1. PIMOR, ET AL. v. VANHEE WOODWORKS, 23CV0578

Status of Bankruptcy Petition

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JULY 19, 2024, IN DEPARTMENT FOUR.

2. McCLELLAN v. BRUDER, 24CV0706

Motion to Strike Portion of Complaint

Before the court is defendant's unopposed motion to strike the punitive damages allegation and prayer for relief in plaintiff's complaint pursuant to Code of Civil Procedure sections 435 and 436. Defendant submitted a declaration stating that the parties met and conferred but were unable to resolve the dispute. (Olson Decl., ¶ 8.)

This is a personal injury action arising from an automobile-versus-bicyclist accident.

A judge may, on a motion to strike made under Code of Civil Procedure section 435 or at any time at the judge's discretion, strike out any irrelevant, false, or improper matter in a pleading, on terms the judge deems proper. (Code Civ. Proc., § 436, subd. (a).)

"[T]o state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damages statute, Civil Code section 3294. [Citation.] These statutory elements include allegations that the defendant has been guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a).) ' "Malice" ' is defined in the statute as conduct, 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' (Civ. Code, § 3294, subd. (c)(1)….) ' "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.' (Civ. Code, § 3294, subd. (c)(2).) ' "Fraud" ' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' (Civ. Code, § 3294, subd. (c)(3).)" (*Turman v. Turning Point of Central Cal., Inc.* (2010) 191 Cal.App.4th 53, 63.)

The court grants defendant's motion to strike the punitive damages allegation and prayer for relief because nothing in the complaint indicates that defendant's conduct arose to the level of malice, oppression, or fraud as those terms are defined in Civil Code

section 3294. The court also grants leave to amend because plaintiff has not been afforded a previous opportunity to amend. (*Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, fn. 12.)

TENTATIVE RULING # 2: THE MOTION TO STRIKE IS GRANTED WITH LEAVE TO AMEND WITHIN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COUT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. NAME CHANGE OF FAGOT, 24CV1146

OSC Re: Name Change

TENTATIVE RULING # 3: PETITION GRANTED AS REQUESTED.

4. BAIRD v. LUX VACA LUXURY RENTALS, 23CV2063

Motion to Quash

Before the court is specially appearing defendant Tahoe Village Homeowners Association's ("defendant") motion to quash plaintiff's service of summons and complaint pursuant to Code of Civil Procedure section 418.10 on the grounds that (1) service was improper, and (2) the court lacks personal jurisdiction over defendant (either general or specific).

Pursuant to Evidence Code section 452, subdivision (d), the court grants defendant's request for judicial notice of Exhibit A (plaintiff's Complaint). The court denies defendant's request for judicial notice of Exhibit B (defendant's information listing on the Nevada Secretary of State's webpage).

Plaintiff does not dispute that service was improper. (Opp. at 1:25–26.) Therefore, the motion to quash is granted on this ground. The court does not reach the issues of general or specific personal jurisdiction. Should plaintiff properly serve defendant, those issues may be raised anew.

TENTATIVE RULING # 4: THE MOTION TO QUASH IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

5. URBAN SUNRISE, LLC, ET AL. v. VOGT, ET AL., 22CV0024

Cross-Complainant David Vogt's Motion for Summary Judgment

Before the court is defendant / cross-complainant David Vogt's, dba Tahoe Investment Properties ("Vogt"), motion for summary judgment on the cross-complaint against plaintiffs / cross-defendants Urban Sunrise and Susan Kerr (collectively, "plaintiffs" or "cross-defendants") filed March 4, 2022. Alternatively, Vogt moves for summary adjudication.

1. Factual Background

This is an action concerning the purchase of five commercial properties in South Lake Tahoe, California (the "Tahoe Properties"). Plaintiff Susan Kerr is the managing member of plaintiff Urban Sunrise, an Arizona limited liability company that was the buyer in these transactions.

In January 2021, Susan Kerr and Urban Sunrise entered into separate buyer's representation agreements with Tahoe Investment Properties. (UMF, ¶ 3; see Vogt Decl., Exs. 1 & 2.) The agreements provided that Vogt would assist with acquisition of real property within a 50-mile radius of South Lake Tahoe, California, in the price range of $200,000 to $20 million. (UMF, ¶ 4.) The agreements also contained a commission clause. (UMF, ¶ 5.) Pursuant to the commission clause, "[b]roker shall be entitled to the compensation provided for in paragraph 3A: [¶] (1) If during the Representation Period, or any extension thereof, Buyer enters into an agreement to acquire property described in paragraph 1A, on terms acceptable to Buyer provided Seller completes the transaction or is prevented from doing so by Buyer." (Vogt Decl., Ex. 1, ¶ 3(C).)

In April 2021, Urban Sunrise executed purchase agreements for the Tahoe Properties. (UMF, ¶ 8.) Escrow was scheduled to close on or before June 30, 2021. (UMF, ¶ 12.) However, Urban Sunrise failed to close escrow within that time. (UMF, ¶ 11.)

Pursuant to Urban Sunrise's buyer's representation agreement, the total amount of Vogt's commission for the Tahoe Properties is $552,000.[1] (UMF, ¶ 17.) After applying a credit of $59,200 (for money Vogt received from the sellers in these transactions), the net amount of commission due is $492,800. (UMF, ¶ 17.) The only amount of the commission that has been paid is the $59,200 from the sellers.[2] (UMF, ¶ 18.)

2. Relevant Procedural Background

On February 22, 2023, Vogt moved for summary judgment on plaintiffs' First Amended Complaint ("FAC"), which asserted causes of action against Vogt for (1) breach of fiduciary duty; (2) professional negligence; (3) constructive fraud; and (4) rescission of the buyer's representation agreement.

On January 9, 2024, the court granted Vogt's motion for summary judgment, specifically finding that: (1) the undisputed material facts demonstrate that Urban Sunrise consented to the dual agency arrangement after full disclosure (Ruling, issued Jan. 9, 2024, at 10:1–2); (2) there are no triable issues of material fact that Vogt breached his fiduciary duty by recommending and encouraging plaintiffs to enter into the Third

[1] Vogt's UMF, ¶ 17, states that the total amount of commission for the Tahoe Properties is $552,000; that a credit of $59,200 should be applied; and thus, the net amount of commission owed to Vogt is $492,800. In response, plaintiffs state: "Disputed that the calculation is correct. Undisputed that this is David Vogt's calculation. The Selling Entities, Charles Germain paid $59,000 toward the Commission. [¶] Supporting Evidence: [¶] Deposition of Charles Germain, Exhibit 9, to AOE." The relevant portion of Mr. Germain's deposition states that he paid "roughly" $59,000 to Vogt. (See Pls.' Appendix of Evidence, Ex. 9 at 143:17–144:1, 145:21–24.) Plaintiffs do not produce any evidence disputing Vogt's total calculation of $552,000. Therefore, the court accepts Vogt's total calculation. The court also accepts Vogt's statement that a credit of $59,200 should be applied because the only evidence that plaintiffs produced to dispute this amount is Mr. Germain's testimony that he paid Vogt "roughly" $59,000.

[2] Vogt's UMF, ¶ 18, states, "[n]either Urban Sunrise, LLC nor Susan Kerr has paid any amount owing to David Vogt." In response, plaintiffs state: "Disputed that no portion of the commission has been paid. [¶] Supporting Evidence: [¶] Deposition of Charles Germain, Exhibit 9 to AOE." Mr. Germain's deposition merely establishes that Mr. Germain paid Vogt "roughly" $59,000. Plaintiffs do not produce any other evidence disputing UMF, ¶ 18.

Addenda (*id.*, at 10:26–11:2); (3) Urban Sunrise waived any alleged conflict of interest concerning Vogt's alleged drafting of the Third Addenda (*id.*, at 11:7); and (4) Vogt satisfied his duty of disclosure in this case regarding the availability and cost of property and/or fire insurance (*id.*, at 12:20–21).

On February 5, 2024, plaintiffs filed a petition for writ of mandate with the Court of Appeal, Third Appellate District. (RJN No. 3.) On February 13, 2024, the Court of Appeal denied the petition.

3. Evidentiary Objections

Plaintiffs' objections to Vogt's UMF, Paragraphs 13 and 14 are sustained. Plaintiffs' objections to Vogt's UMF, Paragraph 16 are overruled.

4. Requests for Judicial Notice

Pursuant to Evidence Code section 452, subdivision (d), the court grants Vogt's request for judicial notice of Exhibit 1 (the court's January 9, 2024, ruling on the previous motions for summary judgment and summary adjudication), Exhibit 2 (plaintiffs' FAC), and Exhibit 3 (plaintiffs' February 5, 2024, petition for writ of mandate).

Pursuant to Evidence Code section 452, subdivision (d), the court also grants plaintiffs requests for judicial notice of Exhibit 15 (plaintiffs' answer to Vogt's Cross-Complaint) and Exhibit 16 (Vogt's Notice of Motion and Motion for Summary Judgment (or Alternatively Summary Adjudication) of Vogt's Cross-Complaint).

The court denies plaintiffs' requests for judicial notice of: (1) the fact that, at all times relevant herein, David Vogt was licensed by the California Department of Real Estate as a real estate broker; (2) the fact that, at all times relevant herein, defendant Ryan Smith was licensed by the California Department of Real Estate as a sales associate; and (3) the fact that, at all times between December 2020 and July 2021, David Vogt was an active member of the California State Bar. (*Jordache Enterprises, Inc. v. Brobeck Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

5. Standard of Review

A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A plaintiff (or cross-complainant) moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "Once the plaintiff … has met that burden, the burden shifts to the defendant … to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant … shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

6. Discussion

5.1. Breach of Contract Claim

The First Cause of Action in Vogt's Cross-Complaint is for breach of contract against both cross-defendants. The elements of a breach of contract claim are: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) the resulting damages to the plaintiff. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.) Vogt alleges that cross-defendants breached their respective buyer's representation agreement by failing to pay Vogt commission for the purchase of the Tahoe Properties. (Vogt Cross-Compl., ¶ 18.)

The buyer's representation agreements provide in relevant part: "[b]roker shall be entitled to the compensation provided for in paragraph 3A: (1) If during the Representation Period, or any extension thereof, Buyer enters into an agreement to acquire property described in paragraph 1A, on terms acceptable to Buyer provided Seller

completes the transaction or is prevented from doing so by Buyer." (Vogt Decl., Exs. 1 & 2 at ¶ 3(C)(1).)

Here, the undisputed material facts show that Urban Sunrise[3] entered into purchase agreements to purchase the Tahoe Properties. (UMF No. 8.) However, Urban Sunrise failed to close escrow within the time provided for in the agreements. (UMF No. 11.) In other words, Urban Sunrise prevented the sellers from completing the transaction, and Vogt is entitled to commission. Based on these undisputed facts, the court finds that Vogt has met his initial burden of persuasion with respect to Urban Sunrise.

5.1.1. Kerr's Individual Liability

Cross-defendant Kerr argues that Vogt's breach of contract claim against her fails because Kerr did not enter into any of the purchase agreements (only Urban Sunrise did) and thus, Kerr did not breach her buyer's representation agreement. However, Vogt argues that Kerr's FAC contains judicial admissions that Kerr *did* enter the purchase agreements in her individual capacity.[4] (Mtn. at 7:8–26.)

"A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.]" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.) "Judicial admissions may be made in a pleading…. [Citations.] Facts established by pleadings as judicial admissions ' "are conclusive concessions of the truth of those matters, are effectively removed as issues from the

[3] The court addresses Kerr's individual liability in the next section.

[4] In support of this claim, Vogt focuses on how the FAC refers to plaintiffs, plurally (meaning both Urban Sunrise and Kerr). For example, the FAC alleges: (1) "Plaintiffs signed the purchase agreements" (FAC, ¶ 18); (2) "The Purchase Agreements entered into by Plaintiffs for the purchase of the Tahoe Properties…" (FAC, ¶ 19); (3) "In accordance with the Purchase Agreements for each of the Tahoe Properties, Plaintiffs deposited initial earnest money deposits with First American Title" (FAC, ¶ 22); (4) "As a result of Plaintiffs' inability to obtain fire insurance for each of the Tahoe Properties, Plaintiffs could not close the escrows in the time set forth in the Addenda prepared by VOGT" (FAC, ¶ 33); (5) "After Plaintiffs failed to close escrow within the time provided for in the Agreements…" (FAC, ¶ 34); (6) "…Plaintiffs have been damaged in a sum equal to the amount of deposits made and released to the Seller" (FAC, ¶ 47).

litigation, and may not be contradicted by the party whose pleadings are used against him or her." [Citations.] " '[A] pleader cannot blow hot and cold as to the facts positively stated.' " [Citation.]' [Citation.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.)

At the same time, with countervailing evidence, allegations in the complaint will not bind the plaintiff on a motion for summary judgment. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1211.)

Here, the face of the purchase agreements show that Kerr merely signed the agreements on behalf of Urban Sunrise; Kerr did not sign the agreements in her individual capacity. (See Vogt Decl., Exs. 3–7.) The court finds that this is countervailing evidence to what would otherwise be a judicial admission that Kerr entered into the purchase agreements in her individual capacity.

Based on the above, the court finds that Vogt has not satisfied his initial burden of establishing a prima facie case of breach of contract against Kerr, individually.

5.1.2. Affirmative Defenses

Cross-defendants assert the Fifth (unclean hands), Sixth (failure to do equity), Ninth (rescission), Tenth (conflict of interest), and Eleventh (unlicensed practice of law) Affirmative Defenses in their Answer to Vogt's Cross-Complaint.

The doctrine of unclean hands bars relief to a party who has engaged in misconduct directly related to the transaction or matter before the court. (*DeRosa v. Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1395; *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 432; accord, *Ditzian v. Unger* (2019) 31 Cal.App.5th 738, 747.)

"[T]he doctrine that he who seeks equity must do equity means that the party asking the aid of the court must stand in conscientious relation towards his adversary; that the transaction from which his claim arises must be fair and just and that the relief itself must not be harsh and oppressive upon the defendant." (*Jacklich v. Baer* (1943) 57 Cal.App.2d 684, 693.)

Cross-defendants contend that Vogt breached various fiduciary duties. (Opp. at 16:16–18.) However, the court already addressed these exact claims in Vogt's previous motion for summary judgment. In the court's January 9, 2024, ruling, the court found that: (1) the undisputed material facts demonstrate that Urban Sunrise consented to the dual agency arrangement after full disclosure (Ruling, issued Jan. 9, 2024, at 10:1–2); (2) there are no triable issues of material fact that Vogt breached his fiduciary duty by recommending and encouraging plaintiffs to enter into the Third Addenda (*id.*, at 10:26–11:2); (3) Urban Sunrise waived any alleged conflict of interest concerning Vogt's alleged drafting of the Third Addenda (*id.*, at 11:7); and (4) Vogt satisfied his duty of disclosure in this case regarding the availability and cost of property and/or fire insurance (*id.*, at 12:20–21).

Accordingly, the court rejects cross-defendants' affirmative defenses, and finds that Vogt is entitled to judgment against cross-defendant Urban Sunrise on Vogt's breach of contract claim.

5.2. Breach of Implied Covenant of Good Faith and Fair Dealing Claim

Vogt's motion does not specifically address the cause of action for breach of the implied covenant of good faith and fair dealing. Therefore, the court makes no finding on this claim.

5.3. Quantum Meruit Claim

Vogt's motion does not specifically address the cause of action for quantum meruit. Therefore, the court makes no finding on this claim.

TENTATIVE RULING # 5: THE MOTION FOR SUMMARY ADJUDICATION IS GRANTED IN PART AND DENIED IN PART. AS TO THE FIRST CAUSE OF ACTION IN DAVID VOGT'S CROSS-COMPLAINT AGAINST CROSS-DEFENDANT URBAN SUNRISE, LLC, FOR BREACH OF CONTRACT, THE MOTION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT

TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.