SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: January 30, 2024 TIME: 9:00 A.M.

FOR ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

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LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	22CV401810	JANE DOE vs QIN XIE et al	Xie's Demurrer is OVERRULED. Please scroll down to lines 1-2 for full tentative ruling. Court to prepare formal order.
2	22CV401810	JANE DOE vs QIN XIE et al	Entity Defendants' Demurrer is OVERRULED. Please scroll down to lines 1-2 for full tentative ruling. Court to prepare formal order.
3	22CV405516	Mario Rodriguez, Jr. vs Sheriff Dept. et al	Defendants' Demurrer is SUSTAINED and Motion to Strike is GRANTED, both WITHOUT LEAVE TO AMEND. The demurrer and motion to strike were properly served at Elmwood with Plaintiff's PFN. No opposition was filed. While 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. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) The demurrer and motion to strike are also well-taken. Plaintiff's complaint is unclear and fails to sufficiently allege the claims Plaintiff appears to try and allege, but to the extent it can be understood, Defendants appear to be immune from liability for the asserted claims. And, while it is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action, the burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff makes no such showing here. Accordingly, Defendants' Demurrer is sustained and motion to strike is granted, both without leave to amend. Defendants to prepare formal order and dismissal.
4	22CV405516	Mario Rodriguez, Jr. vs Sheriff Dept. et al	See line 3, above.
5	23CV419690	Marina Shinkarsky vs Sunnyvale Department of Public Safety et al	The City of Sunnyvale's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to Lines 5-7, 15 for full tentative ruling. Court to prepare formal order. Demurring party to prepare form of dismissal.
6	23CV419690	Marina Shinkarsky vs Sunnyvale Department of Public Safety et al	The County of Santa Clara's Demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Please scroll down to Lines 5-7, 15 for full tentative ruling. Court to prepare formal order. Demurring party to prepare form of dismissal.
7	23CV419690	Marina Shinkarsky vs Sunnyvale Department of Public Safety et al	Rural/Metro's Demurrer is SUSTAINED WITH 20 days leave to amend. Please scroll down to Lines 5-7, 15 for full tentative ruling. Court to prepare formal order.
8	22CV401041	Uhg I LLC vs Anthony Tran	Off calendar
9	22CV406948	Wells Fargo Bank, N.A. vs BILL SPAULDING	Off calendar

10	22CV407312	Jpmorgan Chase Bank N.a. vs Elysia Johnson	Off calendar
11	18CV334430	Discover Bank vs Andrew Euley	Andrew J. Euley's Claim of Exemption is GRANTED. Mr. Euley shall have $100 garnished from his wages per pay period until the debt is paid. Court to prepare formal order.
12	19CV347579	Bh Financial Services, LLC vs Hilda Clayton yra Saludares vs Costco Wholesale et al	Off calendar.
13	20CV369014	Patricia Hawkins et al vs Michael Hulme	Withdrawn by moving party, thus off calendar.
14	22CV405176	Kimberly Bluford vs Mike Santellano et al	Angela Storey's Motion to be relieved as counsel for Kimberly Bluford is GRANTED. Court to use form of order on file.
15	23CV419690	Marina Shinkarsky vs Sunnyvale Department of Public Safety et al	Petitioner's Application for Relief is DENIED. Please scroll down to Lines 5-7, 15 for full tentative ruling. Court to prepare formal order.
16	23CV421107	Matthew Kastner et al vs Kummi Kim et al	The Court will appoint Alma Ruby Gonzalez as Guardian Ad Litem for minor plaintiffs in this action and GRANT Plaintiff's motion for trial preference. The Court orders the parties to meet and confer regarding a trial date and pre-trial schedule and appear for a trial setting conference on February 13, 2024 at 11 a.m. in Department 6. Court to prepare formal order.
17	23CV422621	MICHAEL HERTZ vs MARK A. OLIVEREZ et al	Plaintiff's Motion for Interlocutory Judgment for Partition of Real Property and Appointment of Partition Referee is GRANTED. An amended notice of motion was served by federal express and electronic mail; no opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The summons and complaint was also served on all relevant parties, none of whom has responded to the complaint, thus the ownership allegations remain unopposed. Moving party to prepare formal order.
18	22CV408202	Pet Imaging of San Jose, LLC vs. Dr. Stephens & Company, LLC	Off calendar.

Calendar Lines 1&2
Case Name: *Jane Doe v. Ken Xie et.al.*
Case No.: 22CV401810

Before the Court are Defendants' Ken Xie, Xie Foundation ("Foundation") and LHP 2019 LLC ("LLC") demurrers to Plaintiff's verified third amended complaint ("TAC".) Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Factual

This action arises out of a dispute over the ownership of real property located at 23645 Oak Valley Road in Cupertino (the "Property"). (TAC, ¶ 13.) According to the TAC, Plaintiff's petition for divorce was filed on January 7, 2014, and she and her former spouse needed to sell the Property as part of their marital dissolution. (TAC, ¶¶ 16, 18.) Plaintiff was distraught at the prospect of losing the home she had lived in for 16 years. (TAC, ¶ 19.)

In December 2016, a mutual friend introduced Plaintiff and Mr. Xie, who had filed for dissolution of his own marriage. (TAC, ¶ 20.) On December 6, 2016, Mr. Xie sent number of WeChat messages to Plaintiff apprising her of his educational background, financial background, financial achievements, his daughter, and his daughter's financial success in fashion. (TAC, ¶¶ 21, 22, 23.)

On December 20, 2016, Plaintiff and Mr. Xie had dinner at Alexander Steakhouse, whose owner was a Fortinet chairman and Mr. Xie's friend/co-worker. (TAC, ¶ 25.) Plaintiff and Mr. Xie met again for dinner on December 23, 2016. (TAC, ¶ 28.) In the next seven days, Mr. Xie continued messaging Plaintiff informing her of his speaking schedule at a Morgan Stanely conference and sending her links to complimentary articles about his financial success. (TAC, ¶ 29, 30.) On December 30, 2016, while dinning at Mr. Xie's house with her son, Plaintiff confided to him her financial concerns and inability to keep her house. (TAC, ¶ 31.)

The next day, Mr. Xie messaged Plaintiff inviting her for lunch or dinner and offering to discuss a plan about her house. (TAC, ¶ 32.) Accepting the invitation, on December 31, 2016, Mr. Xie drove Plaintiff and her son to San Fransisco to watch the New Year's fireworks with him. During this drive, Mr. Xie shared how he planned to help Plaintiff with her financial dilemma. Mr. Xie proposed (1) the Foundation would buy the Property, (2) Plaintiff would rent the Property for approximately 6 months,

(3) he would then reimburse her for the rent payments, (4) he would buy the Property from the Foundation, in approximately 6 months, after completing the bifurcation of his divorce, and (5) he would then gift the Property back to Plaintiff. (TAC, ¶ 33.) Mr. Xie explained that since his money was frozen in connection with his divorce, the Foundation would instead purchase the property. Mr. Xie represented that while he and his brother were the founders of the Foundation, he was 100% in charge of making decisions on behalf of the Foundation and his brother. (TAC, ¶ 34.)

The next day, Plaintiff informed her husband about Mr. Xie as a potential buyer. Four days later, on January 5, 2017, Xie toured the Property and informed the broker of his intent to offer between $2,900,000.00 and $2,950,000.00. (TAC, ¶ 35, 36.) After his tour, Mr. Xie messaged Plaintiff and continued to reassure her that he would get her house back. (TAC, ¶¶ 36, 37.) On January 11, 2017, Mr. Xie messaged Plaintiff comforting her that he would process the house documents quickly and sending her a picture of the Fortinet convention he was attending in Las Vegas. Plaintiff expressed her comfort in his reassurance and her awe that he could make things happen. (TAC, ¶ 38.)

On January 17, 2017, Mr. Xie informed Plaintiff's broker about Plaintiff moving back into the house after the sale. The next day, indicating Mr. Xie's authority to make decisions on behalf of the Foundation, the broker informed Plaintiff and her husband of Mr. Xie's offer of $2,958.000.00 and his willingness to have the broker represent both buyer and sellers. (TAC, ¶ 42.) The offered price was approximately 20% below the market value at the time. However, during their earlier meetings on January 13, 2017, and January 18, 2017, Mr. Xie convinced Plaintiff to accept the lower offer so that it would be easier and faster for the Foundation to approve the purchase, and he promised to compensate Plaintiff for the shortfall. During these meetings, Mr. Xie also convinced Plaintiff to pay a monthly rent of $6000.00 by reassuring her that he would compensate her for the rent payments. (TAC, ¶ 44, 45.) Mr. Xie led Plaintiff to believe that taking a small loss was for their future together, and any loss would be temporary and immaterial since she would ultimately own the house. Aware of Mr. Xie's financial success and belief in his business intelligence, Plaintiff trusted Mr. Xie. (TAC, ¶¶ 46, 49.)

While escrow was pending, Mr. Xie continued to reassure Plaintiff of his support and sent her links to Fortinet's 2016 financial reports and press releases. On March 3, 2017, Mr. Xie flew Plaintiff, first class, to Paris for a 7-day vacation, during which he convinced Plaintiff to accept $3000.00 a month

in rent reimbursement instead of the previously promised $6000.00. Mr. Xie assured Plaintiff that this was a temporary arrangement until his divorce was finalized. Plaintiff believed she had no choice in the matter since the Property sale was almost finalized. (TAC, ¶¶ 55-57.) On or about March 12, 2017, Plaintiff executed a blank residential lease agreement which was later completed and signed by Mr. Xie as the landlord. That same day, Mr. Xie executed a sublease, as a tenant, for monthly rent of $3000.00. (TAC, ¶ 60.)

On March 15, 2017, escrow closed and the grant deed for the Property was recorded. (TAC, ¶¶ 64, 66.) No one from the Foundation other than Mr. Xie was involved during the entire sales process. After the completion of the sale, Plaintiff began receiving communications and bills from the Foundation's manager. On April 13, 2017, Mr. Xie informed Plaintiff that the Foundation required an extended one-year lease and offered to buy her a 55" TV to appease her. The new lease listed Mr. Xie as the Foundation CEO and landlord. (TAC, ¶ 71, 72.)

On or about September 11, 2017, Mr. Xie informed Plaintiff that he received or anticipated to receive a disbursement of $10,000,000.00 in connection with his divorce and convinced her that given the housing market it would be best to use the funds for purchase of a bigger house for them to live in. On February 6, 2018, Mr. Xie and Plaintiff discussed making an offer on a bigger house they had considered. (TAC, ¶ 77, 79, 82.)

On December 4, 2019, Plaintiff messaged Mr. Xie expressing her financial concerns. In response, Mr. Xie informed Plaintiff that in the next few months the Foundation was going to transfer the Property out to another entity and this two-step transfer was needed for tax purposes before he could transfer it to her. In response to Plaintiff's protests, Mr. Xie offered to pay for the expenses of her son and asked, "for less attitude and more patience". Plaintiff finally realized that she was being taken advantage of and stopped seeing XIE at the end of 2019. (TAC, ¶ 84-90.)

On January 7, 2020, Mr. Xie, as president of the Foundation, executed a grant deed and transferred the Property to LHP 2019 LLC and declared that no transfer tax was due since the proportional ownership interest remained the same after the transfer. The grant deed was recorded on January 22, 2020. (TAC, ¶ 91.)

On March 26, 2020, Plaintiff informed Mr. Xie that due to Covid, she was unable to pay the monthly rent. In exchanged messages on that date, Mr. Xie told Plaintiff to contact the Foundation's manager since the house still belonged to the Foundation and added that "what and how much I can help you depends on our relationship." (TAC, ¶ 94.) Subsequently, Plaintiff and Mr. Xie began dating again in the Spring of 2020 but broke up after a year in early 2021.

On or about July 1, 2022, in a private settlement meeting, the Foundation offered to waive the unpaid rent for the past two years in exchange for Plaintiff moving out of the Property, and Mr. Xie would compensate her for six months of rent for her to find a new place. The Foundation refused to fulfill Mr. Xie's previous promises to the Plaintiff, and no agreement was reached. (TAC, ¶ 103.)

In July 2023, Plaintiff learned the Foundation had delinquency status with the California Secretary of State, IRS, and California Department of Justice. As such, the Foundation could not engage in any operations including purchasing the Property, collecting rent, and conveying the Property to the LLC. (TAC, ¶¶ 69, 92.)

B. Procedural

Plaintiff filed suit on July 22, 2022 and amended her complaint ("FAC") on September 15, 2022, asserting: (1) breach of contract (against Xie and the Foundation); (2) breach of fiduciary duty (against Xie and the Foundation); (3) fraud (against Xie); (4) intentional infliction of emotional distress (against Xie and the Foundation); (5) quiet title (against Xie, the Foundation and the LLC); and (6) declaratory relief (against Xie and the Foundation). The Court sustained Defendants demurrer and gave Plaintiff leave to amend.

On March 9, 2023, Plaintiff filed her second amended complaint ("SAC") asserting the same claims as the FAC, except including the Entity Defendants in her fraud claim. On August 16, 2023, the Court sustained, without leave to amend, Defendants' demurrers to the SAC's causes of action for (1) breach of contract, (2) breach of fiduciary duty, and (3) intentional infliction of emotional distress. The Court sustained Defendants' demurrers to the claims for fraud, quiet title, and declaratory relief and gave Plaintiff leave to amend.

On August 25, 2023, Plaintiff filed the operative third amended complaint ("TAC") alleging causes of action for (1) fraud, (2) quiet title, and (3) declaratory relief. Mr. Xie and Entity Defendants

filed their instant demurrers respectively on November 13th and 16th of 2023. Plaintiff filed a opposition to both motions.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be also considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The court may, upon a motion or at any time in its discretion and upon terms it deems proper: (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code Civ. Pro. §§ 436(a)-(b); *Stafford v. Shultz* (1954) 42 Cal.2d 767, 782 ["Matter in a pleading which is not essential to the claim is surplusage; probative facts are surplusage and may be stricken out or disregarded"].)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion

for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Analysis

A. Ken Xie's Demurrer

Mr. Xie demurrers to the entire TAC on the grounds that the allegations fail to state facts sufficient to constitute any cause of action against him. Mr. Xie argues that the fraud claim fails because it is barred by the sham pleading doctrine, barred by the statute of limitations, fails to sufficiently allege reliance, and the alleged agreement is illegal. Mr. Xie's demurrer to the second cause of action for quiet title and the third cause of action for declaratory relief rise and fall with the fraud cause of action.

1. Sham Pleading

Under the sham pleading doctrine, the trial court may disregard amendments that omit harmful allegations in the original complaint or add allegations inconsistent with it. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412; *Oakland Raiders v. National Football League* (2005)131 Cal.App.4th 621, 652-653 [applying sham pleading doctrine to request for leave to amend in summary judgment context].) "If a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of the prior pleadings and may disregard any inconsistent allegations." (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151-152.) "The sham pleading doctrine is not 'intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts. [Citation.] Instead, it is intended to enable courts '"to prevent an abuse of process." [Citations.]' Plaintiffs therefore may avoid the effect of the sham pleading doctrine by alleging an explanation for the conflicts between the pleadings." (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.3d 336, 343.)

Mr. Xie contends the TAC is a sham pleading because the following allegations are inconsistent with Plaintiff's prior complaints:

- Plaintiff went to Mr. Xie's residence for dinner on December 30, 2016 and revealed her financial concerns. Mr. Xie argues this is inconsistent with the allegation that the parties began dating in February 2017 set forth the original complaint and FAC.
- On another date on December 31, 2016, Mr. Xie took Plaintiff and her son to San Fransisco and made the promises and representations about his financial help with the Property during that drive.
- Mr. Xie promised to buy the Property back from the Foundation and then gift it to Plaintiff. Plaintiff previously alleged Mr. Xie would cause the Foundation to convey the property back to Plaintiff.
- Plaintiff did not learn about the necessity of the Foundation's approval until April 13, 2017; Plaintiff alleged in the SAC that on January 2, 2017, Mr. Xie texted her asking for more information about the house and stating that he would work on his brother's and their attorney's approval as board members.
- In mid-March 2017, Mr. Xie informed Plaintiff that he would only pay her $3000.00 per month towards the Property rent.
- Plaintiff executed the rental agreement on or about March 12, 2017, whereas Plaintiff alleged in the SAC that she did so on April 1, 2017.

In Opposition, Plaintiff explains:

- The new allegations were added to comply with the Court's admonitions in prior rulings on Defendants' demurrers;
- Any inconsistencies about who would convey the Property back to the Plaintiff are insignificant since the material representation was the return of the Property and not how Mr. Xie would return it;
- Allegations about when Plaintiff first learned about the Foundation's approval and authority are not inconsistent with allegations that Mr. Xie had unfettered authority regarding the acquisition of the Property; and
- Meeting someone is different from dating where there is physical intimacy.

In its ruling on Defendants' demurrer to the SAC, the Court granted Plaintiff leave to amend her causes of action for fraud, quiet title, and declaratory relief to add facts sufficient to allege the specific dates, statements, speakers, and how she relied on those statements when she agreed to sell the Property to the Foundation. The sham pleading doctrine cannot be invoked simply because the TAC contains newly alleged facts; it is appropriate when the newly alleged facts contradict or substantively alter the prior allegations. (*Owens v. Kings Supermarket* (1988) 198 Cal. App.3d 379.)

Here, none of the new allegations substantively alters the prior allegations. Plaintiff alleges alter ego, thus whether the Property was to be initially purchased by Mr. Xie or the Foundation, does not substantively alter the allegation that the Property was to be gifted back to Plaintiff. Similarly, whether the parties discussed Mr. Xie's rent payment before or after the sale of the Property does not alter the allegations that he signed a sublease to pay rent. The only seemingly substantive inconsistent allegation pertains to when Plaintiff and Mr. Xie began dating. However, Plaintiff provides an acceptable and reasonable explanation that dating is a subjective term, and for her it applies to when the individuals become physically intimate. Therefore, her allegation in the FAC that the parties began dating in February of 2017 is not inconsistent with allegations detailing their earlier meetings. A plaintiff may avoid the effect of the sham pleading doctrine by "alleging an explanation for the conflicts between the pleadings." (*Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 344.)

Accordingly, Defendants' demurrer on sham pleading doctrine grounds is OVERRULED.

2. Statute of Limitations

Fraud claims are governed by a three-year statute of limitations period. (Code Civ. Proc. § 338.) The claim is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (Code Civ. Proc. § 338 (d).) The running of a statute of limitations period must appear "clearly and affirmatively" from the dates alleged. It is not enough that the complaint may be barred. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

Mr. Xie contends the fraud cause of action is barred by the statute of limitation because the TAC alleges the fraudulent statements were made on December 31, 2016, the Property was sold on March 15, 2017, and Plaintiff subleased the Property on March 12, 2017; all of which occurred well over three

years prior to the filing of the complaint in July 2022. Mr. Xie adds that Plaintiff had notice of the fraud as early as March 3, 2017, when he changed his promise to pay $6000.00 in rent and again in September 2017, when he changed his intent to use his divorce disbursement to buy a house for himself instead of buying the Property for the Plaintiff.

Mr. Xie's statute of limitations argument fails for at least two reasons. First, the event which would trigger the running of the statute of limitations period would be Mr. Xie's refusal to gift the Property to the Plaintiff. The TAC does not allege Mr. Xie's outright refusal to fulfil his promise. Instead, Plaintiff alleges that while Mr. Xie provided excuses and explanations for his changed actions, he continued to reassure Plaintiff of his intent to gift the Property back to her. Second, Mr. Xie falsely assumes that the applicable statute of limitations period began to run when he made his alleged fraudulent promises in 2016 and 2017. However, the statutory period tolls until the alleged fraud is discovered or reasonably should have been discovered by the Plaintiff. Plaintiff alleges she did not discover the falsity of Mr. Xie's promises and representations until the end of 2019. (TAC, ¶ 138.) As such, the filing of the complaint on July 22, 2022, is well within the three-year statutory period.

Mr. Xie also argues his broken promises would have put a reasonably prudent person on notice of his fraud in 2017. The discovery rule delays accrual until a plaintiff has, or should have had, notice of facts sufficient to put a prudent person on inquiry regarding his or her claim. (*Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31.) Plaintiff alleges Mr. Xie explained and justified his changed actions or broken promises and continued to reassure Plaintiff of his intent to gift her the Property. Whether a reasonably prudent person in Plaintiff's circumstances would have become suspicious of Mr. Xie's fraud is a question of fact, inappropriate for resolution on demurrer. Plaintiff's allegations in the TAC do not represent a clear and affirmative facial defect and at most merely show that the claims "may be barred" by the statute of limitations.

Accordingly, Mr. Xie's demurrer on statute of limitations grounds is Overruled

3. Lack of Reliance

The elements of a fraud claim are (1) misrepresentation; (2) knowledge of falsity; (3) intent to deceive; and (4) reliance and resulting damage. (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal. App. 4th 282, 290.) "To withstand demurrer, the facts constituting every element of fraud must be

alleged with particularity, and the claim cannot be salvaged by references to the general policy favoring the liberal construction of pleadings." (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal. App. 4th 772, 782.)

Mr. Xie contends Plaintiff did not rely on his alleged fraudulent promises because she needed to sell her house whether he bought it or not, the alleged discounted sale price is merely speculative, and she was aware of her responsibility to pay rent prior to the sale of the Property.

Plaintiff alleges she would not have agreed to sell the Property "specifically" to Mr. Xie but for his promise to reconvey and gift the Property back to the Plaintiff. Plaintiff also alleges she would not have entered into the lease agreement had the promise of the Property's reconveyance to her was not a pre-existing condition. The TAC alleges Plaintiff did not consider other available options e.g., having a friend buyout her husband's share or selling the property to another interested buyer for a higher price because she relied on Mr. Xie's promise to gift the house back to her. (TAC, ¶¶ 112-119.) Plaintiff also alleges she was willing to suffer a financial loss from selling the Property below its market value in reliance on Mr. Xie's reconveyance of the Property back to her.

Whether the Property was indeed sold below its market value and whether Plaintiff's reliance on Mr. Xie's promises was reasonable, under the circumstances, are questions of fact not properly resolved on demurrer. (*Charney v. Cobert*, (2006) 145 Cal.App.4th 170, 185-186, citing *Alliance Mortgage Co. v. Rothwell,* (1995) 10 Cal.4th 1226, 1239 ["'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.'"].)

Accordingly, Mr. Xie's demurrer on the grounds that the TAC fails to plead facts establishing reliance is OVERRULED.

4. Illegal Contract

Mr. Xie contends his agreement with Plaintiff is illegal and cannot be enforced since its purpose is tantamount to Plaintiff's breach of her spousal fiduciary duty. Mr. Xie adds that equitable exceptions do not apply here since he was not unjustly enriched nor was Plaintiff disproportionately harmed. In opposition, Plaintiff argues (1) this is not an action for breach of contract, and (2) Mr. Xie's argument is at best speculative and not permissible inquiry on demurrer. The Court agrees.

As a general rule, courts are required to withhold relief under the terms of an illegal contract or agreement which is violative of public policy. (*Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 755.) "A contractual provision that contravenes public policy is illegal and is either void or unenforceable." (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 135.) A bargain may be illegal by reason of the wrongful purpose of one or both of the parties making it. This is true even though the performances bargained for are not in themselves illegal and even though the bargain would be valid and enforceable in the absence of the illegal purpose. A party who makes such a bargain in furtherance of the party's wrongful purpose cannot enforce it, even though it is enforceable against the wrongful party by the other party if the latter is innocent of such a purpose. (*Redke v. Silvertrust* (1971) 6 Cal. 3d 94, 99.) "[W]hen the evidence shows that ... [a party] in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids." (*Lewis & Queen v. N. M. Ball Sons*, (1957) 48 Cal.2d 141, 147-148; *Muth v. Educators Security Ins. Co*., (1981) 114 Cal.App.3d 749.)

Family Code section 721(b) imposes a fiduciary duty on spouses to act in the "highest good faith and fair dealing" in their transactions with each other. The fiduciary duty set out in section 721 includes "[r]endering upon request, true and full information of all things affecting any transaction that concerns the community property." (Fam. § 721(b)(2).) Family Code §1100(e) further provides: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request."

The TAC does not contain allegations indicating Plaintiff failed to make disclosures to her ex-husband. To the contrary, Plaintiff alleges in the TAC that on January 30, 2017, Plaintiff's broker sent an email to Plaintiff and her ex-husband about Plaintiff renting the Property back from Mr. Xie, and with her ex-husband's approval, deferred to Plaintiff to contact Mr. Xie directly. (TAC, ¶ 51.)

For purposes of demurrer, the Court cannot make an evidentiary determination that Plaintiff breached her spousal fiduciary duty. Accordingly, Mr. Xie's demurrer on the grounds of illegality is OVERRULED.

B. Entity Defendants' Demurrer

Entity Defendants argue the TAC fails to state a cause of action for fraud (and consequently any cause of action) because the claim (1) is barred by the sham pleading doctrine, (2) is barred by the three-year statute of limitations, (3) fails to show detrimental reliance, (4) is barred by doctrine of illegality, and (5) Plaintiff misrepresents the corporate status.

Entity Defendants' arguments for sham pleading, statute of limitation, lack of detrimental reliance, and illegality are identical to the arguments presented by Mr. Xie in his individual demurrer. Therefore, the Court's analysis on these grounds for Mr. Xie's demurrer apply equally here and Entity Defendants' demurrer on those grounds is OVERRULED. Entity Defendants also argue the TAC's allegations about revocation or suspension of the Foundation's corporate powers are inaccurate, and thus, Mr. Xie's alleged representations about the Foundation's validity, good standing, and ability to purchase and hold title to the Property would have been accurate statements negating claims of fraudulent misrepresentation.

The elements of fraud are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.)

Plaintiff here alleges sufficient facts for each element against Mr. Xie and alleges unity of ownership and interest among the Foundation and Mr. Xie such that separateness between them never existed. (TAC, ¶¶ 7-12.) Whether the suspended status of the Foundation raises a defense to these allegations is a question of fact in appropriate for demurrer.

Accordingly, Entity Defendants' demurrer is OVERRULED.

Calendar Lines 5-7, 16
Case Name: *Marina Shinkarsky v. Sunnyvale Department of Public Health, et al.*
Case No.: 23CV419690

Before the Court is (1) Marina Shinkarsky's Petition for Relief from Claim Requirement (Gov. Code, § 911.4); (2) City of Sunnyvale's (the "City") demurrer to the Complaint; (3) Rural/Metro of California ("Rural/Metro")[1] demurrer; and (4) County of Santa Clara's (the "County") demurrer. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of the death of Michael Sirota and is brought by Shinkarsky, Sirota's wife, on behalf of herself and her two minor children. (Complaint, p. 6.) On March 10, 2022, Sirota was driving in Sunnyvale when he began to experience chest pains. (*Ibid*.) He called 911 but the call was disconnected. (*Ibid*.) His second call was patched through to Sunnyvale Department of Public Safety ("DPS") and it lasted about eight minutes during which Sirota was clear that he was having serious chest pains. (*Ibid*.) He was informed the Fire Department Paramedics were on their way; Sirota ended the call upon seeing them. (*Ibid*.)

Sirota spoke with the paramedics outside of his car. He was not advised that he may have suffered a heart attack or that further complications could occur, and thus driving was not a good idea. Twelve minutes after his encounter with the DPS, Sirota lost consciousness on the 280 freeway. By the time medical personnel arrived on the scene, Sirota had passed away. (Complaint, p. 6.)

Plaintiff initiated this action on July 21, 2023, asserting (1) gross negligence; (2) intentional tort; and (3) general negligence. Plaintiff filed her petition on December 20, 2023, which is opposed by the City and County. On August 28, 2023, the City filed its demurrer, and on September 25, 2023, the County and Rural/Metro filed their demurrers.

II. Shinkarsky's Petition

Shinkarsky seeks relief from the requirement that her claims be presented within six months.

A. Request for Judicial Notice

[1] The notice of hearing states Rural/Metro was erroneously sued as "AMR Medical Response Inc."

In connection with its demurrer and the opposition to Shinkarsky's petition, the County requests judicial notice of:

(1) Letter from Plaintiff's counsel Joel H. Siegel to the Board of Supervisors for Santa Clara County regarding this matter, dated July 21, 2023: Exhibit A; and

(2) The County's return without action, dated August 30, 2023: Exhibit B.

The Court may take judicial notice of the filings and contents of a government claim, but not the truth of the claim. (See Evid. Code, § 452, subd. (c); see also *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 14; *Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 600 [trial court did not err in taking judicial notice of dates and legal effect of statements contained in the documents].) Thus, the request for judicial notice is GRANTED.

B. Evidentiary Objections

1. The City's Objections

The City objects to portions of Plaintiff's declaration, the note from Dr. Alla Boykoff, and the declaration of Dr. Marlow Macht, in its entirety.

Dr. Macht's declaration is not signed under penalty of perjury, thus objection 2 is SUSTAINED. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612 ["[C]ourts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws."]; *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217 (*ViaView*) [declaration not signed under penalty of perjury has no evidentiary value].)

Objections 1 and 5 are OVERRULED.

Objections 3 and 4 are SUSTAINED.

2. The County's Objections

Objection 1, 2, 5, 6, 7, are OVERRULED.

Objections 3, 4, 8, and 9 are SUSTAINED.

C. Legal Standard

Before a suit for damages may be maintained against a public entity, a written claim must first be submitted to that public entity. (Gov. Code, § 945.4.) A personal injury claim must be filed within six months of the accrual of the cause of action. (Gov. Code, § 911.2) "When a claim…is not presented

within that time, a written application may be made to the public for leave to present that claim." (Gov. Code, § 911.4.) The application shall be submitted "within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim." (Gov. Code, § 911.4, subd. (b).) If the application is denied or deemed denied, a petition may be made to the court for an order relieving the petitioner from Section 954.4. (Gov. Code, § 946.6, subd. (a).)

A court does not relieve a potential plaintiff of the claim requirement under Section 945.4 as a matter of course. (*City of Fresno v. Superior Court* (1980) 104 Cal.App.3d 25.) The plaintiff must first demonstrate by a preponderance of evidence that the claim was presented within a reasonable time, and that the failure to file a timely claim was due to mistake, inadvertence, surprise, or excusable neglect. (*Ibid*; see also *Moore v. California* (1984) 157 Cal.App.3d 715, 721.)

> The mere recital of mistake, inadvertence, surprise, or excusable neglect is not sufficient to warrant relief. Relief…is available only on a showing that the claimant's failure to timely present the claim was reasonable when tested by the objective "reasonable prudent person" standard…
>
> There must be more than the mere failure to discover a fact; the party seeking relief must establish the failure to discover the fact in the exercise of reasonable diligence. The party seeking relief based on a claim of mistake must establish he was diligent in investigating and pursuing the claim and must establish the necessary elements justifying relief by the preponderance of the evidence.

(*Dep't of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293 (*DWP*).)

Section 946.6 is a remedial statute and "should be liberally construed. However, this does not mean relief…should be granted casually. As noted above, a petitioner must show more than his or her failure to discover a fact until it was too late; *the petitioner must establish that in the use of reasonable diligence he or she failed to discover it*." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1783-1784 (*Munoz*) [emphasis added].)

D. Analysis

1. Delayed Discovery Rule

"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 or some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at the time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as reasonable investigation would have revealed its factual basis." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803 (*Fox*).) "'In 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."' [Citations.]" (*NBC Universal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 (*NBC*); see also *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 ["plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified"].) "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.)

Petitioner contends her claims of intentional tort, and general and gross negligence did not accrue until March 1, 2023, because on that date she received communication from Charlene Donahue, an official at DPS. Donahue provided a declaration in support of the City's opposition to the petition, which included the email exchange partially quoted by Petitioner. The email, which was a response to an email sent by Milla Lvovich[2] on February 28, 2023, states:

> I would like to provide information regarding Sunnyvale DPS's EMS model, as this may best answer your questions and assumptions that Sunnyvale was "the only crew that could of placed the electrodes" on the patient. We are a BLS (Basic Life Support) department that has EMTs as the level of care. We are not an ALS (Advanced Life Support) department. Therefore we do not have paramedics (ALS). The EMT Scope of

[2] Throughout the papers, Petitioner refers to a friend who is a probate attorney and it appears Lvovich is that friend in question and Sirota's attorney. (See Donahue Decl., Exh. B.)

> Practice does not include evaluation of heart activity via an electrocardiogram, commonly known as EKG. Therefore, we do not have heart monitoring and evaluation equipment or supplies (electrodes) in our service. Due to this; it is not possible that we placed electrodes on the patient. The only way the electrodes documented in the second call, could be placed on the patient are by a paramedic or hospital/clinic staff….
>
> I am sorry we cannot provide further information. You have the patient care record from the incident. I would suggest asking the electrode question from AMR, as it is likely these were placed on the patient at the first call. Additionally, inquire if a refusal of care form was completed and signed by the AMR crew. I further question how they were on scene for such a short period of time for what would have been a patient that requires an ALS assessment.

(Donahue Decl., Exh. B.)

Petitioner contends the confirmation of the DPS' status, the AMR's status, and the fact that no EKG was taken caused her to discover the facts necessary for her claims, and thus the accrual began on that date. However, the email exchange from Donahue includes Donahue's response to an inquiry from Lvovich, dated May 26, 2022, which states:

> Good afternoon Ms. Lvovich,
>
> I have attached the PDF of the patient care record (PCR) that is referenced in the NFIRS report for your client's spouse. As mentioned in my previous email, the PCR is only documenting what our fire team have done after their arrival on scene as first responders. *Any documentation made by the paramedic, including refusal of care and/or transport, would be documented on the PCR by the paramedic.* ***The paramedic's PCR would need to be requested from [AMR]***.

(Donahue Decl., Exh. B [emphasis added].)

Thus, Petitioner was informed DPS did not have the documentation requested and was directed towards AMR as early as May 26, 2022. Petitioner's argument is also belied by her allegation of a telephone call with Tracy Hern from DPS, who indicated they could not provide information to her since

Sirota "refused transport" but thereafter, around June 8, 2022, they printed records for her. (Complaint, p. 8.)

For the delayed discovery rule to apply, Petitioner must plead specific facts to show "…the inability to have made earlier discovery despite reasonable diligence." (*NBC,* 225 Cal.App.4th at p. 1232.) Petitioner here fails to detail any efforts on her part or by Lvovich to contact AMR or to further investigate the matter in any way. Moreover, it was not until nine months later on February 28, 2023 that Lvovich followed up on the May 26, 2022 exchange. This is insufficient to establish reasonable diligence. (See *Fox,* 35 Cal.4th at p. 803.) Petitioner's arguments and reliance on cases pertaining to mistake or excusable neglect within the context of the Section 946.6 analysis to justify delayed discovery is misplaced. The delayed discovery rule does not apply here.

2. Untimely Claims Presentation

The accrual date for purposes of the government presentation deadline is the date on which the cause of action accrues for the running of the statute of limitations. (Gov. Code, § 901.) The accrual date begins on the date of injury or when the last element essential to the cause of action occurs. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) The statute of limitations for a negligence claim is two years. (Code Civ. Proc., § 335.1.) The statute of limitations in an action for injury or death against a health care provider is "three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever comes first." (Code Civ. Proc., § 340.5.)

Here, the Complaint alleges gross negligence, intentional tort, and general negligence arising from the circumstances of Sirota's death, therefore the claims started accruing on March 10, 2022. As the Court reasoned above, Petitioner fails to provide sufficient facts to support the application of the delayed discovery rule. Petitioner did not present her claims to Defendants within six months of the accrual of the claims, therefore she failed to timely satisfy the presentation requirement. (Gov. Code, § 911.2.)

3. Relief From the Government Claims Filing Requirement

Petitioner relies on Government Code, section 946.6, subdivision (c)(1), which allows relief if the Petitioner can establish that "[t]he failure to present the claim was through mistake, inadvertence,

surprise, or excusable neglect…" (Gov. Code, § 946.6, subd. (c)(1).) Petitioner contends her failure to file a timely claim was based on mistake or excusable neglect.

> Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.) When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under Section 946.6. (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 488.)

(*Munoz, supra,* 33 Cal.App.4th at p. 1779.)

Government Code section 911.4, specifically provides: "(a) When a claim that is required by Section 911.2 to be presented not later than six months after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim. (b) the application shall be presented to the public entity…within a reasonable time *not to exceed one year* after the accrual of the cause of action and shall state the reason for the delay in presenting the claim." (Gov. Code, § 911.4, subd. (b) [emphasis added].)

Petitioner's claims for gross negligence, intentional tort, and general negligence accrued on March 10, 2022. Petitioner filed her claim against Defendants on July 14 and 15, 2023, more than one year after the accrual of the causes of action. (Siegel Decl., Exh. 2.) As the Court stated above, Petitioner fails to allege sufficient facts to support delayed discovery, and Petitioner fails to provide authority permitting relief under Section 946.6 for an application made more than one year after accrual of the claim. The Court is thus without jurisdiction to grant relief under Section 946.6, and Petitioner's request is accordingly DENIED. (See *Greyhound, supra,* 187 Cal.App.3d at p. 488.)

III. The City's and County's Demurrers

The City demurs to each cause of action on the grounds there is no jurisdiction over the claim, it is barred by the statute of limitations, Plaintiffs failed to timely present the claims prior to filing the civil action, and Plaintiffs fail to allege sufficient facts. (Code Civ. Proc., § 430.10, subds. (1) & (e).)

The County demurs to each cause of action on the grounds Plaintiffs failed to timely present the claims prior to filing the civil suit, the claims are barred by the statute of limitations, and they fail to state sufficient facts. (Code Civ. Proc., § 430.10, subds. (a) & (e).)

Given the Court's ruling on the petition, the City's and County's demurrers are SUSTAINED without leave to amend.

IV. Rural/Metro's Demurrer

Rural/Metro demurs to each cause of action on the grounds it fails to state sufficient facts and is time-barred. (Code Civ. Proc., § 430.10, subd. (e).) Rural/Metro does not raise the Government Claims Act or the presentation requirement.

Nevertheless, Plaintiffs failed to file an opposition to Rural/Metro's demurrer. The caption and footer of the opposition, filed on January 18, 2024, specifically states, "PLAINTIFF'S OPPOSITION TO DEFENDANT SUNNYVALE DEPARTMENT OF PUBLIC WORKS AND DEFENDANT COUNTY OF SANTA CLARA DEMURRERS". Rural/Metro's demurrer was filed on September 25, 2023. On October 12, 2023, it filed an amended notice of hearing and proof of service. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Thus, the demurrer is SUSTAINED with 20 days' leave to amend.