SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding
Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 8/22/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (8/21/2024) you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV394516	Facchino/LaBarbera Tenant Station LLC vs Amir Sadat	Hearing: Order of Examination against Amir Sadat [**continued from 7/25/2024 per department 3**] **OFF CALENDAR**. No proof of service.
LINE 2	24CV441113	BALBOA CAPITAL CORPORATION vs MARTINEZ PALLET SERVICES, INC et al	Hearing: Order of Examination Against Francisco J. Mora Martinez (individually and on behalf of Martinez Pallet Services, Inc.) [**continued from 7/25/2024 per department 3**] **OFF CALENDAR**. No proof of service.
LINE 3	20CV366329	Farid Shahrivar vs City of San Jose et al	Hearing: Demurrer to Plaintiff's Second Amended Complaint by City of San Jose) [**continued from 7/18/2024 per department 3**] Ctrl Click (or scroll down) on Line 3 for tentative ruling. The court will prepare the order.

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DATE: 8/22/2024 TIME: 9:00 A.M.

LINE 4	23CV416173	Charles Gardyn vs OSCAR MARTINEZ et al	Hearing: Demurrer Defendant/Cross-Complainant's First Amended Cross-Complaint by Plaintiff/Cross-Defendant Charles Gardyn Ctrl Click (or scroll down) on Line 4 for tentative ruling. The court will prepare the order.
LINE 5	23CV427371	Weiting Zhan vs Shuaiqi Ge	Hearing: Demurrer to the Second-Amended Complaint by Defendant Shuaiqi Ge Ctrl Click (or scroll down) on Line 5 for tentative ruling. The court will prepare the order.
LINE 6	24CV434637	Richard Quihuis vs Quality Car Shippers, LLC	Hearing: Demurrer scheduled online for Respondent/Plaintiff Quality Car Shippers, LLC [**continued from 7/25/2024 per department 3**] Ctrl Click (or scroll down) on Line 6 for tentative ruling. The court will prepare the order.
LINE 7	21CV384411	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	Motion: Admissions Deemed Admitted Specified in plaintiff Creditors Adjustment Bureau, Inc. ("Plaintiff")'s Request for Admission, Set Two against defendant **ROXANA SARJI** AKA ROXANA M SARJI DBA VENICE TITLE AND MARBLE ADBA VENICE TILE & MARBLE ("Defendant") and for [monetary] sanctions payable to Plaintiff against said Defendant in the reasonable amount of $1,573.75. Unopposed and GRANTED. Payment is due by 5:00pm on 9/13/2024. The court will fill in the blanks for the amount of sanctions $1,573.75 and the payment due date on 9/13/2024 and sign the proposed order that the moving party submitted on 8/2/2024 with the motion.
LINE 8	21CV384411	CREDITORS ADJUSTMENT BUREAU, INC. vs HAYDEN SARJI et al	Motion: Admissions Deemed Admitted Specified in in plaintiff Creditors Adjustment Bureau, Inc. ("Plaintiff")'s Request for Admission, Set Two against defendant **HAYDEN SAR|JI** AKA HASSAN SARJI AKA HASSAN H SARJI AKA HASSEN HAYDEN SARJI DBA VENICE TILE AND MARBLE ADBA VENICE TILE & MARBLE ('Defendant") and for monetary sanctions payable to Plaintiff against said Defendant in the reasonable amount of $1,573.75. Unopposed and GRANTED. Payment is due by 5:00pm on 9/13/2024. The court will fill in the blanks for the amount of sanctions $1,573.75 and the payment due date on 9/13/2024 and sign the proposed order that the moving party submitted on 8/2/2024 with the motion.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
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Telephone: (408) 882-2130

DATE: 8/22/2024 TIME: 9:00 A.M.

LINE 9	22CV405477	Nancy Chapel et al vs Jenay Hoffman	Hearing: Motion for Court Approval of Settlement Among the Parties by Defendant/Cross-Complainant Curtis Hoffman and Jenay A. Hoffman Unopposed and good cause appearing GRANTED. Moving party to prepare order and submit to court for signature.
LINE 10	24CV429028	Reynaldo Rodriguez, Jr. vs Justin Boon	Motion: Withdraw as attorney by Greg Loera as to Plaintiff Reynaldo Rodriguez Unopposed and GRANTED. The moving party must **update** the proposed order in paragraph 7 to show Order to Show Cause (OSC) Hearing re dismissal of action for failure to appear and failure to serve on **8/29/2024 at 10:00 a.m. in Dept. 3** and submit it to the court for signature.
LINE 11	24CV435043	ZCA Homes LLC, a California limited liability company vs Rogelio De Runa et al	Hearing: Motion hearings to Dismiss the Action by Defendants James Deruna and Rogelio Deruna (Pro Per) [**continued from 7/25/2024**] Ctrl Click (or scroll down) on Line 11 for tentative ruling. The court will prepare the order.
LINE 12			

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3
Case Name: *Farid Shahrivar v. City of San Jose et al.*
Case No.: 20CV366329

I. Factual and Procedural Background[1]

Plaintiff Farid Sharivar ("Plaintiff") filed his Second Amended Complaint ("SAC") against defendants City of San Jose ("the City"), Federated City Employees' Retirement Plan System ("FCERS"), and Federated City Employees' Retirement System Board of Administration ("the Board").

According to the allegations of the SAC, Plaintiff is an Iranian and Muslim American male who was employed by the City from approximately November 25, 2001 through February 20, 2009. (SAC, ¶¶ 2, 12.) FCERS was established to fulfill the City's disability and retirement benefits to employees of the City, including Plaintiff. (SAC, ¶ 4.) The Board has exclusive authority to administer the City's retirement benefits and disability benefits and is responsible for approving or denying applications of pension plan members for pension benefits. (SAC, ¶ 5.)

During Plaintiff's employment, he was subjected to discrimination and harassment based on his race, national origin, and perceived religion that increased in severity over the years. (SAC, ¶ 14.) In August 2005, Plaintiff complained about the discrimination to his supervisor and in response, the City retaliated with harassment and denial of his employment benefits. (SAC, ¶ 15.) During his employment, Plaintiff also filed complaints with the Department of Fair Employment and Housing ("DFEH") and the Equal Employment Opportunity Commission ("EEOC"). (SAC, ¶ 17.)

Plaintiff then sought to submit an application for disability retirement and was required to turn in an application with the City's Department of Retirement Services. (SAC, ¶ 19.) In or around July 2008, the City's Department of Retirement Services refused to accept Plaintiff's application for disability retirement on behalf of the Board, without Plaintiff's wife's signature, despite their separation. (SAC, ¶ 20.)

On December 1, 2008, Plaintiff filed his application for disability retirement. (SAC, ¶ 21.) On February 20, 2009, the City terminated Plaintiff's employment in retaliation for complaining to his supervisor, the DFEH, and the EEOC. (SAC, ¶ 23.)

On October 26, 2010, a medical examiner found that Plaintiff's symptoms of severe depression were caused by his work environment, that he was disabled, and that he could not work. (SAC, ¶ 26.) On December 18, 2014, the Board appointed a doctor to evaluate Plaintiff's application. (SAC, ¶ 28.)

On November 23, 2015, Plaintiff wrote a letter to the Board to request that it order the Department of Retirement Services to forward Plaintiff's case packet and medical records to the Board so it could make a ruling on his application. (SAC, ¶ 49.)

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[1] The Second Amended Complaint contains numerous factual allegations. For clarity, the Court refers to the allegations most relevant to the instant demurrer.

The SAC alleges that because Plaintiff was Iranian American, the City aided and abetted the Board and FCERS' racial discrimination by not passing Plaintiff's application to the Board. (SAC, ¶ 58.)

On March 18, 2022, Plaintiff filed his SAC, asserting the following causes of action:

1) Racial Discrimination [against the City];
2) Retaliation [against the City];
3) Violation of Government Code section 12940, subdivision (k) [against the City]; and
4) Retaliation [against all defendants].

On April 17, 2024, FCERS and the Board filed a demurrer to the SAC. On the same day, the City filed its own demurrer to the SAC. Plaintiff filed a single opposition to FCERS/the Board's demurrer and the City's demurrer went unopposed.

At the July 18, 2024 hearing on the demurrers, this Court (Hon. Monahan) continued the hearing to give the Court an opportunity to review an untimely opposition filed by Plaintiff and the City's subsequent reply. Plaintiff is reminded to follow all rules of court and procedure going forward.

II. Legal Standard

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

III. Procedural

a. The City's Request for Judicial Notice in Support of Demurrer[2]

In support of its demurrer, the City requests judicial notice of the following:

1) Richeda Decl. (Ex. A). The attachment included as Exhibit A is this Court's (Hon. Monahan) prior order regarding Russell Richeda's special motion to strike the complaint and demurrer to the complaint. No declaration is attached. The request is GRANTED as to the Court's order. (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].)
2) SJMC section 3.28.100 (Ex. B). The request is GRANTED. (Evid. Code, § 452, subd. (b).)
3) SJMC section 3.28.180 (Ex. C). The request is GRANTED. (Evid. Code, § 452, subd. (b).)

[2] The City also filed a request for judicial notice in support of its reply to the opposition. The Court declines to take judicial notice of any documents on reply.

b. Plaintiff's Request for Judicial Notice

In support of his opposition, Plaintiff requests judicial notice of:
1) The City's Charter, updated February 2021;
2) A Public-Record Memo of a request made by Plaintiff;
3) A Copy of the Board's Final Meeting Minutes;
4) Plaintiff's Application for Disability Retirement; and
5) Multiple sections of the City's Municipal Code.

Item Nos. 1-3 are DENIED as unnecessary. (See *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"].)

Item No. 4 is not attached to Plaintiff's judicial notice request. The request is DENIED.

The request for judicial notice of Item No. 5 is GRANTED. (Evid. Code, § 452, subd. (b).)

IV. Demurrer Analysis

The City demurs to each of Plaintiff's claims on the grounds they are untimely and fail to state facts sufficient to constitute a cause of action.

a. FEHA Claims

The City first contends that Plaintiff's first, second, and third causes of action under FEHA are untimely because compliance with the statute of limitations for filing an administrative complaint is a prerequisite to a civil action for damages under FEHA and the statute of limitations runs from the date the alleged unlawful practice occurred. (Demurrer, p. 4:11-14.)

In opposition, Plaintiff argues that the continuing violation doctrine and the equitable tolling doctrine apply to his claims. (Opposition, p. 12:7-10.) He contends that he had an active Workers' Compensation claim and ongoing litigation against the City and that he was pursuing alternative remedies with government organizations that he was advised could help resolve the problem. (*Id.* at p. 12:17-19.) Further, he asserts that even if the continuing violation doctrine does not apply, the doctrine of continuing accrual applies because every month that he did not get his disability retirement pay constitutes a new cause of action. (*Id.* at p. 12:21-22.)

"To establish a continuing violation, an employee must show that 'the employer's unlawful actions are (1) sufficiently similar in kind – recognizing … that similar kinds of unlawful employer conduct, such as harassment or failures to reasonably accommodate disability, may take a number of different forms; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence.'" (*Brome v. Dept. of the California Highway Patrol* (2020) 44 Cal.App.5th 786, 799.) "In cases involving ongoing harassment or failure to accommodate a disability, the unlawful acts will not have gained 'permanence' unless the 'employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.'" (*Ibid*.)

Additionally, the Court declines to apply equitable tolling in this instance. "Broadly speaking, the doctrine applies '"[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one."' Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100 [internal citations omitted].) Here, Plaintiff alleges he considered filing with both the EEOC and DFEH, but did not do so. Moreover, filing with these agencies is a prerequisite to filing a civil action based on FEHA violations. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 ["timely filing of an administrative complaint is a prerequisite to the brining of a civil action for damages under the FEHA"].)

The first, second, and third causes of action for racial discrimination, retaliation, and failure to prevent discrimination and retaliation in violation of FEHA are based on the City's "Department of Retirement Services interfering with Plaintiff's application for service connected disability retirement and/or stalled the review of Plaintiff's application." (E.g., SAC, ¶ 78.) This interference allegedly includes "retaliating against Plaintiff by making [him] 'go through several hoops' to obtain his contractual right of pension benefits by requiring him to sign an overbroad authorization in order to review Plaintiff's application for service connected retirement." (SAC, ¶ 56.) This occurred in 2017. The SAC additionally alleges that Plaintiff was aware he had to sign the authorization form in either 2015 or 2017 (SAC, ¶ 54) and that in June 2017, he communicated with the EEOC about his complaints and the EEOC representative advised him that he might not have a claim because Plaintiff was no longer employed at the time of the discrimination (SAC, ¶ 59). The same month, the DFEH advised him of the same. (SAC, ¶ 61.) Therefore, Plaintiff was aware, at least by June 2017, that the alleged unlawful practice occurred, and chose not to file with the EEOC or DFEH at that time. Nothing in the SAC supports a contention that the alleged unlawful actions by the City had not "acquired a degree of permanence" in 2017 when Plaintiff was again required to sign the authorization. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 814 ["'permanence' . . . should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile."].) Plaintiff did not dual file a complaint with the EEOC/DFEH until April 2, 2019, over a year late. (See Gov. Code, § 12965, subd. (C)(1)(C); see also *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 725.)

Accordingly, the demurrer to the first through third causes of action is SUSTAINED on the ground they are untimely. The Court need not address the remaining arguments as to these three causes of action.

b. Retaliation Under 42 U.S.C. § 1981

Section 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (42 U.S.C. § 1981, subd. (a).) Section 1981 applies to discrimination based on race but not

disability. (See *Davies v. Polyscience, Inc.* (E.D.Pa. 2001) 126 F.Supp.2d 391, 393 ["Plaintiff argues that § 1981 also applies to disability discrimination . . . Plaintiff's reading of the law is incorrect; § 1981 liability does not extend to discrimination based on disability"]; *Thomas v. Northern Telecom, Inc.* (M.D.N.C. 2000) 157 F.Supp.2d 627, 633 ["[c]laims based on Section 1981 are limited to discrimination based on ancestry or ethnic characteristics… Section 1981 does not apply to discrimination on the basis of disability"].)

To establish a prima facie case under 42 U.S.C. section 1981, Plaintiff must allege "(1) [he] engaged in a protected activity; (2) [he] suffered an adverse employment action; and (3) there was a causal connection between the two." (*Surrell v. Cal. Water Serv.* (9th Cir. 2008) 518 F.3d 1097, 1108.)

The City argues it cannot be held liable for the actions of its employees under a theory of respondeat superior under 42 U.S.C. § 1981. (Demurrer, p. 9:9-10.) Rather, a plaintiff is required to allege that execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible. (See *Monell v. Dep't of Soc. Servs*. (1978) 436 U.S. 658, 694 ["a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents . . . [i]nstead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983"]; see also *Maddox v. County of San Mateo* (N.D.Cal. 1990) 746 F.Supp. 947, 956 ["plaintiffs could not circumvent the limitations on municipal liability made applicable to § 1983 by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), by bringing a § 1981 claim against a municipality under a respondeat superior theory . . . [i]n order to properly plead a § 1981 claim against a municipality, a plaintiff is now required . . . to allege that 'the violation of his 'right to make contracts' protected by § 1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases'"]; see also *Patterson v. County of Oneida* (2d Cir. 2004) 375 F.3d 206, 226 ["[l]iability of a municipal defendant or an individual sued in his official capacity under § 1981 and § 1983 cannot, however, be premised on a theory of respondeat superior"].)

In opposition, Plaintiff argues that for "purposes of *Monell liability*, the term 'policy' includes within its definition not only policy in the ordinary sense of a uniform practice, but also includes 'a course of action tailored to a particular situation and not intended to control decisions in later situations.'" (Opposition, p. 10:2-5, citing *Pembaur v. City of Cincinnati* (1986) 475 U.S. 469, 481 (*Pembaur*).) For example, Plaintiff relies on *Harman v. City and County of San Francisco* (*Harman*), which determined that an EEO manager qualified as a final policy maker under *Pembaur* because the manager effectively possessed final authority to establish municipal policy. (See Opposition, p. 10:8-12, citing *Harman*, *supra*, 136 Cal.App.4th 1279, 1303.) The Court however does not find Plaintiff's arguments in opposition to be persuasive.

In reply, the City, quoting *Pembaur*, asserts that the ""official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.'" (Reply, p. 8:20-23 [emphasis original].) As the City further notes in reply, it is not clear what official policy Plaintiff is referring to. Further, there are no allegations that Russell Richeda, a City employee, effectively possessed final authority to

establish municipal policy. Thus, Plaintiff cannot state a claim against the City for violation of 42 U.S.C. section 1981. Accordingly, the demurrer to the fourth cause of action is SUSTAINED.

V. Leave to Amend

The pleading party "bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the party "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The party "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the Court has already afforded Plaintiff an opportunity to amend and he has been unable to state a valid claim to overcome a pleading challenge on demurrer. Further, Plaintiff has not explained how any further amendments will change the legal effect of his pleading. As such, leave to amend is DENIED. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

VI. Conclusion and Order

The City's demurrer is SUSTAINED in its entirety without leave to amend. The Court shall prepare the final order.

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Calendar line 4
Case Name: *Charles Gardyn v. 7&8 Partnership, et al.*
Case No.: 23-CV-416173

Demurrer to the First Amended Cross-Complaint by Cross-Defendant Charles Gardyn

Factual and Procedural Background

The underlying case is an action for foreclosure of a deed of trust and breach of contract brought by plaintiff Charles Gardyn ("Gardyn") against defendants 7&8 Partnership, Oscar Martinez ("Oscar"), Gloria Martinez ("Gloria"), Alina Martinez Cordova ("Alina"), State of California Franchise Tax Board,[3] United States of America – Internal Revenue Service, and Robert Bass, LLC (collectively, "Defendants").[4]

According to the complaint, Defendants have a present ownership interest in or to real property located at 15814 Winchester Blvd. in Los Gatos, California ("Subject Property"). (Complaint at ¶¶ 13, 15.) Plaintiff Gardyn loaned money to Defendants to purchase and/or refinance the Subject Property. (Id. at ¶ 14.)

On December 10, 2007, for valuable consideration, Defendants made, executed and delivered a written straight note ("Note") to Plaintiff in the sum of $100,000. (Complaint at ¶ 16.) The parties later modified the Note on January 28, 2016. (Id. at ¶ 21.) By the terms of the modified Note, Defendants promised and agreed to pay Plaintiff monthly installments of $1,953.14, principal and interest beginning February 1, 2016. (Ibid.) Defendants made sporadic payments since 2016 but defaulted on the Note in January 2022. (Ibid.) Thus, Defendants are indebted to plaintiff Gardyn in an amount not less than $516,870.96. (Id. at ¶ 35.)

On May 11, 2023, plaintiff Gardyn filed a complaint against Defendants alleging causes of action for: (1) foreclosure of deed of trust and appointment of receiver; (2) breach of contract; and (3) account stated.

On February 15, 2024, cross-complainants 7&8 Partnership, Oscar, Gloria, and Alina (collectively, "Cross-Complainants") filed a cross-complaint against Gardyn setting forth the following causes of action:

- First Cause of Action: Fraud – Intentional Misrepresentation;
- Second Cause of Action: Fraud – Negligent Misrepresentation;
- Third Cause of Action: Fraud – False Promise;
- Fourth Cause of Action: Fraud - Concealment;
- Fifth Cause of Action: Constructive Fraud (Civil Code, § 1573);
- Sixth Cause of Action: Breach of Fiduciary Duty – Failure to use Reasonable Care;

[3] Defendant State of California Franchise Tax Board was dismissed from this action by stipulation and order filed on April 15, 2024.
[4] At times, the court refers to some parties by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

- Seventh Cause of Action: Breach of Fiduciary Duty – Duty of Undivided Loyalty;
- Eighth Cause of Action: Breach of Oral Contract;
- Ninth Cause of Action: Breach of Written Contract;
- Tenth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing;
- Eleventh Cause of Action: Breach of Implied Duty to Perform with Reasonable Care;
- Twelfth Cause of Action: Intentional Interference with Prospective Economic Relations;
- Thirteenth Cause of Action: Negligent Interference with Prospective Economic Relations;
- Fourteenth Cause of Action: Conversion;
- Fifteenth Cause of Action: Trespass to Chattels;
- Sixteenth Cause of Action: Unfair Competition in Violation of Business and Professions Code section 17200;
- Seventeenth Cause of Action: Civil Extortion;
- Eighteenth Cause of Action: Civil Theft (Penal Code, § 496);
- Nineteenth Cause of Action: Elder Abuse – Financial Abuse;
- Twentieth Cause of Action: Unjust Enrichment;
- Twenty-First Cause of Action: Accounting;
- Twenty-Second Cause of Action: Declaratory Relief.

According to the cross-complaint, Cross-Complainants and cross-defendant Gardyn entered into a series of transactions dating back to at least 2006. (Cross-Complaint at ¶¶ 1, 11.) During this time, they relied on Gardyn, a licensed CPA and real estate broker, to conduct all the arrangements and execute the relevant contracts. (Id. at ¶ 13.) These transactions however demonstrate a pervasive pattern of fraud, predatory lending, bad faith, and abuse by cross-defendant Gardyn. (Id. at ¶¶ 1, 11.)

On March 11, 2024, cross-defendant Gardyn filed a demurrer to the cross-complaint. The motion was scheduled for hearing on May 14, 2024. Prior to the hearing, this court posted a tentative ruling sustaining the demurrer to the eighth, ninth, tenth, eleventh, and sixteenth causes of action for failure to state a valid claim with leave to amend. The court overruled the balance of the demurrer. Neither side appeared at the hearing nor contested the tentative ruling which became the final order of the court.

On May 23, 2024, Cross-Complainants filed a first amended cross-complaint ("FACC"), now the operative pleading, asserting causes of action for:

- First Cause of Action: Fraud – Intentional Misrepresentation;
- Second Cause of Action: Fraud – Negligent Misrepresentation;
- Third Cause of Action: Fraud – False Promise;
- Fourth Cause of Action: Fraud - Concealment;
- Fifth Cause of Action: Constructive Fraud (Civil Code, § 1573);
- Sixth Cause of Action: Breach of Fiduciary Duty – Failure to use Reasonable Care;

- Seventh Cause of Action: Breach of Fiduciary Duty – Duty of Undivided Loyalty;
- Eighth Cause of Action: Breach of Oral Contract;
- Ninth Cause of Action: Breach of Written Contract;
- Tenth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing;
- Eleventh Cause of Action: Breach of Implied Duty to Perform with Reasonable Care;
- Twelfth Cause of Action: Intentional Interference with Prospective Economic Relations;
- Thirteenth Cause of Action: Negligent Interference with Prospective Economic Relations;
- Fourteenth Cause of Action: Conversion;
- Fifteenth Cause of Action: Trespass to Chattels;
- Sixteenth Cause of Action: Unfair Competition in Violation of Business and Professions Code section 17200;
- Seventeenth Cause of Action: Civil Extortion;
- Eighteenth Cause of Action: Civil Theft (Penal Code, § 496);
- Nineteenth Cause of Action: Elder Abuse – Financial Abuse;
- Twentieth Cause of Action: Unjust Enrichment;
- Twenty-First Cause of Action: Accounting;
- Twenty-Second Cause of Action: Declaratory Relief.

On June 4, 2024, cross-defendant Gardyn filed the motion presently before the court, a demurrer to the FACC. Cross-Complainants filed written opposition.

A further case management conference is set for December 3, 2024.

Demurrer to the FACC

Cross-defendant Gardyn argues the eighth, ninth, tenth, and eleventh causes of action in the FACC are subject to demurrer on the following grounds: (1) standing/legal capacity to sue; (2) uncertainty; (3) statute of limitations; and (4) failure to state a valid claim.

Meet and Confer Requirement

Before filing a demurrer, a demurring party must "meet and confer in person or by telephone" with the opposing party to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code of Civ. Proc., § 430.41, subd. (a).) This conference should occur at least five days before the deadline to file. (Code Civ. Proc, § 430.41, subd. (a)(2).)

When filing the demurrer, the demurring party must include a declaration stating either "the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer" or "[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith." (Code Civ. Proc., § 430.41, subd. (a)(3).) A court's

determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (Code Civ. Proc., § 430.41, subd. (a)(4).)

Here, attorneys on both sides filed declarations describing the parties' efforts to meet and confer prior to filing the instant demurrer. (See Cohen Decl.; Corrinet Decl.) In reviewing the declarations and attached exhibits, there appears to be minimal effort by the parties to meet and confer. But, none of those efforts appear to be meaningful or productive in order to informally resolve any deficiencies in the amended pleading. As the court observed in its prior order, there appears to be some degree of hostility and animosity between counsel. Perhaps some of that hostility is now mitigated as attorney Corrinet contends Mr. Cohen is no longer employed by the plaintiff's law firm. (Corrinet Decl. at ¶ 6.) Even so, while meet and confer in this instance could have been more productive, the court does not sustain or overrule a demurrer based on any perceived failure to do so adequately. **That said, this court again strongly reminds counsel to undertake the obligations set forth in Code of Civil Procedure section 430.41 with sincerity and good faith**.[5]

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Standing/Legal Capacity to Sue

"Standing is the threshold element required to state a cause of action and, thus, lack of standing may be raised by demurrer. [Citations.] To have standing to sue, a person, or those whom he properly represents, must ' "have a real interest in the ultimate adjudication because [he or she] has [either] suffered [or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." [Citation.]' [Citation.] Code of Civil Procedure section 367 establishes the rule that '[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.' A real party in interest is one who has 'an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in

[5] Santa Clara County Bar Association's Code of Professionalism, § 9 ["A lawyer should at all times be civil, courteous, and accurate in communicating with adversaries, whether in writing or orally"].

the action.' [Citation.]" (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031-1032.)

Also, "[a] party initiating a lawsuit must have both capacity to sue (the right to come into court) and standing to sue (the right to state a cause of action seeking particular relief). [Citation.] Incapacity is ' "a legal disability, such as infancy or insanity, which deprives a party of the right to come into court." ' [Citation.] A challenge to a party's capacity must be brought at the earliest opportunity or the challenge is forfeited. [Citations.]" (*Smith v. Cimmet* (2011) 199 Cal.App.4th 1381, 1390.) Such a challenge may be brought by demurrer under Code of Civil Procedure section 430.10, subdivision (b).

Here, cross-defendant Gardyn argues simply the eighth, ninth, tenth, and eleventh causes of action do not allege that any Cross-Complainants suffered harm. (See Demurrer at p. 4:3-10.) This argument is not persuasive as Cross-Complainants allege that they suffered harm with respect to these claims. (See FACC at ¶¶ 96, 104, 112, 119, and Prayer for Judgment at No. 1.) The court will separately consider whether sufficient facts have been pled to state a valid cause of action in support of these harms later in this order. Nor does such an argument demonstrate a lack of capacity to sue as Cross-Complainants are not infants or otherwise adjudicated as incompetent or insane. The demurrer is therefore not sustainable on these grounds.

Accordingly, the demurrer to the eighth, ninth, tenth, and eleventh causes of action on the grounds of lack of standing and legal capacity to sue are OVERRULED.

Uncertainty

" ' "[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is incomprehensible that a defendant cannot reasonably respond." ' [Citations.] ' "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." ' [Citations.]" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Here, the arguments in support of uncertainty are largely intertwined with points raised in connection with the general demurrer for failure to state facts. Given the contentions raised on general demurrer, cross-defendant Gardyn appears to be on notice of the claims against him in this litigation. Nor does the court find the eighth, ninth, tenth, and eleventh causes of action to be so incomprehensible or ambiguous to support a demurrer for uncertainty. And, to the extent there is any such uncertainty, the parties can clarify those ambiguities utilizing civil discovery procedures. (See *Davies v. Super. Ct.* (1984) 36 Cal.3d 291, 299 [purpose of civil discovery is to take game element out of trial preparation and assist parties in obtaining facts and evidence necessary for expeditious resolution of their dispute].)

Consequently, the demurrer to the eighth, ninth, tenth, and eleventh causes of action on the ground of uncertainty is OVERRULED.

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806 (*Fox*).) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962 (*Fuller*).) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197 (*Aryeh*).)

" '[I]t is difficult for demurrers 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. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed.' [Citation.]" (*Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549, 554.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

On demurrer, cross-defendant Gardyn argues the eighth, ninth, tenth, and eleventh causes of action are time barred as the events alleged in the FACC occurred in 2006. (See Demurrer at p. 5:24-6:5.) But, while Gardyn contends each of these claims is subject to a four-year statute of limitations, he fails to identify any specific time when each cause of action accrued to trigger the statute of the limitations. Instead, there is only the conclusory statement in the moving papers that the events "appear" to have occurred in 2006. (Id. at p. 5:24-25; see *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 ["In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred."].) Thus, the statute of limitations argument is undeveloped and fails on this

ground alone. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants."].)

Furthermore, Cross-Complainants appear to be relying either on the delayed discovery rule or fraudulent concealment doctrine to overcome a statute of limitations defense. (See OPP at pp. 4:11-8:16.)

"[I]n order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox, supra,* 35 Cal.4th at p. 808.)

"The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale." (*Aryeh, supra,* 55 Cal.4th at p. 1192.) "In support of this doctrine, a plaintiff must allege the supporting facts—i.e., the date of discovery, the manner of discovery, and the justification for the failure to discover the fraud earlier—with the same particularity as with a cause of action for fraud. [Citation.]" (*Fuller, supra,* 216 Cal.App.4th at p. 962.)

Here, like the prior pleading, Cross-Complainants allege the action is timely as they did not discover cross-defendant Gardyn's misdeeds until February 2023. (FACC at ¶ 31.) At that time, Gardyn sent a demand letter to Cross-Complainants with a balance of ($2,312,411) far in excess of earlier escrow papers and based on the earlier fraudulent notes for $565,000, which is what prompted them to finally discover his misdeeds. (Id. at ¶ 27.) Cross-Complainants did not make discovery of the misdeeds earlier as they justifiably relied on Gardyn as a family friend, licensed CPA, and real estate broker. (Id. at ¶¶ 16, 31; see *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 [" 'If the plaintiff and defendant are in a confidential relationship there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation does not excite suspicion under these special circumstances.' "].) Nor did Cross-Complainants make earlier discovery as Gardyn repeatedly refused to provide accountings or explanations and provided fraudulent ones to them. (FACC at ¶¶ 16, 27.) Such allegations may support exceptions for delayed discovery or fraudulent concealment to defeat a pleading challenge on demurrer under the statute of limitations.

Therefore, the demurrer to the eighth, ninth, tenth, and eleventh causes of action is barred by the statute of limitations is OVERRULED.

Failure to State a Cause of Action

" 'The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.' [Citation.] 'Conversely, a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that

make it subject to special demurrer.' [Citation.]" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).)

"A complaint, with certain exceptions, need only contain a 'statement of the facts constituting the cause of action, in ordinary and concise language' [citation] and will be upheld ' "so long as [it] gives notice of the issues sufficient to enable preparation of a defense." ' [Citation.] '[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.' [Citation.]" (*Morris, supra,* 78 Cal.App.5th at p. 292.)

Eighth Cause of Action: Breach of Oral Contract

To prevail on a cause of action for breach of contract, the plaintiff must allege and prove: (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

Cross-defendant Gardyn argues the breach of oral contract claim fails as it does not identify the parties to the contract, the respective duties under the contract, whether such duties were performed or any clear breach or harm. (See Demurrer at p. 4:21-27.) This argument lacks merit as Cross-Complainants allege an oral contract with Gardyn where he promised to pay the discrepancy in value from the 1031 exchange. (FACC at ¶ 91.) Cross-Complainants allege they performed under the contract or were otherwise excused from performance. (Id. at ¶ 92.) Furthermore, Gardyn had a duty under the contract to pay the discrepancy in value and breached the agreement by failing to do so which resulted in harm to Cross-Complainants. (Id. at ¶¶ 91, 94-96.) Such allegations, which must be accepted as true on demurrer, are sufficient to state a claim for breach of oral contract.

Accordingly, the demurrer to the eighth cause of action on the ground that it fails to state a valid claim is OVERRULED.

Ninth Cause of Action: Breach of Written Contract

Cross-defendant Gardyn contends there are no facts amounting to an actual breach of the written contracts. This contention however is unavailing as Cross-Complainants set forth multiple breaches in the FACC which alleges:

> "Cross-Defendant Gardyn failed to do things that the contracts required him to do and did things that the contracts prohibited him from doing. These include: (1) defrauding Cross-Complainants by orchestrating a fraudulent 1031 exchange, (2) failing to pay Cross-Complainants the discrepancy in value from the 1031 exchange (and thus failing to perform his end of the exchange), and (3) tricking Cross-Complainants with regard to the notes totaling $565,000 by wrongfully loaning them their own money. Moreover, to the extent these notes totaling $565,000 constitute valid contracts, Cross-Defendant Gardyn further breached them by (1) charging compound interest despite multiple notes not providing for such interest and (2) attempting to collect rents, issues, and profits before demonstrating that Cross-Complainants were in default and thus in violation of Cross-Complainants' own collection rights." (FACC at ¶ 102.)

To the extent that Gardyn believes such breaches are duplicative of the fraud claims, the court acknowledges that California law allows parties to plead in the alternative. (See *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 ["When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations."]; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 690-691 [factually and legally inconsistent theories allowed].) And, whether one cause of action duplicates another is not a valid ground for demurrer. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 [Sixth District Court of Appeal found that duplicativeness "is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment."]; *McDonell v. American Trust Co*. (1955) 130 Cal.App.2d 296, 303 [redundancy is not a ground for demurrer]; see also Code Civ. Proc., § 430.10 [setting forth the grounds for demurrer].) Thus, the demurrer is not sustainable on this ground.

Consequently, the demurrer to the ninth cause of action on the ground that it fails to state a valid claim is OVERRULED.

Tenth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing

"[E]very contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.)

"The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation." (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031.) "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690.) "In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153.)

"In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." (*Rosenfeld v. JPMorgan Chase Bank, N.A.* (N.D. Cal. 2010) 732 F. Supp.2d 952, 968; CACI No. 325.)

Again, cross-defendant Gardyn asserts in part that the breach of implied covenant claim is a restatement of the fraud causes of action. (See Demurrer at p. 5:18-23.) The court however has already rejected the redundancy argument for reasons stated above. Gardyn also contends there is no wrongful conduct alleged to support breach of the implied covenant of good faith and fair dealing. (Id. at p. 5:14-17.) This contention is not persuasive as Cross-Complainants allege conduct which prevented them from receiving the benefits under the contracts and thus Gardyn did not act fairly and in good faith. (FACC at ¶¶ 110-112.) Such

allegations, which must be accepted as true on demurrer, are sufficient to state a cause of action.

Therefore, the demurrer to the tenth cause of action on the ground that it fails to state a claim is OVERRULED.

Eleventh Cause of Action: Breach of Implied Duty to Perform with Reasonable Care

The demurrer to the eleventh cause of action is OVERRULED for the same reasons articulated above in connection with the court's ruling on the breach of implied covenant of good faith and fair dealing claim.

Disposition

The demurrer to the eighth, ninth, tenth, and eleventh causes of action in the FACC is OVERRULED in its entirety.

The court will prepare the Order.

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Calendar Line 5
Case Name: *Weiting Zhan v. Shuaiqi Ge et al.*
Case No.: 23CV427371

I. Factual and Procedural Background

This is an intentional tort action brought by plaintiff Weiting Zhan ("Plaintiff"), a self-represented litigant, against defendant Shuaiqi Ge ("Ge").

According to the second amended complaint ("SAC"), on March 19, 2021, Ge received approximately 23 messages from Jianing Tang ("Tang"). (SAC, ¶ 3.) Thereafter, Ge called 911. (SAC, ¶ 4.)

That same night, Tang was questioned by the police and she admitted she wanted rent and deposit. (SAC, ¶ 5.) Tang could not decide if she wanted to press charges against Plaintiff and so Tang consulted with Ge and then decided to press charges. (SAC, ¶ 6.) When questioned by police, Ge stated that Tang instructed him to call 911. (SAC, ¶ 8.)

According to the allegations of the SAC, Plaintiff did not become aware of Ge's potential involvement in influencing Tang until 2022 and that she filed her complaint against him on December 6, 2023. (SAC, ¶ 10.) The criminal case brought by Tang against Plaintiff was filed on May 5, 2021 and was dismissed on January 4, 2024. (SAC, ¶ 9.) Plaintiff alleges that Ge is liable to her for potential civil conspiracy, malicious prosecution leading to a breach of a rental lease, and intentional tort for violating her speedy trial rights. (SAC, ¶ 13.)

On May 24, 2024, this Court (Hon. Monahan) sustained Ge's demurrer to the first amended complaint with 15 days' leave to amend on the ground Plaintiff failed to sufficiently allege a cause of action for civil conspiracy or malicious prosecution.[6]

The SAC contains one labeled cause of action for malicious prosecution. (See SAC, subd. II.)

On July 12, 2024, Ge filed a demurrer to the SAC. Plaintiff opposes the motion and Ge filed a reply.

II. Demurrer

Ge demurs to the SAC on the ground it fails to state facts sufficient to constitute a cause of action and is barred by the applicable statute of limitations.

a. Legal Standard

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not

[6] The Court declined to address Ge's arguments regarding the statute of limitations.

concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

b. Analysis

Ge asserts three arguments to support his demurrer: 1) he is not liable for malicious prosecution because any role he played in Plaintiff's legal issues was *de minimus*; 2) he is not liable for civil conspiracy because there is no underlying tort; and 3) Plaintiff's complaint is time-barred because it was filed after the two-year statute of limitations for tort actions.

i. Malicious Prosecution

"Malicious prosecution is a disfavored action. This is due to the principles that favor open access to the courts for the redress of grievances. The elements of the malicious prosecution tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim. Three elements must be pleaded . . . to establish the tort of malicious prosecution: (1) A lawsuit was commenced by or at the direction of the defendant which was pursued to a legal termination in plaintiff's favor; (2) the prior lawsuit was brought without probable cause; and (3) the prior lawsuit was initiated with malice." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 216 (*Robbins*) [internal citations and quotations omitted].)

Here, Ge argues that "simply calling 911, without more, is not enough to trigger liability for this tort." (Demurrer, p. 4:9-10, citing *Cox v. Griffin* (2019) 34 Cal.App.5th 440, 452 (*Cox*).) Ge is correct that "in most cases, a person who merely alerts law enforcement to a possible crime is not liable if law enforcement, on its own, after an independent investigation, decides to prosecute." (*Cox*, *supra*, at p. 452.) *Cox* is inapposite. Here, Plaintiff alleges more than that Ge merely called 911. The SAC additionally alleges that Ge "influenced [Tang's] decision towards pressing criminal charges." (SAC, p. 4:21-23.) The Court next turns to the elements of malicious prosecution.

As to the first element, "[t]he basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff's innocence. When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit." (*Robbins*, *supra*, 182 Cal.App.4th at p. 217.) Here, the SAC merely alleges that the criminal charges against Plaintiff were dismissed on January 4, 2024. (SAC, p. 5:2.) There are no allegations that the resolution of the criminal case indicates Plaintiff's innocence.

As to the second element, Plaintiff fails to sufficiently allege that the prior lawsuit was brought without probable cause. "To make a prima facie case of lack of probable cause, [plaintiff] must show no reasonable attorney would have thought [defendant's] lawsuit was tenable in light of the facts known to [defendant] at the time the suit was filed." (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 202 (*Ross*).) "Where there is no dispute as to the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute that action is purely legal. If there is a dispute as to such facts, that dispute must be resolved by the trier of fact before the objective standard can be applied by the court."

(*Ibid*. [internal citations omitted].) Here, is it clear that the facts are disputed by the parties. Specifically, the parties dispute what took place on March 19, 2021, when law enforcement was called to handle the dispute between Plaintiff and Tang. Therefore, the second element is not properly decided on demurrer.

Finally, "[t]he malice element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action." (*Ross, supra,* 145 Cal.App.4th at p. 204 [internal quotations omitted].) "The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward the plaintiff but exists when the proceedings are instituted primarily for an improper purpose." (*Ibid*. [internal citations omitted].) Here, the SAC is devoid of sufficient allegations of malice. Plaintiff alleges that the "malice of defendant is evident in [his] intent to help [Tang] avoid $200 to be released from the lease, despite knowing this was the legal method to terminate the lead. Additionally, [Ge] aimed to assist [Tang] in prolonging the plaintiff's arrest and ultimately sending the plaintiff back to China." (SAC, p. 6:2-7.) These allegations are not sufficient to allege that Ge had a subjective malicious intent or purpose in influencing Tang to press charges against Plaintiff. Further, the pleading itself indicates that an altercation took place between Plaintiff and Tang to the point that 911 needed to be called, and thus, there is nothing to support the assertion that Ge "influenced" Tang to press charges against Plaintiff for an ***improper purpose***. (See *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 495 [listing improper purpose to initiate a civil proceeding].)

In opposition, Plaintiff attempts to assert facts not alleged in the SAC and implies that these facts can be "construed as evidence" against Ge. These are not proper arguments on demurrer. (See *SKF Farms v. Superior Court* (1984) 153 Cal. App.3d 902, 905 [a demurrer is limited to the face of the pleading at issue and may not involve extrinsic evidence].)

Accordingly, Plaintiff does not sufficiently allege two of the elements of malicious prosecution. Thus, the demurrer is SUSTAINED as to the cause of action labeled malicious prosecution.

ii. Civil Conspiracy

"'Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.' A civil conspiracy 'must be activated by the commission of an actual tort.'" (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1021 (*AREI*) [internal citations omitted].)

In this case, it appears the underlying tort is the malicious prosecution cause of action. As explained above, Plaintiff fails to sufficiently allege malicious prosecution. Thus, there is no underlying tort to support a civil conspiracy. Furthermore, even if the malicious prosecution allegations were sufficient, "[i]t is well settled that bare allegations and rank conjecture do not suffice for a civil conspiracy. A party seeking to establish a civil conspiracy must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspirators knew of an intended wrongful act, they had to agree – expressly or tacitly – to achieve it." (*AREI, supra*, 216 Cal.App.4th at p. 1022 [internal citations and quotations omitted].) Here, the SAC's sole allegation regarding civil

conspiracy is entirely insufficient. (See SAC, ¶ 13 ["Additionally, I am pursuing damages from [Ge] for his potential civil conspiracy . . ."].)

As such, Plaintiff fails to sufficiently allege civil conspiracy and the demurrer is SUSTAINED as to this cause of action. Based on the foregoing, it is unnecessary for the Court to address Ge's remaining argument regarding statute of limitations.

III. Leave to Amend

The pleading party "bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the party "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The party "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the Court has already afforded Plaintiff an opportunity to amend and she has been unable to state a valid claim to overcome a pleading challenge on demurrer. Further, Plaintiff has not explained how any further amendments will change the legal effect of her pleading. As such, leave to amend is DENIED. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

IV. Conclusion and Order

The demurrer is SUSTAINED its entirety without leave to amend. The Court shall prepare the final order.

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Calendar Line 6
Case Name: *Richard Quihuis v. Quality Car Shippers, LLC*
Case No.: 24-CV-434637

Demurrer to the Notice of Appeal by Defendant and Respondent Quality Car Shippers, LLC

Factual and Procedural Background

This is a notice of appeal from the order, decision, and award of a labor commissioner by plaintiff and appellant Richard Quihuis ("Plaintiff"), a self-represented litigant.[7]

Plaintiff was employed by defendant Quality Car Shippers, LLC ("Defendant"), under a written agreement, as a truck driver from May 21, 2019 to June 19, 2019 in Los Angeles County and throughout the State of California. Defendant is an interstate automotive transportation hauling company. Plaintiff was paid at various rates depending on the load transported and the distance traveled.

Plaintiff was discharged from his employment on June 19, 2019. Plaintiff did not receive a final check until approximately six (6) weeks later via first class mail. This would mean that he received his final check around July 31, 2019. Because of the delay in payment, Plaintiff requested waiting time penalties for the maximum 30 days.

On February 14, 2024, a hearing was conducted by the San Jose WCA (Wage Claim Adjudication) office of the Labor Commissioner to consider Plaintiff's claim for waiting time penalties under Labor Code section 203.

At the hearing, Defendant submitted evidence of a class action lawsuit for wages, including waiting time penalties pursuant to Labor Code section 203. Plaintiff was included as a member in the class action lawsuit. Nor was there evidence that Plaintiff had "opted out" of the lawsuit. Thus, Defendant argued waiting time penalties should not be awarded and the case should be dismissed.

The Office of the Labor Commissioner therefore concluded it did not have jurisdiction to proceed with the matter and dismissed Plaintiff's claim for waiting time penalties under Labor Code section 203.

On April 8, 2024, Plaintiff filed a notice of appeal to the order, decision, and award of the labor commissioner.

On May 9, 2024, Defendant filed the motion presently before the court, a demurrer to the notice of appeal. Defendant filed a request for judicial notice in conjunction with the motion. Plaintiff filed written opposition. Defendant filed reply papers.

Demurrer to the Notice of Appeal

Defendant argues Plaintiff's wage and hour claim raised in the notice of appeal is barred by the doctrine of res judicata. (See *Frommhagen v. Bd. of Supervisors* (1987) 197

[7] The factual background is primarily taken from the Order, Decision, and Award of the Labor Commissioner.

Cal.App.3d 1292, 1299 [“If all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer.”].)

Request for Judicial Notice

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

Here, Defendant requests judicial notice of various items in support of its res judicata argument on demurrer. (See Request for Judicial Notice at Item Nos. 1-5.) The court however declines to take judicial notice of these items as they are not relevant in resolving the demurrer for reasons explained below. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it “is necessary, helpful, or relevant”].)

Accordingly, the request for judicial notice is DENIED.

Legal Standard

“In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Plaintiff’s Opposition

As a procedural matter, Plaintiff’s opposition, while filed with the court, does not appear to be served on Defendant as no proof of service has been filed with the court. (See Code Civ. Proc., § 1005, subd. (b) [“all opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days…before the hearing”].) In reply, Defendant claims it was not served with opposition and that opposition submitted to the court was untimely filed. (See Reply at pp. 1-2.) Even so, Defendant filed reply papers addressing the substance of the opposition thus waiving any defect in service. (See *Tate v. Super Ct.*

(1975) 45 Cal.App.3d 925, 930 ["It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion."].) Nor is the court concerned about the untimely filing of the opposition as the hearing on the demurrer was continued to August 22, 2024 and a substantive reply was submitted and thus there appears to be no prejudice. Therefore, the court will consider the opposition in connection with the demurrer. The court however reminds Plaintiff to comply with court rules and procedures with respect to future filings as Plaintiff is not exempt from compliance with the code by virtue of his self-representation status. (See *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [a litigant appearing in propria persona is entitled to the same, but no greater, consideration than other litigants and attorneys]; see also *Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193 [self-represented party "held to the same restrictive procedural rules as an attorney"].)

Analysis

Defendant argues the notice of appeal is subject to demurrer based on the doctrine of res judicata.

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Res judicata also bars claims that could have been brought in the prior action. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226.) The purpose of res judicata is to "preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation." (*Vandenberg v. Super. Ct.* (1999) 21 Cal.4th 815, 829.) In essence, it precludes the piecemeal litigation of claims. (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.)

The elements for res judicata are: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 93.)

The burden of proving the requirements for the application of res judicata is upon the party seeking to assert it as a bar or estoppel. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.)

But, as a threshold matter, this court considers whether a notice of appeal from the order of a labor commissioner is subject to the procedural challenge of general demurrer.

"An employee pursuing a wage-related claim ' "has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. [Citation.] Or the employee make seek *administrative* relief by filing a wage claim with the [commissioner] pursuant to a special statutory scheme codified in [Labor Code] section 98 to 98.8 … ." ' [Citations.]" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115 (*Murphy*).) The

administrative wage claim process is commonly known as the Berman hearing procedure. (*Ibid*.)

"The Labor Commissioner 'has broad authority to investigate employee complaints and to conduct hearings in actions "to recover wages, penalties, and other demands for compensation … ." [Citation.]' [Citation.] 'Within 30 days of the filing of a complaint, the commissioner must notify parties as to whether he or she will take further action. [Citation.] The statute provides for three alternatives: the commissioner may either accept the matter and conduct an administrative hearing [citation], prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship [citation], or take no further action on the complaint. [Citation.]' [Citation.] If the commissioner decides to accept the matter and conduct an administrative hearing, he or she must hold the hearing within 90 days. [Citation.]" (*Murphy, supra*, 40 Cal.4th at p. 1115.)

" 'Labor Code section 98, subdivision (a), expressly declares the legislative intent that hearings be conducted "in an informal setting preserving the right of the parties." The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. [Citation.]' " (*Murphy, supra,* 40 Cal.4th at p. 1115.) In fact, the purpose of the Berman hearing procedure is to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims. (*Ibid*.)

" 'Within 15 days after the Berman hearing is concluded, the commissioner must file a copy of his or her order, decision, or award and serve notice thereof on the parties. [Citation.] The order, decision, or award must include a summary of the hearing and the reasons for the decision, and must advise the parties of their right to appeal. [Citation.]' " (*Murphy, supra,* 40 Cal.4th at p. 1115.)

" 'Within 10 days after service of notice, the parties may seek review by filing an appeal to the municipal or superior court "in accordance with the appropriate rules of jurisdiction, where the appeal shall be heard de novo." [Citation.] The timely filing of a notice of appeal forestalls the commissioner's decision, terminates his or her jurisdiction, and vests jurisdiction to conduct a hearing de novo in the appropriate court. [Citation.]' [Citation.] 'Although denoted an "appeal," unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo. [Citation.] " 'A hearing *de novo* [under Labor Code section 98.2] literally means a new hearing,' that is, a new trial." [Citation.] The decision of the commissioner is "entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.' " [Citation.] The decision of the trial court, after de novo hearing, is subject to a conventional appeal to an appropriate appellate court. [Citation.] Review is of the facts presented to the trial court, which may include entirely new evidence. [Citations.]' [Citation.]" (*Murphy, supra,* 40 Cal.4th at p. 1116.)

According to the Code of Civil Procedure, a party against whom a complaint or cross-complaint has been filed may object by demurrer or answer. (Code Civ Proc., § 430.10.) The code defines a "complaint" as a "complaint" or "cross-complaint." (Code Civ. Proc., § 426.10, subd. (a).) Here, no complaint or cross-complaint has been filed in this action. Instead, Plaintiff filed a notice of appeal challenging the decision of the labor commissioner. Defendant cites no legal authority and this court is aware of none that allows a defendant to contest a notice of appeal in this instance by general demurrer. Defendant directs the court only to *Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070 (*Shine*), a decision from

the Second Appellate District. (See Demurrer at p. 7:7-26.) But, *Shine* is distinguishable as that case addressed the sustaining of a demurrer based on res judicata to a class action complaint, not a notice of appeal disputing the decision of the labor commissioner. While Defendant may ultimately prevail on the merits at the trial de novo, the court has no authority to dispose of this action by general demurrer.

Consequently, the demurrer to the notice of appeal on the ground of res judicata is OVERRULED.

Disposition

The demurrer to the notice of appeal is OVERRULED.

The court will prepare the Order.

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Case Name: *ZCA Homes LLC v. Rogelio DeRuna, et al.*
Case No.: 24-CV-435043

Motion to Dismiss by Defendants Rogelio T. DeRuna and James B. DeRuna

Factual and Procedural Background

This is a contract action involving real property brought by plaintiff ZCA Homes LLC ("Plaintiff") against defendants Rogelio T. DeRuna, successor trustee of the DeRuna Family Trust and James B. DeRuna, attorney-in-fact for Rogelio T. DeRuna (collectively, "Defendants") acting as self-represented litigants.

According to the complaint, the real property at issue is a single-family residence located at 2551 Huran Court, San Jose, California 95122 (the "Property"). (Complaint at ¶ 1.)

On December 26, 2023, Plaintiff presented Defendants with a Real Estate Purchase & Sale Agreement for the Property and offered to purchase the Property for $750,000. (Complaint at ¶ 7, Ex. 1.) Defendants accepted Plaintiff's offer and a contract was formed ("Agreement"). (Id. at ¶ 7.) Under the terms of the Agreement, Defendants were obligated to transfer and convey the Property to Plaintiff. (Id. at ¶ 16.)

After the Agreement was executed, an escrow was opened and Plaintiff's earnest money deposit of $5,010 was deposited in escrow account number 23-191761 with WFG National Title Insurance Company. (Complaint at ¶ 8.) Defendants breached the Agreement by: (1) failing or refusing to close escrow as required under the Agreement; and (2) failing and refusing to transfer and convey the Property to Plaintiff. (Id. at ¶¶ 9, 17-18.)

On April 10, 2024, Plaintiff filed the operative complaint against Defendants alleging causes of action for specific performance and breach of contract.

On June 12, 2024, Defendants filed the motion presently before the court, a motion to dismiss the complaint. Plaintiff filed and served timely written opposition.

A case management conference is set for October 1, 2024.

Motion to Dismiss the Complaint

While California law allows for motions to dismiss under specific circumstances, the legal authority for Defendants' motion is not entirely clear to the court. Defendants' memorandum in part address points related to a failure to state facts on the part of Plaintiff which would give rise to a general demurrer. (See Motion at p. 4; Code Civ. Proc., § 430.10, subd. (e).) The memorandum also attaches declarations from Defendants and cites Code of Civil Procedure section 437c which pertains to motions for summary judgment. (Motion at p. 4; Code Civ. Proc., § 437c.) The court addresses whether either motion is applicable here.

General Demurrer

Law

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

" 'The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.' [Citation.] 'Conversely, a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer.' [Citation.]" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).)

"A complaint, with certain exceptions, need only contain a 'statement of the facts constituting the cause of action, in ordinary and concise language' [citation] and will be upheld ' "so long as [it] gives notice of the issues sufficient to enable preparation of a defense." ' [Citation.] '[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.' [Citation.]" (*Morris, supra,* 78 Cal.App.5th at p. 292.)

Analysis

As stated above, the operative complaint alleges causes of action for breach of contract and specific performance.

To prevail on a cause of action for breach of contract, the plaintiff must allege and prove: (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

"If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.)

"To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract. [Citations.]' [Citations.]" (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.)

As to the breach of contract, the complaint alleges: (1) Plaintiff and Defendants entered into an Agreement; (2) Plaintiff fully performed under the Agreement; (3) Defendants breached the Agreement by refusing to close escrow and convey the Property to Plaintiff; and (4) Plaintiff suffered general and consequential damages from Defendants' breach. (Complaint at ¶¶ 14-19.)

As to specific performance, the complaint alleges: (1) Plaintiff fully perfomed under the Agreement; (2) Plaintiff has no adequate remedy at law because the Agreement was for the sale of real property; and (3) Plaintiff is entitled to specific performance. (Complaint at ¶¶ 10-12.)

As a procedural matter, Defendants did not submit a meet and confer declaration before filing a demurrer as required under Code of Civil Procedure section 430.41. Regardless, Defendants' memorandum does not specifically challenge whether Plaintiff has alleged sufficient facts to state claims for breach of contract or specific performance. Instead, Defendants argue the Agreement is null and void as defendant James DeRuna was never legally authorized to enter into the Agreement on behalf of Rogelio or the trust. But, Defendants' lack of capacity to enter into a contract argument cannot be resolved on demurrer which considers only the well-pleaded allegations of the complaint and judicially-noticed materials. (See *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 597, fn. 1 [on demurrer, court's focus is limited to the facts alleged on the face of the pleading and its exhibits, and any facts subject to judicial notice].) Nor is it the role of the court on a demurrer to examine the merits of a case or consider declarations filed by the parties. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [demurrer tests only legal sufficiency of a complaint and court cannot consider substance of declarations in addressing demurrer]; see also *SKF Farms v. Super. Ct.* (1984) 153 Cal.App.3d 902, 905 ["A demurrer tests the pleadings alone and not the evidence or other extrinsic matters."].) To the extent Defendants intend to rely on a particular defense for lack of capacity or that the Agreement is null and void, they may plead it as an affirmative defense in their answer to the complaint. Thus, the court finds no basis to treat the motion to dismiss as a general demurrer.

Motion for Summary Judgment

Law

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.)

A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Analysis

Here, Defendants may have intended to file a motion for summary judgment as they contend Plaintiff has not provided any evidence or legal authority to support its claims in this action. (See Motion at p. 2; see also *Aguilar, supra,* 25 Cal.4th at p. 854 [a defendant may move for summary judgment on the ground that plaintiff cannot establish at least one element of the cause of action and that plaintiff does not possess and cannot reasonably obtain needed evidence].)

But, any such motion for summary judgment would include very specific procedural requirements by the moving party. For example, "[n]otice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing." (Code Civ. Proc., § 437c, subd. (a)(2); see *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262 [trial court cannot shorten the minimum statutorily required notice without parties' consent].) Furthermore, "[a] party moving for summary judgment is required to support its motion with a separate statement that sets forth plainly and concisely the material facts the moving party contends are undisputed." (*Cadlo v. Ownes-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 523; Code Civ. Proc., § 437c, subd. (b)(1).) Defendants have not satisfied either of these requirements to support a motion for summary judgment. Nor are Defendants relieved of these procedural conditions by virtue of their self-representation status. (See *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [a litigant appearing in propria persona is entitled to the same, but no greater, consideration than other litigants and attorneys]; see also *Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193 [self-represented party "held to the same restrictive procedural rules as an attorney"].) Therefore, the court declines to construe the motion to dismiss as a motion for summary judgment. (See *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256 ["Summary judgment, although a very useful tool in litigation, is also a drastic remedy. Because of this, it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy."].)

Consequently, the motion to dismiss the complaint is DENIED.

Disposition

The motion to dismiss the complaint is DENIED.

The court will prepare the Order.

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