 'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.' 'Where there is no legal duty, the issue of professional negligence cannot be pled because with the absence of a breach of duty, an essential element of the cause of action for professional negligence is missing.'" (*Giacometti v. Aulla, LLC*, *supra*, 187 Cal.App.4th at p. 1137, internal citations omitted.)

"The general rule is that privity of contract is a requisite to a professional negligence claim." (*Ibid*, internal citation omitted.) However, courts may still impose a duty of care even in the absence of contractual privity where public policy factors weigh in favor of imposing a duty. (*Ibid*, citing *Biankanja v. Irving* (1958) 49 Cal.2d 647, 650.) Those factors include "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja*, *supra*, 49 Cal.2d at p. 650.) "Later cases have considered additional factors, including whether extending liability would impose an undue burden on the profession." (*Giacometti v. Aulla, LLC*, *supra*, 187 Cal.App.4th at p. 1137, internal citation omitted.)

Here, while there was apparently no agreement that created a brokerage relationship between the Estate and Ennis or Strong, the lack of a contract between Ennis

and the Estate does not automatically mean that Ennis had no duty toward the Estate. The court must still consider the *Biakanja* factors to determine whether a duty should be imposed under the circumstances.

With regard to the first factor, the extent to which the transaction was intended to affect the plaintiff, the Estate has alleged that it was a 50% owner of the subject property, and that it was in a partnership or joint venture with Leavitt which involved the ownership and management of commercial properties, including the subject property. (SACC, ¶¶ 6, 7.) The subject property was owned by the partnership. (See Corp. Code, § 16203; Corp. Code, § 16204, subd. (c); Corp. Code, § 16401, subd. (g).) Thus, Leavitt was acting on behalf of the partnership when she entered into the agreement with Ennis and Strong to find a lessee for the property. As the Estate was a partner and 50% owner of the property, she was an intended beneficiary of the lease agreement and entering into the lease agreement was likely to affect her.

The Estate clearly expected to share in the rental revenues from the property, as it alleges that Leavitt wrongfully withheld the rents and deposit money from the Estate after leasing the property to Zart Transmission. (SACC, ¶ 9.) The Estate also alleges that it expected to be consulted on the lease negotiations and that it provided suggested changes to the lease agreement, but those changes were ignored. (*Id*. at ¶ 8.) It appears that Ennis and Strong knew that the Estate was a co-owner of the property, as they did provide a copy of the lease agreement to the Estate. (*Ibid*.) Thus, first Biakanja factor weighs in favor of imposing a duty of care on Ennis and Strong, as the lease agreement was clearly likely to have a significant impact on the Estate, which was a 50% owner of the property and a partner in the partnership, whose sole asset was the subject property.

The second factor, the foreseeability of harm to the plaintiff, also weighs in favor of imposing a duty on Ennis and Strong. It was foreseeable that the Estate would be harmed if the lease agreement was not executed properly, or if the brokers were negligent in finding a tenant who was not going to pay rent or maintain the property. Again, the Estate was a 50% owner of the property and one of two partners in a partnership, the sole purpose of which was to lease the subject property for profit. If the real estate broker failed to lease the property to a viable tenant who was willing and able to pay rent and maintain the property, it was easy to foresee that the Estate would be harmed. Therefore, the second factor weighs in favor of imposing a duty on Ennis and Strong.

The third factor is the degree of certainty that plaintiff suffered harm. Here, the Estate has alleged that it suffered harm from lost rents, damage to the subject property from lack of maintenance, and lost future profits. It appears that much of the damage suffered by the Estate was actually caused by Leavitt, who allegedly retained the deposit and rents from the property for herself rather than sharing them with the Estate, as well as failing to pay property taxes. However, it does appear that the Estate also suffered harm when Zart failed to pay rent or maintain the property, which was allegedly a result of Ennis and Strong's negligence in locating Zart and allowing Zart to enter into the lease even though Zart was not a viable tenant. Therefore, the Estate has alleged sufficient facts to support the third factor.

There is also a close connection between Ennis and Strong's negligence and the injury suffered by the Estate. The Estate alleges that Ennis and Strong failed to consider the Estate's suggested changes to the lease, failed to obtain the Estate's consent to allow Zart to lease the property, and failed to ensure that Zart was a viable tenant. Assuming these allegations are true, there is a close connection to Ennis and Strong's alleged negligence in locating a tenant for the property and allowing the parties to enter into the lease, and the resulting harm to the partnership and the Estate from lost rents and profits, as well as damage to the subject property from Zart's alleged failure to maintain it. As a result, the fourth factor also weighs in favor of imposing a duty on Ennis and Strong.

The fifth factor, the moral blame attached to the defendant's alleged misconduct, also weighs in favor of imposing a duty, as Ennis and Strong were commercial real estate brokers who allegedly failed to obtain the consent of one of the two owners of a property before leasing it out to a tenant who later failed to pay rent or maintain the property. While Ennis and Strong contend that they had no duty to consult with the Estate when carrying out their duties as they had no agreement with the Estate, the Estate was still a 50% owner of the property and a 50% partner in the partnership that was formed to run the property. They also allegedly sent a copy of the proposed lease to the Estate, and thus they apparently knew that the Estate was a co-owner of the property and expected to be consulted before anyone leased the property. Yet they allegedly ignored the Estate's proposed changes and allowed Leavitt and Zart to execute the lease without the Estate's knowledge or consent. These allegations are sufficient to show moral blame and support imposing a duty of care on Ennis and Strong here.

With regard to the final factor, it would serve the policy of preventing future harm to impose a duty on Ennis and Strong, as imposing a duty on commercial real estate brokers to consult with the co-owners of a property before allowing it to be leased by a tenant would likely help avoid future harm in the form of tenant defaults and property damage from lack of maintenance. As a result, the court intends to find that the Biakanja factors weigh in favor of imposing a duty of care on Ennis and Strong.

Ennis and Strong have argued that the Court of Appeal decisions in *Richard B. LeVine v. Higashi, supra*, 131 Cal.App.4th 566, *Giacometti*, *supra*, 187 Cal.App.4th 1133, *Coldwell Bank Residential Brokerage Co. v. Superior Court (Salazar)*, *supra*, 117 Cal.App.4th 158, and *FSR Brokerage, Inc. v. Superior Court*, *supra*, 35 Cal.App.4th 69, require a finding that no duty exists here because of the lack of any contractual relationship between the parties. However, the cases cited by Ennis and Strong are distinguishable from the present case.

In *Giacometti*, the Court of Appeal held that accountants hired by the employer of the plaintiffs to prepare year-end financial documents including W-2 forms did not owe the plaintiffs a duty of care, and thus could not be held liable to the employees for professional negligence in preparing their W-2s. (*Giacometti*, *supra*, 187 Cal.App.4th at pp. 1137-1141.) The court noted that there was no contract between plaintiffs and the defendants, which is usually a requirement to find a duty of care in a professional negligence claim. (*Id*. at p. 1137.) Also, the court held that the public policy factors under *Biankanja* did not support imposing a duty of care despite the lack of contractual

privity between the parties. (*Id*. at pp. 1137-1141.) Nor was there any indication that the defendants were hired to provide a benefit to the plaintiffs, and in fact they were primarily hired to prepare year-end financial documents for tax purposes. (*Id*. at p. 1139.)

In the present case, on the other hand, the Estate was not an employee of the party who entered into the contractual relationship with the real estate brokers. Instead, the Estate was a 50% owner of the subject property and a 50% partner of the partnership, the sole purpose of which was to operate the property for a profit. The lease contract for the property was thus clearly intended to provide a benefit to the partnership, and by extension, the Estate. The allegations of the SACC also indicate that Ennis and Strong knew that the Estate was a co-owner of the property and expected to be involved in the lease negotiations, as they sent a copy of the lease to the Estate and the Estate provided proposed changes to the lease.

As such, Ennis and Strong allegedly knew that the Estate was not just a passive partner and that it had a right to be consulted about the lease process. However, they allegedly ignored the proposed changes to the lease and allowed Leavitt and Zart to execute the lease without the Estate's knowledge or consent. Thus, the situation here is different from the circumstances in *Giacometti*, where the accountants had no reason to believe that they owed any duty to the employees, as they were simply preparing year-end financial documents and W-2 to satisfy the employer's tax obligations.

Likewise, in *Richard B. LeVine, Inc. v. Higashi*, *supra*,131 Cal.App.4th 566, the Court of Appeal held that a partner in a medical partnership could not state a professional negligence claim against the accountant who was hired by the partnership to provide a calculation of each partner's share of the partnership profits. (*Id*. at pp. 581-582.) The *LeVine* court found that the accountant only owed a duty of care toward the partnership, not to the individual partners who were not signatories to the agreement with the accountant. (*Ibid*.) The court also noted that the accountant had simply carried out the calculations as instructed by his client, the partnership, and there was no evidence that the accountant had made any miscalculations. (*Id*. at p. 582.) "Moreover, there is no evidence that at the time [the accountant] received instructions regarding the 1995 calendar year he had been given any reason to believe the OCHI partners had not advised plaintiff of the methodology to be used for that year, or, for that matter, that plaintiff had not agreed with the adjustments in the calculation." (*Ibid*.) Thus, the court concluded that the *Biankanja* factors did not weigh in favor of imposing a duty of care on the accountant with regard to the individual partners. (*Ibid*.)

In the present case, by contrast, the Estate has alleged that Ennis and Strong did not simply carry out the instructions of Leavitt without doing anything else that might be considered negligent. Instead, they located a tenant to lease the property, then circulated the lease agreement to both the Estate and Leavitt, which indicates that they knew the Estate was a co-owner of the property and expected to be consulted about the lease. However, when the Estate proposed changes, they ignored the changes and allowed Leavitt and Zart to execute the lease without the Estate's knowledge or consent. Thus, the allegations indicate that Ennis and Strong were negligent in carrying out their duties as real estate brokers, and did not simply carry out their client's instructions. The alleged facts also support the Estate's contention that it was an intended beneficiary of the agreement, as the lease was going to benefit the Estate as 50% owner of the property

and 50% partner in the partnership. As a result, the facts here are distinguishable from the facts in *LeVine*.

In *Coldwell Bank Residential Brokerage Co. v. Superior Court (Salazar)*, *supra*, 117 Cal.App.4th 158, the Court of Appeal held that a real estate broker could not be held liable for personal injuries suffered by a minor child after his mother bought a home that turned out to have toxic mold. The court found that the real estate broker who helped sell the house to plaintiff's mother owed no duty of care toward the minor child, who was not its client, either under statutory or common law principles. (*Id*. at pp. 164-169.) Also, the court pointed out that there was no relationship between the broker and the plaintiff that could be used to impose a duty of care on the broker, and he was not an intended beneficiary of any disclosures regarding the house. (*Id*. at pp. 165-166.)

Salazar is distinguishable from the present case, since here the Estate is a 50% owner of the subject property and the lease agreement was clearly intended to benefit the partnership between the Estate and Leavitt. By contrast, in *Salazar* the minor child was not an owner or buyer of the property in question and he was not an intended beneficiary of the sale agreement or the statute requiring disclosures regarding the condition of the home, so the broker owed him no duty of care. Thus, *Salazar's* holding does not apply to the facts of the present case.

Similarly, in *FSR Brokerage, Inc. v. Superior Court*, *supra*, 35 Cal.App.4th 69, the Court of Appeal held that real estate brokers did not owe a duty of care toward multiple people who were injured or killed when the balcony of a house collapsed under them. Since the injured persons were not clients of the brokers and had no other relationship with them, there was no basis for imposing a duty on the brokers to inspect the residence and disclose any defects in the balcony to them. (*Id*. at p. 73.) Nor was there any evidence that the plaintiffs were intended beneficiaries of the defective information supplied by defendants. (*Id*. at pp. 73–75, internal citations omitted.) Thus, the court found that summary judgment should have been granted in favor of the brokers. (*Ibid*.)

On the other hand, in the case at bar the Estate has alleged facts indicating that it was an intended beneficiary of the real estate broker agreement and the subsequent lease agreement, since it was a 50% owner of the subject property and a partner in the partnership that was formed to operate the property. The Estate was also involved in the lease negotiations and proposed changes to the lease, so Ennis and Strong allegedly knew or should have known that the Estate had a right to be consulted about the lease agreement. They nevertheless failed to obtain the Estate's consent to lease the property to Zart, which resulted in damages to the Estate. The Estate was not simply a third party that happened to be injured while on the property, but was actually a 50% owner of the property with the alleged right to be involved in the negotiations to lease the property. As a result, the present case is distinguishable from *FSR Brokerage*.

In summary, the court intends to find that the Estate has sufficiently alleged the existence of a duty of care owed by Ennis and Strong toward it. Consequently, the court intends to overrule Ennis and Strong's demurrer to the SACC.

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: DTT on 3/16/2022.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Gil v. Ventura***
Superior Court Case No. 20CECG02627

Hearing Date: March 22, 2022 (Dept. 501)

Motion: Defendant's Demurrer to the First Amended Complaint

Tentative Ruling:

To sustain. (Code Civ. Proc., § 430.10, subds. (e), (f).) Leave to amend is granted on condition that counsel meet and confer before an amended pleading is filed. (Code Civ. Proc., § 430.41, subd. (c).) Plaintiff is granted 30 days' leave to file a Second Amended Complaint. The time in which such pleading can be filed will run from service by the clerk of the minute order. New allegations in a Second Amended Complaint must be set in **boldface** type.

Explanation:

Meet and Confer

Defendant's attorney filed a declaration stating that he sent a detailed ten page meet and confer letter and left a voicemail with plaintiff's counsel, but the call was not returned. Considering that this matter seeks division of only partially identified property, it appears that sincere meet and confer efforts will likely refine the issues or resolve the controversy altogether. Therefore, the filing of an amended pleading is conditioned upon counsel meeting and conferring face-to-face or by telephone. (Code Civ. Proc., § 430.41, subds. (a) and (c).)

Timeliness

Plaintiff's opposition contends that defendant's demurrer is untimely under the 30-day time period set forth in Code of Civil Procedure section 430.40. Defendant's reply does not address this issue, which, under some circumstances, authorizes the court to strike an untimely demurrer and grant default. (See *Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 464.) It is well settled that the court also possesses the discretion to hear a late filed demurrer where the late filing is a "mere irregularity," i.e. does not involve jurisdictional issues. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 282; *Johnson v. Sun Realty Co.* (1934) 138 Cal.App. 296, 299 [Noncompliance with procedural rules "did not prevent the court from hearing and disposing of the demurrer."].) Consequently, the court may and will consider the demurrer on its merits.

Demurrer – First thru Fourth and Eighth Causes of Action

A party may file a general demurrer on claims that "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e); *Estate of Moss* (2012) 204 Cal.App.4th 521, 535.) However, "objections that a complaint

is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by *special demurrer,* and cannot be reached on general demurrer." (*Johnson v. Mead* (1987) 191 Cal.App.3d 156, 160.) A special demurrer should be sustained where the allegations of the complaint are insufficient to "apprise the defendant of the issues which he is to meet." (*People v. Lim* (1941) 18 Cal.2d 872, 882.)

In addition, an obligation cannot be specifically enforced if its terms "are not sufficiently certain to make the precise act which is to be done clearly ascertainable." (Civ. Code, § 3390, subd. (e).) In addition, specific performance requires that conditions precedent must be satisfied or excused (Civ. Code, § 3392), and the defendant's duty to perform must have arisen. (*Bryne v. Harvey* (1962) 211 Cal.App.2d 92, 113 ["'But if the condition is an *event* which must happen before the defendant's duty of performance accrues, a *specific allegation* of the happening of the condition is a necessary part of the pleading of the defendant's breach.' [Citation.]"].)

The First Amended Complaint alleges that, after their 2011 divorce, plaintiff and defendant entered into a contract where defendant pledged subsequently acquired property in exchange for plaintiff "render[ing] services, which included but was not limited to a nurse, confidante, companion, homemaker, housekeeper, cook, social-companion, and advisor to defendant." (FAC, ¶ 6(a).) Plaintiff alleges she performed "each and every" act required of her under the parties' agreement (*id*. at ¶ 9), and that defendant "repudiated" his obligation because he asserted a 100% ownership interest in a residence held exclusively in plaintiff's name (*id*. at ¶ 10-12).

Although the First Amended Complaint concludes that a contract existed and that defendant breached that contract, conclusory allegations are insufficient to survive demurrer. (*E-Fab, Inc. v. Accountants, Inc.* (2007) 153 Cal.App.4th 1308, 131.) In other words, although property acquired by an unmarried may be subject to equitable division (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 679), there nevertheless must be facts alleged which establish the underlying agreement and which identify what conduct by defendant constitutes a refusal to comply therewith. (*Id*. at pp. 679-670 [rejecting the antiquated contention that such agreements were illegal]; see e.g. *Sass v. Cohen* (2020) 10 Cal.5th 861, 865 [allegations of formation and breach clearly alleged]; *Riechert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 830 [reciting the elements for breach of contract].)

Furthermore, the First Amended Complaint alleges that plaintiff holds "sole[]" title to the subject real property (FAC, ¶10), which contradicts the grantee identified in the deed attached to defendant's request for judicial notice[1] and reasonably implies an absence of a justiciable controversy, damages, or a divisible interest. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909 [declaratory relief requires … justiciable questions]; *Riechert v. General Ins. Co. of America, supra,* 68 Cal.2d at p. 830 [breach of contract requires damages allegations]; *Summers v. Superior Court* (2018) 24 Cal.App.5th 138, 143 [partition action requires a determination of interests].) Finally, to

[1] The court may take judicial notice of the facts derived from the legal effect of a recorded document. (See Evid. Code, § 452, subds. (c) and (h); *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.)

the extent additional property exists but unalleged, there is insufficient allegations to apprise defendant how such property might be defined or identified.

Consequently, the First Amended Complaint alleges uncertain and insufficient facts to support the first thru fourth and eighth causes of action. Therefore, the general and special demurrers are sustained. (Code Civ. Proc., § 430.10, subds. (e) and (f).)

Fifth Cause of Action

" '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.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Id*. at p. 645.)

The First Amended Complaint does not sufficiently contain a description of the fraudulent conduct, and generalized facts are insufficient to support a fraud claim. (See *Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645 [to support a fraud claim, a plaintiff must plead "'*facts* which show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]".) Accordingly, the general demurrer is sustained. (Code Civ. Proc., §430.10, subd. (e).)

Sixth and Seventh Cause of Action

To survive demurrer, a plaintiff attempting to plead an intentional infliction of emotional distress cause of action must allege with "great specificity the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 160–161, internal citations, quotation marks, and brackets omitted.) Similarly, a plaintiff attempting to plead a negligent infliction of emotional distress cause of action must allege sufficient to satisfy the traditional negligence elements of duty, breach of duty, causation, and damages. (*Arista v. County of Riverside* (2018) 29 Cal.App.5th 1051, 1063 [" ' "[T]he negligent causing of emotional distress is not an independent tort, but the tort of negligence. [Citation.] The traditional elements of duty, breach of duty, causation, and damages apply."'"].)

As discussed above, the First Amended Complaint is uncertain what particular conduct by defendant constitutes breach of the alleged agreement. For the same reason, the First Amended Complaint does not provide factual allegations of outrageous conduct sufficient to state a cause of action for intentional infliction of emotional distress. Furthermore, plaintiff only pleads conclusory allegations that she suffered severe emotional distress (FAC, ¶61), but a cause of action for intentional infliction of emotional distress must include facts of "[s]evere emotional distress mean[ing] 'emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it.'" (*Kieskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 232, internal citations omitted.)

Similarly, the First Amended Complaint is uncertain, and thus fails to allege, adequate facts establishing a cause of action for negligent infliction of emotional distress, which requires its elements be established by factual allegations. (*Arista v. County of Riverside, supra,* 29 Cal.App.5th at p. 1063; *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 820.)

Therefore the general demurrer to the sixth and seventh causes of action is sustained. (Code Civ. Proc., § 430.10, subd. (e).)

Leave to Amend

With the exception of the fourth cause of action, defendant's demurrer appears suitable to amendment. Considering the liberal policy concerning amendment, and to the extent additional facts may cure the defects apparent in all the asserted causes of action, plaintiff is granted leave to amend each cause of action. (See *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 304.)

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: DTT on 3/18/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Escalante v. Dyving***
Superior Court Case No. 20CECG02097

Hearing Date: March 22, 2022 (Dept. 501)

Motion: by Defendants for Order Establishing Admissions as to Each Plaintiff

Tentative Ruling:

To grant the request regarding defendants' Requests for Admissions served on plaintiffs Brandon A. Escalante and Samantha Quintero. The matters specified in each of defendants' Requests for Admission are deemed admitted unless plaintiffs serve, before the hearing, responses to the Requests for Admissions that are in substantial compliance with Code of Civil Procedure section 2033.220.

Explanation:

Failure to timely respond to Requests for Admissions results in a waiver of all objections to the requests. (Code Civ. Proc. § 2033.280, subd. (a).) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) "The law governing the consequences for failing to respond to Requests for Admission may be the most unforgiving in civil procedure. There is no relief under section 473. The defaulting party is limited to the remedies available in [Code of Civil Procedure Section 2033.280]...." (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 394–395, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

The purpose of a Request for Admission is to enable counsel "to 'set at rest' issues that are not genuinely disputed." (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 281.) This effectively removes from the trier of fact those issues that are not in dispute, and relieves the jury, the lawyers, and the judge from spending their valuable time on issues that are not at issue. They are designed to "make trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal. 2d 355, 364.)

The court may relieve a party who fails to file a timely response if, *before entry of the order deeming the requested matters admitted*, the party in default 1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect;" and 2) serves a response in "substantial compliance" with Code of Civil Procedure section 2033.220 (See Code Civ. Proc. § 2033.280, subds. (a)-(c); See *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, *fn.* 12.) "If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion . . . Everything, in short, depends on submitting responses prior to the hearing." (*Demyer v. Costa Mesa Mobile Homes Estates* (1995) 36 Cal. App. 4th 393, 395-396.)

Since plaintiffs did not respond to the Requests for Admissions and there is no evidence that they have either requested relief from their failure to respond or submitted proper responses before the hearing, the motion will be granted.

No monetary sanctions were requested, so none are awarded.

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: DTT on 3/18/2022.
(Judge's initials) (Date)