SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 04-02-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)


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TO CONTEST THE RULING: Before 4:00 p.m. today 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 strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Online reservations are now open for you to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to schedule your motion.

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FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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	22CV398994 Conference: Further Case Management	Sharon Lewis vs City of Milpitas et al	
LINE 2	22CV398994 Hearing: Demurrer	Sharon Lewis vs City of Milpitas et al	See Tentative Ruling. The Court will file the final order.
LINE 3	23CV425290 Hearing: Motion to Strike	Anthony Logan vs Ford Motor Company et al	See Tentative Ruling. The Court will file the final order.
LINE 4	23CV425290 Hearing: Demurrer	Anthony Logan vs Ford Motor Company et al	See Tentative Ruling. The Court will file the final order.
LINE 5	22CV398906 Motion: Compel	Marzieh Abdolyousefi et al vs Mojtaba Taiebat et al	See Tentative Ruling. Plaintiff shall submit the final order within 10 days.

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LINE 6	19CV359494 Motion: Compel	Rafael Martinez vs Dale Deselms	Notice appearing proper and good cause appearing, Defendant's unopposed motion to compel Plaintiffs Jonathon Contreras Martinez and Andrew Contreras Martinez ("Plaintiffs") to respond to Form Interrogatories, Set One, Special Interrogatories, Set One, and Demand for Inspection, Set One against is GRANTED. Plaintiffs shall provide code compliant responses within 20 days of service of the final order. Plaintiffs shall also pay to defendant's counsel sanctions in the amount of $960 (2 hrs + filing fee) within 20 days of service of the final order. Defendant shall submit the final order.
LINE 7	22CV398130 Motion: Compel	Jane Doe vs FRANKLIN-MCKINLEY SCHOOL DISTRICT et al	Notice appearing proper and good cause appearing, Plaintiff's unopposed motion to compel compliance with subpoena to SJPD is GRANTED. Defendant Dadaerian failed to file a motion to quash, as required, and nonparty SJPD has not opposed the request. The motion is GRANTED. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	22CV406086 Motion: Compel	ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, an Iowa corporation vs MARICEL AQUISAP	Because Defendant received actual notice of this motion to compel on January 9 and February 13, notice is proper. The unopposed motion to compel Form Interrogatories, Set One is GRANTED. Defendant must provide code compliant responses within 20 days of service of the final order. Defenant must also pay to Plaintiff's counsel $285 in sanctions within 20 days of service of the final order. Plaintiff must submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	20CV374668 Motion: Order Termination Sanction	Violet Williamson vs MOSAIC DANCE AND FITNESS, LLC, a California limited liability company et al	Normally, the Court would grant an unopposed motion. Here, however, Plaintiff has received outstanding discovery and seeks evidentiary sanctions based on Defendant's failure to pay discovery sanctions. The Court ordered in its Order filed December 13, 2023, that Defendant was to pay Plaintiff over $7000 in sanctions within 10 days of the order. The Court also indicated that Plaintiff would be entitled to bring a further motion to compel evidentiary sanctions should Defendant fail to comply with the order and continue to engage in misuse of the discovery process. While "disobeying a court order to provide discovery" constitutes a misuse of the discovery process, disobeying a court order to pay sanctions is not included under CCP section 2023.010. Although the list under that provision is not all inclusive, the Court is hesitant to impose evidentiary sanctions where Defendant has provided the discovery requested, as it appears has occurred in this case. The point of increasing sanctions is to get a party to provide discovery. It is not to obtain an advantage in the litigation over the failure to obtain sanctions. For this reason the Court declines to impose evidentiary sanctions and instead orders Defendant to pay to Plaintiff's counsel an additional $500 for its failure to pay the discovery sanctions as previously ordered. This amount shall be payable with 20 days of service of the final order. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 10	21CV389159 Motion: Vacate Prior Order	Onemain Financial Group, Llc vs Michael Provencio	Notice appearing proper and good cause appearing, Plaintiff's Motion to Set Aside and Vacate its Prior of Dismissal and for Entry of Judgment pursuant to Stipulation of the Parties is GRANTED. Plaintiff shall submit the final order.
LINE 11	22CV395140 Motion: Leave to File FAC	Real Time Staffing Services, LLC vs Advoque, LLC et al	Notice appearing proper and good cause appearing, Plaintiff's Motion for Leave to File its First Amended Complaint, Exh. B to Decl. of Miller, is GRANTED. However, prior to filing, Plaintiff should add the new Defendants to the caption of its FAC, as the new Defendants' names do not there appear, and should change Department 2 to Department 16 and change Judge Takaichi to Judge Rosen. Plaintiff shall file the final order and file the corrected amended complaint within 10 days.
LINE 12	23CV425115 Motion: Stay	ARI LAW, PC vs MUSEUM PLAZA, LLC et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 2
Case Name: *Sharon Lewis v. City of Milpitas et al.*
Case No.: 22CV398994

I. Factual and Procedural Background

This is a breach of contract action brought by pro per plaintiff Sharon Lewis ("Plaintiff") against defendants City of Milpitas ("the City"), City of Milpitas Housing Authority ("Housing Authority"), Tim Wong ("Wong"), and Julie Edmonds-Mares ("Edmonds-Mares") (collectively, "Defendants") over a condominium located at 340 Celebration Drive, Milpitas, California ("Condo").

Plaintiff initiated this action by filing a complaint on June 9, 2022. Plaintiff filed the first amended complaint ("FAC") on May 15, 2023. Thereafter, Defendants demurred to the FAC. The Court (Hon. Rosen) made the following ruling:

> Defendants' demurrer to the first, third, fourth and fifth causes of action on the ground of insufficient facts is SUSTAINED with 10 days leave to amend. Defendants City and Housing Authorities' demurrer to the second cause of action on the ground of insufficient facts is SUSTAINED without leave to amend. Defendants Wong and Edmonds-Mares' demurrer to the second cause of action on the ground of statutory immunity is OVERRULED. Defendants Wong and Edmonds-Mares' demurrer to the second cause of action on the grounds of time-bar and sufficiency of pleading is SUSTAINED with 10 days leave to amend. Defendants' demurrer to the FAC on the ground of uncertainty is OVERRULED.

(See Court's October 20, 2023 Order ("Court's Order"), p. 13:5-13.)

On October 30, 2023, Plaintiff filed the operative second amended complaint ("SAC"). The SAC alleges Plaintiff and the City signed a Residential Purchase Agreement and Joint Escrow Instructions ("2013 Contract") on October 18, 2013, formalizing the sale of the Condo to Plaintiff. (SAC, ¶ 23.) The terms of the 2013 Contract included a $175,000 sale price, a seller credit to buyer of $20,000, a $250 Home Warranty provided by seller. (*Id.* at ¶ 11.)

On January 15, 2018, Plaintiff opened escrow to record and close the 2013 Contract. (SAC, ¶ 48.) On March 1, 2018, the City, Wong, and Plaintiff executed an oral contract separate from the Condo's escrow transaction, stipulating Defendants would provide $57,000 for repairs to the Condo. (*Id.* at ¶¶ 92, 94.) On August 26, 2018, Plaintiff signed a new purchase contract ("2018 Contract") with Defendants for the Condo under fraud and duress. (*Id.* at ¶ 7.)

The 2018 Contract unilaterally added $35,000 to the price, a 45-year ownership restriction, and approximately $140,000 in costs for an undisclosed loan and APR terms. (SAC, ¶ 7.) Defendants allegedly substituted the 2018 Contract in escrow and forced Plaintiff to sign. (*Id.* at ¶ 23.)

The SAC alleges the following causes of action against Defendants:

1) Breach of Contract;

2) Negligent Misrepresentation, Fraud;
3) Intentional Interference with Performance of Contract;
4) Breach of Oral Contract;
5) Breach of Implied Duty to Deal in Good Faith, Fair Dealing, and/or with Care; and
6) Specific Performance.

On December 4, 2023, Defendants filed a demurrer to the SAC. Plaintiff opposes the motion.

II. Judicial Notice

a. Defendants' Request for Judicial Notice

Defendants request judicial notice of Plaintiff's Complaint (Ex. A) and FAC (Ex. B). The requests are GRANTED as to their existence. (See Evid. Code § 452, subd. (d); see also *People v. Woodell* (1998) 17 Cal.4th 448, 455.)

b. Plaintiff's Request for Judicial Notice

Plaintiff requests judicial notice of her Complaint, FAC, and SAC. The requests are DENIED. The Court has already taken judicial notice of the Complaint and FAC and finds it unnecessary to take judicial notice of the SAC, as it is the pleading under review. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1.)

Plaintiff requests judicial notice of Defendants' demurrer to the SAC. It is not clear why Plaintiff is requesting judicial notice of the operative demurrer and the Court finds it unnecessary to take judicial notice of the demurrer. Accordingly, the request is DENIED. (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"].).)

Finally, Plaintiff requests judicial notice of an email sent from Wong to Plaintiff that confirmed the 2013 Contract. The request is DENIED. (Evid. Code, § 450 ["Judicial notice may not be taken of any matter unless authorized or required by law."]; *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364; *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 761, fn. 18 [email is generally not a proper subject of judicial notice].)

III. Procedural Matters

As an initial matter, the Court notes that on March 7, 2024, Plaintiff filed two separate oppositions to the demurrer: one twelve-page brief and another fifteen-page brief. Code of Civil Procedure section 1005 does not permit a party to file two separate oppositions to a single demurrer. Moreover, taken together, the oppositions exceed the fifteen-page limit on responding memorandum. (See Cal. Rules of Court, Rule 3.1113, subd. (d) [no responding memorandum may exceed 15 pages].)

As noted above, Plaintiff is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same

standards as attorneys" and must comply with the rules of civil procedure and rules of court. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].) Accordingly, the Court will treat the second, fifteen-page brief, as the superseding opposition and will rely solely on that brief in reaching a decision.

IV. 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.)

V. Analysis

Defendants demur to the SAC on the grounds it is barred by the applicable statutes of limitations and for failure to allege sufficient facts to state a cause of action.

a. Breach of Contract

Defendants demur to the first cause of action for breach of contract, asserting that the four-year statute of limitations bars the claim. (Demurrer, p. 4:9-11, citing Code Civ. Proc., § 337, subd. (a).)

2013 Contract

In their demurrer, Defendants assert the Court's prior October 20, 2023 Order indicated Plaintiff did not specifically allege the dates of the breach of the 2013 Contract, rendering her cause of action related to that contract devoid of sufficient facts to survive a demurrer. Defendants now contend Plaintiff still alleges "the closing date was unspecified." (Demurrer, p. 5:1-5.) The Court is not persuaded by this argument.

As an initial note, Plaintiff incorporates her general allegations into her breach of contract cause of action. (SAC, ¶ 36.) In this case, the SAC asserts that Defendants breached the 2013 Contract when they failed to record the 2013 Contract as agreed, and instead recorded the 2018 Contract on August 26, 2018. (*Id.* at ¶¶ 14, 20-23, 25 [stating, for example, "The [Defendants] . . . wrongly prevented [Plaintiff] from closing and recording the 2013 Contract by initiating, unilaterally substituting, and recording the 2018 contract on or around August 26, 2018"].) Thus, Plaintiff alleges the breach occurred on August 26, 2018, and her June 9, 2022 Complaint was therefore timely filed.

Defendants next argue that even if the statute of limitations does not bar Plaintiff's claim, Plaintiff has failed to allege sufficient facts to state a claim for breach of contract.

To state a cause of action for breach of contract, Plaintiff must allege: 1) the existence of a contract; 2) plaintiff's performance or excuse for nonperformance; 3) defendant's breach; and 4) the resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

In this case, the SAC alleges: 1) the existence of the 2013 Contract (SAC, ¶ 37); 2) Plaintiff's performance of all obligations under the 2013 Contract except for those obligations in which she was excused from performing due to Defendants' intentional interference (*id.* at ¶¶ 42, 51, 54); 3) Defendants' breach of the contract by failing to close and record the contract as agreed and failing to follow the terms of the 2013 Contract, including the $20,000 Credit and $175,000 sale price (*id.* at ¶¶ 39-40, 43); and 4) Plaintiff suffered damages and was harmed as a result of Defendants' breach (*id.* at ¶¶ 44-45). These allegations are sufficient to survive a demurrer. (See e.g., *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [in considering merits of a demurrer, facts alleged in the pleading are deemed true, however improbable they may be].) Accordingly, the Court declines to sustain the demurrer to the first cause of action's 2013 Contract.

Because the SAC states a cause of action as to the 2013 Contract, the Court need not discuss whether the breach of contract cause of action is sufficiently pled, as a demurrer does not lie to a portion of a cause of action. (See e.g., *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778 ["a defendant cannot demur generally to part of a cause of action"]; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."].)

Based on the foregoing, the demurrer to the first cause of action is OVERRULED.

b. Negligent Misrepresentation/Fraud

Defendants demur to the negligent misrepresentation/fraud cause of action on the grounds it is barred by the statute of limitations and fails to allege sufficient facts to state a cause of action.

Statute of Limitations

Similar to above, Defendants contend the second cause of action is also barred by the statute of limitations and delayed discovery is inapplicable. (Demurrer, p. 9:25-28, citing Code Civ. Proc., § 338, subd. (d) [providing a three-year statute of limitations for fraud causes of action].) Although Defendants do not adequately develop their argument, their general point is well taken.

As this Court previously noted, Plaintiff does not dispute the three-year statute of limitations applies, but asserts that the delayed discovery rule applies here because she was unaware of her claim until May 8, 2021. (See Court's Order, p. 8:1-6.) In opposition, Plaintiff argues she believed Defendants' statements until around May 8, 2021 and that Defendants' wrongful acts, including fraud, continued until that date. (Opposition, p. 7:21-25.)

Section 338, subdivision (d) "provides that a cause of action based on fraud or mistake 'is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'" (*Vera v. REL-BC, LLC* (2021) 66 Cal.App.5th 57, 68.)

However, "[a] fraud claim will accrue even without actual knowledge if a plaintiff knows facts that should raise suspicion and trigger a further investigation." (*Id.* at p. 69.)

Here, the SAC alleges Plaintiff believed Defendants would honor over $15,000 in repair payments made by Plaintiff, and so Plaintiff continued to pay for repairs on the Condo until around May 8, 2021. (SAC, ¶ 10.) The SAC further alleges Plaintiff could not conclude a total investigation until May 8, 2021 due to the complexity of the claims, the difficulty of reaching anyone at the City or Housing Department, the large number of claims involved, as well as Defendants' fraud and covert acts. (*Id.* at ¶ 14.) Plaintiff additionally alleges that she began her investigation on August 26, 2018 and concluded that investigation on May 8, 2021. (*Id.* at ¶ 22.)

If Plaintiff's suspicion arose on August 26, 2018, such that she needed to begin investigating, her discovery of the claim began on that date, not on the date she completed the investigation. (See e.g., *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803 ["under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads . . . that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action"].)[1] Thus, Plaintiff had three years from August 26, 2018 to file a fraud claim against Defendants. Accordingly, Plaintiff had until August 26, 2021 to file her claim but did not file the initial complaint until June 9, 2022. Based on the foregoing, the second cause of action is time-barred and delayed discovery is inapplicable.

Accordingly, the demurrer to the second cause of action is SUSTAINED without leave to amend on the ground the claim is barred by the statute of limitations. Given the Court's ruling, it declines to address Defendants' remaining arguments.

c. Intentional Interference with Performance of Contract

Defendants demur to the third cause of cause of action on the grounds it is barred by the statute of limitations under Code of Civil Procedure section 339, subdivision (1), which generally applies to oral contracts, and fails to allege sufficient facts to state a cause of action.

After reviewing the SAC, it is apparent that Plaintiff is alleging an interference of the 2013 Contract, a written contract between her and the City, rather than interference of an oral contract. In any event, to determine which statute of limitations applies to a cause of action, it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153.) Here, the nature of the cause of action is the tort of interference and it is therefore irrelevant, for purposes of determining the applicable statute of limitations, whether the contract is written or oral.

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[1] The SAC does not sufficiently indicate why Plaintiff's investigation lasted nearly three years or what her investigation included. In opposition, Plaintiff asserts she had a "desire to discover all the facts constituting the fraud" in order to create a "complete complaint." (Opposition, p. 15:22-24.) The Court finds this justification to be insufficient. Moreover, as explained above and in the Court's prior order, delayed discovery must be pled with specificity.

Causes of action for interference with contractual relations have a two-year statute of limitations. (See *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168; see also *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 301; *Murphy v. Hartford Acci. & Indem. Co.* (1960) 177 Cal.App.2d 539, 543.) "In general, a cause of action for wrongfully induced breach occurs at the date of the wrongful act." (*Trembath v. Digardi* (1974) 43 Cal.App.3d 834, 836; see also *Kiang v. Strycula* (1965) 231 Cal.App.2d 809, 811-812.)

Here, the SAC alleges that on August 26, 2018, Edmonds-Mares substituted the 2013 Contract with the 2018 Contract, thereby intentionally interfering with Plaintiff's performance of the 2013 Contract. (SAC, ¶¶ 51, 56, 84.) Plaintiff alleges she became aware of this substitution on that date. Applying the two-year statute of limitations to the August 26, 2018 date, Plaintiff had until August 26, 2020 to bring her cause of action for intentional interference with contractual relations. As noted above, she did not bring her action until June 9, 2022 and the claim is untimely.

Accordingly, the demurrer to the third cause of action is SUSTAINED without leave to amend on the ground it is untimely under the applicable statute of limitations. The Court need not address Defendants' remaining arguments.

d. Breach of Oral Contract

Defendants demur to the fourth cause of action on the grounds it is barred by the applicable statute of limitations and is barred by the statute of frauds.

i. Statute of Limitations

The Court previously determined that the statute of limitations had run on Plaintiff's breach of oral contract claim but granted leave to amend allegations of delayed discovery.[2]

The SAC alleges Plaintiff did not "fully realize" Defendants' breach of the oral contract until on or around May 8, 2021 and that prior to this date Plaintiff was working to gather information to fully determine and understand the breach of the oral contract. (SAC, ¶ 107.) As the Court explained in its prior order, such allegations are insufficient for pleading purposes and the demurrer may be sustained on this basis. (See Court's Order, p. 10:16-19.)

ii. Statute of Frauds

This Court previously determined the statute of frauds was applicable to the oral contract. (See Court's Order, p. 11:4-6.)

The SAC contains a single allegation that states "[Plaintiff] is not barred by statute of limitation for Breach of Contract or Statute of Frauds . . . [Plaintiff] is not barred by statute of fraud limitation[.]" (SAC, ¶ 31.) Plaintiff does not elaborate and the SAC does not contain additional allegations stating why the cause of action is barred by the statute of limitations. Thus, the demurrer may also be sustained on this basis.

Accordingly, the demurrer to the fourth cause of action is SUSTAINED without leave to amend on the ground it is untimely and barred by the statute of frauds.

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[2] The SAC still alleges the breach of oral contract occurred during and/or after the close of escrow (SAC, ¶ 94) and that escrow closed on August 26, 2018. (SAC, ¶ 13.)

e. Implied Duty to Deal in Good Faith

Defendants demur to Plaintiff's fifth cause of action for implied duty to deal in good faith. The fifth cause of action is based on the 2018 Contract.

As previously explained, the "prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)

The elements of Civil Code section 1550 are a requisite to the existence of a valid contract. Section 1550 states that it is essential the existence of a contract that there be: 1) parties capable of contract; 2) their consent; 3) a lawful object; and 4) a sufficient cause or consideration. (Civ. Code, § 1550; see also *Cmty. Facilities Dist. v. Harvill* (1999) 74 Cal.App.4th 876, 880 [failure to meet a requirement can constitute a defense to a cause of action for breach of contract].) An essential element of any contract is consent and the consent must be mutual. (See Civ. Code, § 1565; *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942 ["Every contract requires the mutual assent or consent of the parties."].) Thus, if there is no "manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

Here, the SAC repeatedly alleges that Plaintiff did not believe the 2018 Contract was a real contract, she was told it was a sample contract, and she had no intention of entering into a contract at the time she signed the sample contract. (SAC, ¶¶ 50-51.) Thus, based on these allegations, there was no assent or consent to the contract and there could be no contract formation. As such, there can be no implied duty to deal in good faith regarding the 2018 Contract.

Accordingly, there is no valid contractual relationship, and the demurrer is SUSTAINED without leave to amend.

f. Specific Performance

Defendants demur to Plaintiff's final cause of action for specific performance on the ground it fails to allege sufficient facts to state a cause of action. Specifically, Defendants contend Plaintiff's allegations do not meet the burden under Civil Code section 3387 because 1) her "own pleadings maintain that she [is] seeking changes to the monetary agreements within her real estate contract" and 2) she states she is still residing at her Condo. (Demurrer, p. 14:15-20.)

Civil Code section 3387 states:

> It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is a presumption affecting the burden of proof.

(Civ. Code, § 3387.)

In this case, the SAC seeks specific performance of the 2013 Contract with a record sale of $175,000, a $20,000 credit, and a $250 warranty. (See SAC, ¶¶ 123-130.) In other words, Plaintiff only seeks a monetary difference based on the 2013 Contract. Thus, specific performance is an inadequate remedy. (*Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 136 ["'A party may not obtain both specific performance and damages for the same breach of contract[.]"].)

Based on the foregoing, the demurrer to the sixth cause of action is SUSTAINED without leave to amend on the ground it fails to allege facts sufficient to state a cause of action.

VI. Conclusion and Order

The demurrer to the first cause of action is OVERRULED. The demurrer to the second through sixth causes of action is SUSTAINED without leave to amend. (See e.g., *Eghtesad v. State Farm General Ins. Co.* (2020) 51 Cal.App.5th 406, 411 ["denial of leave to amend constitutes an abuse of discretion unless the complaint 'shows on its face that it is incapable of amendment.'"].)

The Court will issue the final order.

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Calendar Linse 3-4
Case Name: *Logan v. Ford Motor Co., et al.*
Case No.: 23CV425290

This is a lemon law case. According to the allegations of the complaint, on plaintiff Anthony Logan ("Plaintiff") purchased a new 2017 Ford Fusion manufactured and/or distributed by defendants Ford Motor Company ("Ford") and/or Carmax Auto Superstores, Inc. ("Carmax") (collectively, "Defendants"). (See complaint, ¶ 5.) Defendants gave Plaintiff an express written warranty in which they undertook to preserve or maintain the utility or performance of the vehicle, or to provide compensation in the event of a failure in utility or performance for a specified period of time. (See complaint, ¶ 6.) During the warranty period, the vehicle contained or developed nonconformities including power steering failure, loss of communications between modules, dash lights illuminating including traction control light, airbag light, TPMS light, check engine light and the wrench light, faulty powertrain control module, failure to shift out of park, gears failing to shift, defective transmission and failing to accelerate. (See complaint, ¶ 7.) Defendants have been unable to service or repair the vehicle to conform to the applicable express warranties after a reasonable number of opportunities, and Defendants failed to promptly replace the vehicle or make restitution to Plaintiff as required by Civil Code sections 1793.2, subdivision (d) and 1793.1, subdivision (a)(2). (See complaint, ¶ 8.) Plaintiff suffered damages not less than $25,000. (See complaint, ¶ 9.)

On October 31, 2023, Plaintiff filed a complaint against Defendants, asserting causes of action for:

1) violation of Civil Code section 1793.2, subdivision (a);
2) violation of Civil Code section 1793.2, subdivision (b);
3) breach of express warranty;
4) breach of the implied warranty of merchantability;
5) violation of the Magnusson-Moss Warranty Act; and,
6) violation of Business & Professions Code § 17200.

Defendant Carmax demurs to each of the causes of action of the complaint, on the grounds that they are uncertain and fail to state facts sufficient to constitute a cause of action. Carmax also moves to strike paragraphs 11, 12, 13, 19 and 23 of the complaint and paragraph C from the prayer of the complaint regarding civil penalties.

I. CARMAX'S DEMURRER TO THE COMPLAINT

First through third causes of action

Carmax argues that "it is unclear on what authority plaintiff bases his claims… [because t]he Complaint cites Civil Code § 1793.2(d), but that section applies to a manufacturer and a 'new motor vehicle.'" (Carmax's memorandum of points and authorities in support of demurrer ("Carmax's demurrer memo"), p.4:10-11.) "While the Complaint pleads this is a 'new' vehicle… this is a 2017 Ford bought in 2019." (*Id*. at p.4:12-13.) Further, "CarMax is not in the business of selling new vehicles… [and thus] CarMax is not… 'a manufacturer' and/or 'distributor' under the Act." (*Id*. at p.4:12-14.) However, the complaint alleges that Carmax is the distributor and that the car is new. On demurrer, we accept the allegations as true. (See *Hilliard v. Harbour* (2017) 12 Cal. App. 5th 1006, 1008

(stating that on "demurrer, we accept as true the facts as stated in the complaint").) Neither allegations nor judicially noticeable facts indicate that Carmax is not in the business of selling new vehicles. Accordingly, this argument is without merit.

Carmax also argues that "plaintiff does not meaningfully plead of what 'failure arose in the subject vehicle, which makes it impossible to see whether the alleged failure constitutes a 'nonconformity' under the act." (Carmax's demurrer memo, p.4:4-9.) However, paragraph 7 plainly alleges facts constituting the purported nonconformities.

Lastly, Carmax argues that "plaintiff fails to plead sufficient facts to show that CarMax breached an express warranty under the Song Beverly Act… [because] the Complaint does not even definitively plead that CarMax sold plaintiff the Subject Vehicle… [and] fails to allege that plaintiff presented the Subject Vehicle to CarMax for at least two repairs, and plaintiff fails to allege the date(s) that he presented the Vehicle to CarMax. Here, the complaint alleges that Defendants warranted the car and that they have been unable to service or repair the Vehicle to conform to the applicable express warranties after a reasonable number of opportunities." (Complaint, ¶ 8.) Here, it is true that Plaintiff must allege a plural number of opportunities. CarMax cites to *Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, which specifically held that one opportunity to repair a conformity does not constitute "a reasonable number of attempts" pursuant to the Act because "'[a]ttempts' is plural." (*Id*. at p.1208.) However, here the complaint alleges a "reasonable number of opportunities." "Opportunities" is plural. Thus, Carmax's own case does not support its assertion that the breach of express warranty cause of action is deficient. The dates and numbers of attempts to repair the subject vehicle can be clarified through discovery. The demurrer to the first through third causes of action is OVERRULED.

Fourth cause of action for breach of the implied warranty of merchantability

Carmax argues that "plaintiff alleges that the Subject Vehicle was sold with an express written warranty but does not indicate the duration of the warranty…. [and that] there is nothing in the complaint to indicate that any 'defects' rose to the level of the vehicle being 'unmerchantable' to breach the alleged warranties… [t]here are no allegations pleaded that plaintiff was unable to use the Subject Vehicle due to the alleged issues, nor are there any allegations that during plaintiff's ownership of the Subject Vehicle that he was put in danger because of such alleged damage." (Carmax demurrer memo, p.5:14-27.) However, the complaint does allege that the "defects substantially impair the use, value, or safety of the Vehicle" that the defects arose "[d]uring the warranty period." Carmax does not cite to any authority requiring the allegation of a warranty period, and as previously stated, the Court must accept the allegation that the "defects arose during the warranty period" as true. The demurrer to the fourth cause of action is OVERRULED.

Fifth cause of action for violation of the Magnusson-Moss Act

Carmax argues that "[b]ecause plaintiff's causes of action for breach of express warranty and breach of implied warranty fail, plaintiff's fifth cause of action under Magnusson-Moss also fails." (Carmax demurrer memo, p.7:3-4.) However, in light of the above rulings, Carmax's argument necessarily is without merit. The demurrer to the fifth cause of action is OVERRULED.

Sixth cause of action for violation of Business and Professions Code § 17200

Carmax argues that the sixth cause of action "fails for the same reason as the others. (Carmax demurrer memo, p.7:11.) However, again, in light of the above rulings, Carmax's argument necessarily is without merit. The demurrer to the sixth cause of action is OVERRULED.

II. CARMAX'S MOTION TO STRIKE PORTIONS OF THE COMPLAINT

Carmax moves to strike paragraphs 11, 12, 13, 19, 23 of the complaint and paragraph C from the prayer seeking civil penalties, arguing that "Plaintiff pleads mere conclusory allegations, without supporting facts, that CarMax's actions constituted a willful violation of the Song-Beverly Act." (Carmax's memorandum of points and authorities in support of motion to strike portions of the complaint ("Carmax strike memo"), p.3:4-5.) Carmax further argues that "Plaintiff has failed to plead sufficient facts related to the Vehicle's alleged defects, the warranty's duration, and whether the alleged defects arose during the warranty." (*Id*. at p.3:5-7.) "Therefore, as alleged by plaintiff, CarMax could not have had the requisite knowledge to willfully breach any warranty to plaintiff." (*Id*. at p.3:7-8.)

As previously indicated above, Carmax has not presented any authority requiring a plaintiff to allege the duration of a warranty, and the complaint alleges that the purported nonconformities arose during the warranty period. Moreover, Carmax omits certain portions of the allegations that do demonstrate willfulness. For example, paragraph 23 alleges that Carmax's "failure to comply with its obligations under the express warranty was willful, in that Defendant CarMax… and its representative were aware of their obligation to repair the Vehicle under the express warranty, but they intentionally declined to fulfill their obligation." (Complaint, ¶ 23.) Paragraph 11 alleges that Carmax's "failure to comply with its obligations under Civil Code section 1793.2, subdivision (d) was willful, in that Defendant and its representative were aware that they were unable to service or repair the Vehicle to conform to the applicable express warranties after a reasonable number of repair attempts, yet Defendant CarMax… failed and refused to promptly replace the Vehicle or make restitution." (Complaint, ¶ 11.) These allegations certainly support willfulness and are not conclusory.

The motion to strike is DENIED in its entirety.

The Court will prepare the Order.

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Calendar Line 5
Case Name: Abdolyousefi v. Taiebat
Case No.: 22CV398906 and 22CV399354

Motion to Compel Further Responses to Document Requests; Compelling Production of Documents, and Sanctions

Plaintiff requests further responses to request for documents, claiming that Defendant's objections to requests 1-4, 14, 15, 21, and 23 were not timely made and are therefore waived. Here, Defendant asked for and received an extension of time from Plaintiff. While the time to respond had already run by the time Defendant requested an extension, the extension kept open the time for Defendant to respond, as there was no agreement by the parties that objections were waived and Defendant claims he was not properly served with the requests. As such, Defendant may raise a proper objection.

Defendant objects to requests 1 and 2 claiming that the requests do not identify the documents sought with "reasonable particularity" which Defendant claims is required by CCP 2031.030. That provision requires the demand to designate the documents by specifically describing each item or by reasonably particularizing each category of item. Plaintiff is seeking "all documents" supporting Defendant's general denial. The Court agrees that this is not sufficiently particularized even by category. Plaintiff's requests to further compel requests 1 and 2 are DENIED.

Next, Defendant objects to requests 3, 4, 14, 15, 21 and 23, claiming that it need not produce documents because the affirmative defenses claimed are "purely legal defenses" that require no supporting documents. Defendant is required to turn over any documents it might use to support the affirmative defenses, whether such documents are required to prove his defense or not. Plaintiff's requests 3, 4, 14, 15, 21, and 23 are GRANTED.

The Court agrees with Plaintiff that Defendant's response to requests 5-9 – that it is providing nothing "because the requested documents do not exist"-- is deficient and not in compliance with CCP 2031.020 which requires the responding party to state that a diligent search and reasonable inquiry has been made and to state whether the documents ever existed. Plaintiff's requests 5-9 are GRANTED.

Finally, the Court agrees that Defendant's responses to requests 10-13, 16-20, and 22 are insufficient. To comply, the responses must identify which documents produced go with which request. It is not sufficient for a responding party simply to refer to other documents without identifying and summarizing them. *See Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 783-84. Plaintiff's requests 10-13, 16-20, and 22 are GRANTED.

The Court does not find that Defendant acted with substantial justification in opposing the vast majority of Plaintiff's requests. As such, Defendant and his attorney must pay sanctions to Plaintiff in the amount of $960 (2 hours time plus filing cost). Defendant must provide code compliant responses and pay sanctions within 20 days of the final order. Plaintiff shall submit the final order within 10 days.

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Calendar line 12

Museum Plaza LLC, Walid Mando, Katalyst Development LLC, Forma LLC, Hado LLc, FDL LLC, and Forma DDM (hereinafter "Defendants") bring a motion to dismiss the complaint, or in the alternative to stay the action pending arbitration. Plaintiff Ari Law agrees that the action should be stayed pending arbitration.

Defendants claim that the action should be dismissed, and not simply stayed, because Plaintiff knew about the request for arbitration prior to filing the lawsuit. Defendants claim that it was improper of Ari Law to file the suit because CA Business and Professions Code section 6201 requires a legal fee dispute to go to arbitration unless the client waives its right to arbitration. Because Plaintiff knew that Defendants had not waived their right to arbitration, Defendant asserts that Plaintiff acted improperly in filing the suit. Defendants only put in evidence regarding serving the Plaintiff notice in their reply, and thus it cannot be considered. Points raised for the first time in a reply brief ordinarily will not be considered because such consideration would either deprive respondent of an opportunity to counter the argument or require the effort and delay of additional brief by permission. *See, e.g., Marriage of Khera & Sameer* (2012) 206 Cal. App. 4th 1467, 1477 ("Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief[.]").

Defendants fail to meet their burden to show that Plaintiff improperly filed the lawsuit. But even if Plaintiff had, Defendants do not provide authority for their claim that the remedy for an improperly filed suit is dismissal of the lawsuit. B&P Code section 6201, cited by Defendants, only mentions staying the action, not dismissing it. Even the notice provided by Plaintiff to Defendants about their right to arbitrate states that "If I have already filed a lawsuit or arbitration, you may have the lawsuit or arbitration postponed after you have filed an application for arbitration under this program." (Ex. 2 attached to Complaint.) As such, it appears that the proper remedy is staying the action pending the arbitration, rather than dismissal. Moreover, dismissal would not cure the public nature of these filings, as they would remain part of the public record even were the case to be dismissed.

Defendants also request sanctions, but again cite no authority for the provision of sanctions in a case such as this. The Court does not find sufficient evidence to support a finding that Ari Law or its counsel knowingly lied to the Court in its complaint.

Accordingly, the case is stayed pending arbitration and no sanctions are awarded. Plaintiff shall submit the final order.

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