

**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: 11/7/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (11/6/2024) 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	23CV413944	Xiufeng Xie vs Silin Chen et al	Hearing: Demurrer [**C/F 10/15/2024 per courtroom**] Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.
LINE 2	23CV416173	Charles Gardyn vs OSCAR MARTINEZ et al	Hearing: Demurrer Ctrl Click (or scroll down on Lines 2-3 for tentative ruling. The court will prepare the order.
LINE 3	23CV416173	Charles Gardyn vs OSCAR MARTINEZ et al	Hearing: Motion to Strike Ctrl Click (or scroll down on Lines 2-3 for tentative ruling. The court will prepare the order.

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LINE 4	24CV433473	Bank Of America N.a. vs Luis Huerta	<p>Motion: Admissions Deemed Admitted</p> <p>Plaintiff Bank of America, N.A. ("Plaintiff")'s motion for order pursuant to Code of Civil Procedure ("CCP") sections 2023.010 et seq. and 2033.280 that the truth of all specified facts in the Request for Admissions, Set One, propounded by Plaintiff to defendant Luis Reyes Huerta by mail on July 18, 2024, be DEEMED ADMITTED.</p> <p>Unopposed and GRANTED. Moving party to prepare order for signature by court.</p>
LINE 5	21CV376082	Navy Federal Credit Union vs Dana Lewis	<p>Motion: Enforce Settlement</p> <p>Plaintiff Navy Federal Credit Union ("Plaintiff")'s motion for an order to enforce settlement agreement, and to enter judgment against defendant Dana Lewis ("Defendant") in the amount of \$5,751.32 that has been calculated to include court costs and attorney's fees, in accordance with the terms of written settlement agreement approved and accepted by all parties pursuant to paragraph 5-7 of the Stipulated Judgment, which provides that "[t]he Court shall retain jurisdiction in this matter pursuant to California Code of Civil Procedure [section] 664.6."</p> <p>Unopposed and GRANTED. Moving party to prepare order and judgment for signature by court.</p>
LINE 6	23CV419757	Andrew Fierros vs Juliana Linssen et al	<p>Hearing: Motion hearings</p> <p>Intervenor Liberty Mutual Insurance Company ("Intervenor")'s motion for leave to intervene in this action on the grounds that Intervenor has an interest in the matter based on the worker's compensation benefits paid out to plaintiff Andrew Fierro as a result of the subject incident and the subrogation rights conferred onto Intervenor under California Labor Code section 3852 and California Insurance Code section 11661.</p> <p>Unopposed and GRANTED WITH 15 DAYS LEAVE TO FILE COMPLAINT IN INTERVENTION. Moving party to prepare order for signature by court.</p>

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DATE: 11/7/2024 TIME: 9:00 A.M.

LINE 7	24CV428428	Christian Ortega vs Wanda Serrano	<p>Motion: Withdraw as attorney by Michel R. Huff and Huff Legal, PC for plaintiff Christian Ortega</p> <p>Unopposed and GRANTED. Moving attorney to prepare updated order for signature by court. Please include the April 10, 2025 at 10:00 AM in Department 3 hearing for Order to Show Cause to Plaintiff for Failure to Serve the Complaint in the proposed order on Items 7 a and b of proposed order for signature by court.</p>
LINE 8	2015-1-CV-286652	Wei Peng "Michael" Zhang et al vs Hardip Singh et al	<p>Hearing: OSC Re Contempt against defendants Hardip Singh and Jasvinder Kaur</p> <p>APPEAR.</p> <p>Note: Defendant Hardip Singh needs a Punjabi interpreter.</p> <p>Proof of personal service on Jasvinder Kaur on 9/18/2024 (filed on 9/26/2024).</p> <p>Proof of personal service on Hardip Singh on 9/18/2024 (filed on 9/26/2024).</p> <p>No opposition papers have been filed. Moving party to e-file and bring proposed order to hearing.</p>
LINE 9	2011-1-CV-196465	Cedarcrest Fund, LP vs M. Tran, et al	<p>Hearing: Claim of Exemption (Wage Garnishment) by Judgment Debtor Minh-Hang Tran</p> <p>APPEAR.</p> <p>Note:</p> <p>The Marin County Sheriff's Office is currently holding: \$114.52.</p> <p>The judgment creditor Cedarcrest Fund, LP will accept \$150 per pay period on account of this debt.</p>
LINE 10	23CV420593	Less Properties, LLC vs Ali Paknejad, et al	<p>Hearing: Application for Right to Attach Order by Plaintiff Less Properties LLC and an order or issuance of a writ of attachment in the sum of \$206,876.43 against defendant Mohammad Reza Pak Nezhad and defendant Ali Paknejad</p> <p>[**reset D18a MO dated 10/30/2024**]</p> <p>Unopposed and GRANTED. Moving party to submit order for signature by the court.</p>

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LINE 11			
LINE 12			

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Calendar Line 1

Case Name: *Xiufeng Xie v. Silin Chen (aka Lavender Chan and Simyllina Chen) et al.*

Case No.: 23CV413944

I. Factual and Procedural Background

Plaintiff Xiufeng Xie (“Plaintiff”) brings this first amended complaint (“FAC”) against defendants Silin Chen (aka Lavender Chan and Simyllina Chen) (“Silin” or “Lavender”);¹ Simorphy Design and Investment, LLC (“the LLC”); and Guang Chen (“Guang”).

In 2019, Plaintiff met Silin through a dating application. (FAC, ¶ 6.) Silin represented that her name was Lavender. (*Ibid.*) During that year, Lavender represented the following to Plaintiff: (1) one of her cousins, Simyllina Chen (“Simyllina”) lived in Los Angeles and owned the LLC; (2) her other cousin, Silin Chen (“Silin”) was a California real estate broker living in Hong Kong; and (3) Lavender sometimes acted as Silin’s agent on real estate deals. (FAC, ¶ 7.) Also during 2019, Lavender persuaded Plaintiff to retain both Silin and the LLC to represent him in purchasing a residence. (FAC, ¶ 8.)

In or around November 2019, Plaintiff, represented by Silin and the LLC, entered into an agreement to purchase a property on El Cajon Drive in San Jose (“El Cajon”) for \$721,000. (FAC, ¶ 9.) In December 2019, Lavender further recommended that Plaintiff retain the LLC to remodel El Cajon and thereafter, on December 2, 2019, Plaintiff entered into a contract with the LLC. (FAC, ¶ 10.) On December 17, 2019, escrow closed on El Cajon and Silin received a commission as Plaintiff’s real estate agent. (FAC, ¶ 11.)

On January 6, 2020, Lavender introduced Plaintiff to Guang as her brother, who was married with two sons; however, Guang was not Lavender’s brother and was not married. (FAC, ¶ 12.) Thereafter, the LLC commenced its work on El Cajon under the contract and Plaintiff’s payments to the LLC totaled more than \$130,000. (FAC, ¶ 13.)

In August 2020, Lavender suggested that Plaintiff throw himself a party to celebrate a new job and his birthday. (FAC, ¶ 15.) Once Plaintiff agreed, Lavender suggested Plaintiff invite Guang and his wife to the party and Plaintiff again agreed. (*Ibid.*)

Plaintiff’s party was scheduled for August 9, 2020, but on August 7, 2020, Lavender told Plaintiff that Guang and his wife had been in a serious accident while traveling to the party and were hospitalized. (FAC, ¶ 16.) Eventually, Lavender told Plaintiff that both Guang and his wife died from their injuries and that she would have to adopt her nephews. (*Ibid.*) Lavender blamed Plaintiff for the orphaned nephews because their parents were traveling to attend his party. (*Ibid.*)

In or about October 2020, Lavender asked Plaintiff to help pay property taxes on a property located at North Capitol Ave. in San Jose (“North Capitol”). (FAC, ¶ 17.) Lavender represented that North Capitol was owned by Silin and that the family could not afford the

¹ 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.)

property tax because they were taking care of the nephews. (*Ibid.*) Lavender also began showing signs of mental instability due to the stress of taking care of her nephews and the financial responsibility. (*Ibid.*) Plaintiff was persuaded to help pay the property tax at North Capitol and then sell El Cajon so he could purchase North Capitol. (*Ibid.*) Thereafter, Plaintiff signed an agreement to have Simyllina and the LLC sell El Cajon. (FAC, ¶ 18.)

On December 11, 2020, Plaintiff sold El Cajon for \$795,000. (FAC, ¶ 19.) On January 4, 2021, Plaintiff entered a contract to purchase North Capitol from Silin for \$950,000. (FAC, ¶ 20.) On January 11, 2021, Plaintiff received an appraisal valuing North Capitol at about \$64,000 less than the contract price. (FAC, ¶ 21.) Based on this appraisal, Lavender represented that Silin was willing to adjust the purchase price to \$905,000. (*Ibid.*) Escrow then closed on both properties. (FAC, ¶¶ 22-23.)

In or around May 2021, Lavender told Plaintiff she located a home in Texas and planned to move her nephews there. (FAC, ¶ 25.) Lavender told Plaintiff that her cousin Silin would purchase the Texas property but that Silin needed help with the financing and was willing to become partners with Plaintiff in the ownership of the Texas Property. (*Ibid.*) Plaintiff felt guilty and agreed to the partnership. (*Ibid.*)

In June 2021, Plaintiff contributed \$11,400 towards the Texas Property and signed a personal loan contract presented by Lavender. (FAC, ¶ 26-27.) Lavender did not provide Plaintiff with a copy of the contract. (FAC, ¶ 27.) In July 2021, Plaintiff paid an additional \$14,891 towards the Texas Property. (FAC, ¶ 28.) In or around July 2022, Lavender claimed she lost \$30,000 of Plaintiff's payments and had not transmitted them to Silin and that Silin refused to give Plaintiff credit for those payments. (FAC, ¶ 29.) During this discussion, Lavender sent Plaintiff copies of the personal loan contract but the language differed from the contract he had signed. (FAC, ¶¶ 30-31.) Plaintiff began reviewing the matter more thoroughly and discovered: (1) Lavender, Silin, and Simyllina were all the same person; (2) Guang was alive and had never been in a fatal car accident; (3) Guang and Silin/Lavender were a couple; and (4) Silin's purported nephews were actually her children. (FAC, ¶ 32.) Plaintiff confronted Silin who then claimed that she acted at the instruction of Guang. (FAC, ¶ 33.)

On June 6, 2024, Plaintiff filed his FAC, asserting the following causes of action:

- (1) Fraud [against Silin and the LLC];
- (2) Aiding and Abetting Fraud [against Guang];
- (3) Breach of Fiduciary Duty [against Silin and the LLC];
- (4) Aiding and Abetting Breach of Fiduciary Duty [against Guang];
- (5) Rescind Personal Loan Contract and Texas Partnership [against Silin]; and
- (6) Disgorgement [against the LLC].

On August 19, 2024, Silin, a self-represented litigant, filed a demurrer to the first, third, fifth, and sixth causes of action. Plaintiff opposes the motion and Silin filed a reply.

II. Request for Judicial Notice

In support of his opposition, Plaintiff requests the Court take judicial notice of the following:

- (1) Original Complaint filed April 3, 2023;
- (2) First Amended Complaint filed June 6, 2024;

- (3) Entry of Default against Guang filed September 4, 2024;
- (4) Grant Deed recorded on January 29, 2021 for North Capitol; and
- (5) Silin Chen's Real Estate Licensing.

The request for judicial notice is DENIED as unnecessary. (See e.g., *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"].)

III. Legal Standard on Demurrer

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 (*Blank*).) "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.)

IV. First Cause of Action – Fraud

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 [internal citations omitted].) "Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*Id.* at p. 793 [internal citations and quotations omitted].)

The gist of Silin's demurrer to the fraud cause of action is that it is conclusory. In particular, Silin asserts that Paragraphs 14, 16, and 17 do not include sufficient factual details such as how she persuaded Plaintiff; what she said; what representations she made; how the nephews acted towards their parents' death; when she ran into traffic; whether the police were involved; and if there were witnesses. (Demurrer, p. 4.) Silin first argues that Paragraph 14 does not indicate "what kind of contacts" the parties had; however, Paragraph 14 is clear that Plaintiff had face-to-face, in person contacts with Silin and Guang starting in March 2020. (See FAC, ¶ 14.) Paragraph 16 and 17 are likewise sufficiently specific in that it alleges the date Silin made the representations, in 2020 and therefore, in person, who she made them to, and what she said to Plaintiff. (See FAC, ¶¶ 16, 17.) As Plaintiff notes in his opposition, the accuracy of the alleged facts or the likelihood that Plaintiff can prove these facts is not properly decided on demurrer. (See *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [In considering the merits of a demurrer, the facts alleged in the pleading are deemed true, however improbable they may be.]; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof"].) The Court finds that

Plaintiff's fraud allegations are pled with sufficient particularity and declines to sustain the demurrer on this basis.

Silin next argues that the FAC's allegations are inconsistent and contradictory to the FAC's Exhibit B. (See Demurrer, p. 5, subd. 3.) Exhibit B of the FAC is the personal loan contract signed by Plaintiff regarding the Texas Property. The FAC itself alleges that the personal loan contract that was sent to Plaintiff is not the same as the personal loan contract that he initially signed. (See FAC, ¶¶ 27, 30-31, Ex. B.) Thus, Silin's second argument that Exhibit B contradicts the allegations in the FAC is not persuasive.

Next, Silin argues that Plaintiff fails to allege that he justifiably relied on Silin's representations and that he was damaged as a result. (Demurrer, pp. 7, subd. 4., 8, subd. 5.) Here, the first cause of action alleges that Plaintiff reasonably relied on Silin's representations and her "feigned mental instability" and as a result, he was damaged in the amount of \$265,000. (FAC, ¶¶ 39-41.) Further, the general allegations, incorporated into the first cause of action, allege that Plaintiff relied on Silin's representations about who she was, who her cousins were, and representations about her nephews and the purchase of both North Capital and the Texas Property and because of these misrepresentations, he made payments to Silin and purchased homes for her. (See FAC, 16-24, 29.) The Court finds these allegations to be sufficient.

Based on the foregoing, the demurrer to the first cause of action on the ground it fails to state facts sufficient to constitute a cause of action is **OVERRULED**.

Finally, Silin argues that the first cause of action must be sustained as uncertain. "[D]emurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Reg. Authority* (2012) 208 Cal.App.4th 1125, 1135.) This is because "ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.) Here, it is clear from Silin's detailed arguments as to the substance of the first cause of action that the fraud claim is not so uncertain that Silin is unable to respond. Accordingly, the demurrer to the first cause of action on the ground it is uncertain is **OVERRULED**.

V. Third Cause of Action - Breach of Fiduciary Duty

"The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

Silin argues the third cause of action is subject to demurrer because: 1) there is no fiduciary relationship between the parties; 2) there are insufficient facts regarding the breach and damages; and 3) it is uncertain.

Silin first contends that the contracts that Plaintiff entered were with the LLC and therefore, she did not owe Plaintiff a fiduciary duty. (Demurrer, p. 11:6-10.) Silin asserts that although she is the legal owner of the LLC, the contract was signed by the LLC as a separate entity, and not by her as an individual person. (*Ibid.*) In opposition, Plaintiff argues the FAC alleges Silin pretended to be three separate people and that she acted as both Plaintiff's real estate agent and the seller of North Capitol. (Opposition, pp. 8:28-9:4.)

“The law imposes on a real estate agent the same obligation of undivided service and loyalty that imposes on a trustee in favor of his beneficiary. This relationship not only imposes upon him the duty of acting in the highest good faith towards his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal’s decision.” (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562-1563.)

Here, the FAC alleges that Silin acted as Plaintiff’s real estate agent and received a commission as a result. (FAC, ¶¶ 7, 11, 37.) While Exhibit A shows that the LLC was a party to the contract, the FAC still includes allegations that Silin represented that “Silin” was the real estate agent conducting the transaction. Moreover, “[a] corporation is, of course, a legal fiction that cannot act at all except through its employees and agents.” (*Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6.) Silin concedes it is an agent of the LLC. (See Demurrer, p. 11:11-12 [“Defendant is the legal owner of the LLC”].) Therefore, Plaintiff has sufficiently alleged a fiduciary duty.²

Silin next argues that the FAC does not sufficiently allege a breach of the fiduciary duty and resulting damages. As Plaintiff notes in opposition, the FAC alleges Silin lied to Plaintiff about who she was, pretended to be multiple people doing business with Plaintiff, convinced Plaintiff to pay above market rate for North Capital and sell El Cajon, all while Silin pocketed the profits. (See FAC, ¶¶ 49-50.) The FAC then alleges that as a result of Silin’s actions, Plaintiff was damaged in a sum no less than \$265,000. (FAC, ¶¶ 51-52.) At the pleading stage, these allegations are sufficient to allege breach and resulting damages. (See e.g., *Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790 [breach of the fiduciary duty is a question of fact].)

As such, the demurrer to the third cause of action on the ground it fails to state facts sufficient to constitute a cause of action is **OVERRULED**.

Similar to above, Silin argues the third cause of action is uncertain. Again, given the detailed argument set forth in the demurrer, the Court is not persuaded that Silin is unable to reasonably respond to the claim. Thus, the demurrer to the third cause of action on the ground it is uncertain is **OVERRULED**.

VI. Fifth Cause of Action – Rescission

In support of the demurrer to the fifth cause of action, Silin argues that: (1) this Court does not have jurisdiction over the claim because it involves the Texas Property and is therefore governed by Texas law; and (2) that fraud must be pled with specificity. The first argument is not well taken. Nothing in the FAC suggests the personal loan contract was formed outside of California. Instead, the personal loan contract itself states that it was notarized in Santa Clara County. (See FAC, Ex. B.) Moreover, performance of the contract took place in California, where Plaintiff allegedly made payments to Silin. (See e.g., *Stone v. Tex.* (1999) 76 Cal.App.4th 1043, 1048.) Likewise, Silin’s second argument is not persuasive. As noted above,

² Silin also argues there is no fiduciary duty based on the personal loan contract. However, a party may not demur to a portion of a cause of action. (See *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 [“a demurrer cannot rightfully be sustained to part of a cause of action”].)

the fraud cause of action is sufficiently pled. Accordingly, the demurrer to the fifth cause of action is OVERRULED.

VII. Sixth Cause of Action – Disgorgement

Silin demurs to the sixth cause of action. As Plaintiff notes in his opposition, the sixth cause of action is brought only against the LLC, and not Silin. (Opposition, p. 10:9-13.) Thus, the Court declines to sustain Silin’s demurrer to the sixth cause of action and the demurrer is OVERRULED.

VIII. Conclusion and Order

The demurrer is OVERRULED in its entirety.

The Court will prepare the final order.

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Calendar Lines 2-3

Case Name: *Charles Gardyn v. 7&8 Partnership, et al.*

Case No.: 23-CV-416173

Demurrer and Motion to Strike to the Answer to the First Amended Cross-Complaint by Cross-Complainants 7&8 Partnership, Oscar Martinez, Gloria Martinez, and Alina Martinez

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 a demurrer to the FACC. The motion was scheduled for hearing on August 22, 2024. Prior to the hearing, this court posted a tentative ruling overruling the demurrer in its entirety. Neither side appeared at the hearing nor contested the tentative ruling which became the final order of the court.

On September 4, 2024, cross-defendant Gardyn filed his answer denying allegations of the FACC and setting forth eighteen affirmative defenses.

Currently before the court are Cross-Complainants' demurrer and motion to strike to cross-defendant Gardyn's answer to the FACC. Gardyn filed written oppositions. Cross-Complainants filed reply papers.

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

Demurrer to the Answer

Cross-Complainants argue each affirmative defense is subject to demurrer for uncertainty and failure to state sufficient facts. (Code Civ. Proc., § 430.10, subds. (e), (f).)

Legal Standard

A plaintiff (or cross-complainant) may demur to a defendant's (or cross-defendant's) answer within 10 days of being served with the answer (Code Civ. Proc., § 430.40, subd. (b)) on three grounds: (1) failure to state facts sufficient to constitute a defense; (2) uncertainty; or

(3) failure to state whether a contract alleged in the answer is written or oral. (Code Civ. Proc., § 430.20.)

The demurrer may be to the whole answer or to any one or more of the several defenses set up in the answer. (Code Civ. Proc., § 430.50, subd. (b).) The plaintiff may not, however, demur to part of a defense and, in order to determine the sufficiency of a defense, it must be considered as a whole. Each defense must be considered separately without regard to any other defense, and one defense does not become insufficient because it is inconsistent with any other parts of the answer. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733 (*South Shore Land Co.*)).

The critical inquiry when a plaintiff demurs to an answer is whether the answer raises a defense to plaintiff's stated cause of action. (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 879-880.) Affirmative defenses presented in an answer must plead ultimate facts to the same extent as required in a complaint. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Thus, for any "new matter" for which a defendant has the burden of proving at trial, the defendant must plead supporting facts. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.) Affirmative defenses consisting of legal conclusions will not survive demurrer nor motion for judgment on the pleadings. (*Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1117)

"The determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (*South Shore Land Co., supra*, 226 Cal.App.2d at p. 732.) "[T]he demurrer to the answer admits all issuable facts pleaded therein and eliminates all allegations of the complaint denied by the answer." (*Id.* at p. 733.) Unlike a demurrer to the complaint, "the defect in question need not appear on the face of the answer" as "[t]he determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*Ibid.*)

Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.) "[T]he failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty." (*Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809, overruled on other grounds by *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30.)

Here, the arguments in support of uncertainty are largely intertwined with points raised in connection with the general demurrer for failure to state facts. Stated another way, there are no separate and distinct arguments raised to support a special demurrer for uncertainty. Nor do the affirmative defenses, each identified specifically by name, appear to be so vague, ambiguous, or uncertain that Cross-Complainants cannot reasonably respond to them. 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 1st through the 18th affirmative defenses on the ground of uncertainty is **OVERRULED**.

Failure to State Sufficient Facts

Cross-Complainants argue each affirmative defense consists only of legal conclusions and fails to allege sufficient facts to constitute a valid defense. In opposition, cross-defendant Gardyn submits the following identical response in support of each affirmative defense:

“Cross-Defendant’s answer is sufficiently plead to provide Cross-Complainants with information to understand the nature of the defenses. The affirmative defenses are pled in a manner that gives Cross-Complainants sufficient notice with which to conduct discovery and prepare their case, akin to those addressed in *Harris*.⁵ Like *Harris*, Cross-Defendant’s answer places the Cross-Complainants on notice of each and every affirmative defense he intends to present at trial. Taken along with the facts alleged I [sic] the cross-complaint, this is sufficient to allow Cross-Complainants to conduct discovery necessary to investigate the affirmative defenses. This affirmative defense is appropriate at this state of the case, where discovery is at its initial stage.” (See OPP at pp. 2-8.)

Although rare for parties to demur to an answer, the law requires a defendant (or cross-defendant) to allege sufficient facts in support of each affirmative defense. Here, the court finds the 1st, 5th, and 13th affirmative defenses are properly pled to constitute a defense. For example, as to the fifth affirmative defense for statute of limitations, all that is necessary is to specify the applicable section; no additional facts are required. (See Code Civ. Proc., § 458; see also *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 [“It is necessary for defendant who pleads the statute of limitations to specify the applicable section, and, if such section is divided into subdivisions, to specify the particular subdivision or subdivisions thereof.”].) The remaining defenses however consist primarily of legal conclusions without supporting facts and thus are subject to demurrer. In fact, the 17th affirmative defense for “no recovery of attorney’s fees” and 18th affirmative defense for “reservation of defenses” do not appear to be valid defenses as a matter of law. Should the court sustain the demurrer, cross-defendant Gardyn requests leave to amend to allege additional facts which will be granted. (See *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 69 [leave to amend must granted if there is a reasonable possibility the defect can be cured by amendment].)

Therefore, the demurrer to the 1st, 5th, and 13th affirmative defenses for failure to state a valid defense is **OVERRULED**. The demurrer to the remaining affirmative defenses is **SUSTAINED WITH 15 DAYS LEAVE TO AMEND** for failure to allege facts to support a valid defense.

Motion to Strike

⁵ This case refers to *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 (*Harris*).

Cross-Complainants move to strike cross-defendant Gardyn's request for attorney's fees in Paragraph 2 of the Prayer for Relief in his answer to the FACC.

Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).)

Irrelevant matter includes "immaterial allegations." (Code Civ. Proc., § 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd. (b).)

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Edmon & Karnow, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2024) ¶ 7:168, p. 7(1)-79 citing Code Civ. Proc., § 437.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (Id. at ¶ 7:169, p. 7(1)-79.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (*Ibid.*)

Request for Attorney's Fees

"In the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney." (*Howard v. Schaniel* (1981) 113 Cal.App.3d 256, 266; Code Civ. Proc., § 1021.)

The answer to the FACC at #2 in the Prayer for Relief states: "Cross-Defendant has judgment for his costs of the suit and attorney's fees incurred herein."

Cross-Complainants argue there is no statutory, contractual, or factual basis for claiming attorney's fees alleged by cross-defendant Gardyn in the answer. In opposition, Gardyn contends attorney's fees are reciprocal under Civil Code section 1717 and that he is entitled to such fees if he is deemed the prevailing party. Section 1717, subdivision (a) provides in relevant part:

“In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs...” (Civ. Code, § 1717, subd. (a).)

The contention raised in opposition however is not persuasive. For example, the answer fails to allege the request for attorney’s fees is supported by Civil Code section 1717. Nor does cross-defendant Gardyn direct the court to any portion of the FACC requesting an award of attorney’s fees in connection with a breach of contract under section 1717. The request for attorney’s fees is therefore stricken but Gardyn will be allowed leave to amend to correct the defect. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360 [regarding demurrers and motions to strike, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question].)

Accordingly, the motion to strike the request for attorney’s fees is GRANTED WITH 15 DAYS LEAVE TO AMEND.

Disposition

The demurrer to the answer on the ground of uncertainty is OVERRULED.

The demurrer to the 2nd through 4th, 6th through 12th, and 14th through 18th affirmative defenses is SUSTAINED WITH 15 DAYS LEAVE TO AMEND for failure to allege facts to support a valid defense.

The demurrer to the 1st, 5th, and 13th affirmative defenses for failure to allege facts to support a valid defense is OVERRULED.

The motion to strike the request for attorney’s fees in the answer is GRANTED WITH 15 DAYS LEAVE TO AMEND.

The court will prepare the Order.

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