SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
Department 20
Hon. Socrates P. Manoukian

Heard in Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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DATE: MARCH 28, 2024 TIME: 9:00 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV361905	Princeton University v. John Nguyen	Order of Examination. No Proof of Service filed.
LINE 2	22CV393277	Second Osborn LLC v. Le Garden HB, LLC	Order of Examination
LINE 3	20CV368277	Michelle Espinoza v. Santa Clara Valley Transportation Authority	Absent confirmed written agreement regarding waiver of costs, Plaintiff's motion to strike/tax costs is DENIED.
LINE 4	23CV409659	Outertainment Construction, Inc. v. Ismael Hernandez-Romero	See Line 4 for tentative ruling.
LINE 5	22CV428600	Ivan Milan Pantic v. Santa Clara County Sheriff	Demurrer to Complaint. No Opposition filed. SUSTAINED on all grounds with 15 days leave to amend.

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LINE 6	22CV398119	Nathaniel Villareal et al. v. Richard Vasquez et al.	Defendant's motion for discovery sanctions is CONTINUED to April 30, 2024 at 9:00 a.m. in Department 20.
LINE 7	23CV412043	Karen Kochenburg v. Sharla Coleman, et al.	Unopposed motion to compel responses to discovery and for monetary sanctions is GRANTED. Objections are waived. Verified, fully code-complaint responses shall be served within 15 days of notice of formal order. Defendant Rogerson shall pay to plaintiff's counsel discovery sanctions of $850 within 15 days.

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LINE 8	23CV412522	Dr. Tal Lavian v. CRADAR, A1 LLC	Hearings on two pending discovery motions (Lines 8 and 9) CONTINUED to May 14, 2024 at 9:00 a.m. in Department 20.
LINE 9	23CV412522	Dr. Tal Lavian v. CRADAR, A1 LLC	Hearings on two pending discovery motions (Lines 8 and 9) CONTINUED to May 14, 2024 at 9:00 a.m. in Department 20.
LINE 10	21CV377923	Tonya O'Kray v. General Motors	See Line 10 for tentative ruling.
LINE 11	22CV393142	Claudia Phan v. Charles Jin-Young Lee	Unopposed motion for leave to file First Amended Complaint is GRANTED.
LINE 12	23CV427979	Vojin Oklobdzija v. SambaNova Systems, Inc.	CONTINUED per Stipulation and Order to May 9, 2024 at 9:00 a.m. in Department 20.

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LINE 13	17CV313599	Jeffrey Hutchins v. Safyre Solutions, Inc. et al.	Order of Examination of Alan Slater. No Proof of Service filed.
LINE 14	17CV313599	Jeffrey Hutchins v. Safyre Solutions, Inc. et al.	Order of Examination of George Spilios. No Proof of Service filed.

Calendar Line 1

Case Name:
Case No.:

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Calendar Line 2

Case Name:
Case No.:

- oo0oo -

Calendar Line 3

Case Name: Michelle Espinoza v. Santa Clara Valley Transportation Authority
Case No.: 20CV368277

- oo0oo -

Calendar Line 4

Case Name: Outertainment Construction, Inc. v. Ismael Hernandez-Romero
Case No.: 23CV409659

Defendant's Demurrer to Plaintiff's First Amended Complaint

Factual and Procedural Background

On or about 16 September9 2019, plaintiff Outertainment Construction, Inc. ("OCI") and defendant Valerie's Swimming Pool, Inc. ("VSP") entered into a written agreement ("Pool Contract") under which defendant VSP agreed to construct a swimming pool, spa, and install a hydraulic pool cover at a single family residential property located at 1321 Paramount Drive in Saratoga ("Project Site"). (First Amended Complaint ("FAC"), ¶12.) Pursuant to the Pool Contract, plaintiff OCI paid defendant VSP a sum of no less than $106,800. (*Id*.) The Pool Contract included an express warranty. (FAC, ¶13.)

Pursuant to the Pool Contract, the swimming pool's interior plaster finish was to consist of "Aqua Blue Pebble," a finish defendant VSP claimed was manufactured by Pebble Technology International. (FAC, ¶14.) Defendant VSP contracted with defendant JG Bay Area Pools Inc. ("JG") to install the swimming pool's interior plaster finish which defendant JG did so install. (*Id*.)

By July 2021, the owners of the Project Site suspected the swimming pool was leaking. (FAC, ¶15.) Plaintiff OCI made numerous requests to defendant VSP to inspect the swimming pool which were unrequited. (*Id*.) Thereafter, plaintiff OCI engaged a third party company who found no less than seven cracks in the swimming pool's interior plaster/ pebble finish. (FAC, ¶16.) Defendant VSP was notified specifically about discovery of the cracks. (*Id*.) Defendant VSP finally responded and, on or about 7 December 2021, defendant VSP and/or JG performed a demolition of the swimming pool's pebble finish. (FAC, ¶17.)

On or about 18 January 2022, defendant VSP and/or JG replaced the swimming pool's since demolished pebble finish, but the replacement was grossly substandard, requiring another visit by defendant JG on or about 24 February 2022 to polish the uneven pebble finish. (FAC, ¶18.)

On 25 March 2022, plaintiff OCI met with defendant VSP in an attempt to resolve the problematic pebble finish. (FAC, ¶19.) Defendant VSP suggested using tile to cover the uneven portions of the swimming pool's surface. (*Id*.) On 12 April 2022, the swimming pool was drained to determine the viability of using tile per defendant VSP's suggestion. (FAC, ¶20.) A third-party tile company (referred by defendant Ismael Hernandez-Romero ("Romero")) informed plaintiff OCI that the swimming pool could only install tiles up to the swimming pool's existing tile line, resulting in uneven application. (*Id*.) Defendant VSP refused to re-tile the swimming pool up to its top to resolve the aforesaid uneven application. (*Id*.)

Plaintiff OCI, despondent with defendant VSP's refusal to correct the aforementioned deficiencies, engaged a third-party, Aquatic Technology, to perform a comprehensive inspection of the swimming pool/ spa and to review the Pool Contract. (FAC, ¶21.) On or about 25 April 2022, Aquatic Technology issued its report ("AT Report"), finding a litany of Swimming Pool failures and other deficiencies. (FAC, ¶22 - 38.) Soon after the AT Report issued, plaintiff OCI shared its findings with defendants VSP and Romero. (FAC, ¶39.)

On or about 19 May 2022, plaintiff OCI, defendant VSP, and owners of the Project Site signed a document ("May 2022 Agreement") intended to identify which of the swimming pool failures defendant VSP would agree to remedy. (FAC, ¶40.) In addition to signing the May 2002 Agreement, defendant VSP made handwritten notations on the margin of the document stating defendant VSP would remedy the pool cover, glass tile, and sheer descent; defendant VSP would not remedy the spa's corner jets, replace the pool fittings, or fix the crooked tiles; and that all other items identified in the May 2022 Agreement would be addressed in a subsequent email by defendant VSP. (FAC, ¶41.) Defendant VSP did not send any subsequent email or make any attempt to remedy anything whatsoever. (FAC, ¶42.) Defendant VSP has since refused to respond to any of plaintiff OCI's communications including a 1 November 2022 written demand from plaintiff OCI's attorney. (*Id*.)

On 6 January 2023, plaintiff OCI filed a complaint against defendants VSP, JG, and Romero asserting causes of action for:

(1) Breach of Written Contract [against defendants VSP and Romero]

(2) Breach of Implied Duty to Perform with Reasonable Care [against defendants VSP and Romero]

(3) Breach of Express Warranty [against defendants VSP and Romero]

(4) Breach of Implied Warranty [against defendants VSP and Romero]

(5) Professional Negligence

(6) Fraud [against defendants VSP and Romero]

On 22 March 2023, defendant JG filed an answer to plaintiff OCI's complaint.

On 4 May 2023, defendants VSP and Romero filed a demurrer to the alter ego allegations and the sixth cause of action [fraud] of plaintiff OCI's complaint. On 2 October 2023, the court issued an order sustaining defendant Romero's demurrer to the complaint and sustaining defendant VSP's demurrer to the sixth cause of action of the complaint.

On 5 October 2023, plaintiff OCI filed the operative FAC which continues to assert the same six causes of action asserted in the original complaint.

On 24 January 2024, defendants VSP and Romero filed a demurrer to the alter ego allegations and the sixth cause of action [fraud] of plaintiff OCI's FAC.

II. Analysis.

A. Defendants' demurrer to plaintiff OCI's FAC.

1. Defendant Romero's demurrer to plaintiff OCI's FAC is OVERRULED.

The court understands defendant Romero to generally demur to the entirety of plaintiff OCI's complaint on the ground that plaintiff OCI has not sufficiently stated facts to hold defendant Romero liable under alter ego principles. "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "[T]wo conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1202.) Defendant Romero acknowledges the alter ego allegations found at

paragraphs 43 – 51 of plaintiff OCI's complaint but contends these allegations are not sufficiently specific to support an alter ego theory.

The question here is whether plaintiff OCI's complaint alleges sufficient facts to impose liability under an alter ego theory. Looking to a few examples of the past, in *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 (*Vasey*), plaintiff brought an unlawful detainer and breach of contract action against the defendant corporation ("CDC") and the two individuals associated with that corporation. The defendants defaulted and the lower court entered judgment against the individual defendants. The appellate court overturned the judgment as to the two individual defendants finding that the plaintiff's complaint, "asserted a bare conclusory allegation that the individual and separate character of the corporation had ceased and that CDC was the alter ego of the individual defendants." (*Vasey*, *supra*, 70 Cal.App.3d at p. 749; emphasis added.) "In order to prevail in a cause of action against individual defendants based upon disregard of the corporate form, the plaintiff must plead and prove [1] such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and [2] that an inequity will result if the corporate entity is treated as the sole actor." (*Id.*)

Vasey states the two pleading requirements to sue upon an "alter ego" theory and, by way of example, shows us that pleading only one of those two requirements in general "bare conclusory" terms is insufficient to withstand even a default judgment. In *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827 (*Stodd*), we get to see an example of a sufficiently pleaded complaint under the "alter ego" theory. In *Stodd*, a California corporation, M.I.I. Corporation ("M.I.I."), entered into a joint venture agreement with Goldco, a limited partnership for the ownership and operation of a hotel. The same three general partners who made up Goldco also owned M.I.I. When the venture failed, M.I.I filed for bankruptcy. The trustee in bankruptcy then brought suit against Goldco and its three individual general partners. In its first cause of action, the trustee sought "to disregard M.I.I.'s corporate existence and, on the theory of alter ego, establish defendants' personal liability for all of M.I.I.'s debts and recover from defendants damages in the approximate sum of $2,542,000.00." (*Stodd*, *supra*, 73 Cal.App.3d at p. 832.)

"To support the alter ego doctrine it is alleged that there is a unity of ownership between defendants and M.I.I., that defendants dominated and controlled M.I.I., that M.I.I. was created and

operated by defendants pursuant to a fraudulent scheme to defraud M.I.I.'s creditors and that adherence to the fiction of M.I.I.'s separate existence would sanction a fraud and promote injustice." (*Id.*)

The defendants made and the trial court granted its motion for judgment on the pleadings (functionally the same as a demurrer) as to the alter ego cause of action. The trial court granted plaintiff 15 days' leave to amend, noting that amendment would permit plaintiff to prove that corporate assets were converted, transferred and deal with to the injury of the corporation and its creditors. However, "[p]laintiff declined to avail himself of the opportunity to amend."

In granting plaintiff leave to amend, the court was not saying that "conversion or transfer of corporate assets to the injury of the corporation" is a necessary allegation to invoke the alter ego doctrine. The *Stodd* court held that the allegations of alter ego appeared to be sufficient as plead. However, a trustee in bankruptcy is not the real party in interest and does not have standing to sue unless it can plead and prove some direct injury to the corporation itself. "In the absence of any such allegation, the asserted cause of action belongs to each creditor individually, and plaintiff (trustee in bankruptcy) is not the real party in interest." (*Id.* at p. 833.)

With respect to the pleading requirements for the alter ego doctrine, the *Stodd* court again reiterated the two basic allegation requirements for the alter ego doctrine noting however, that "the conditions under which a corporate entity may be disregarded vary according to the circumstances in each case." (*Id.* at p. 832.)

In *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415, the court wrote, "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. [Citation.] An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity. [Citation.]"

In *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155, the court wrote:

> "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among

> the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used. [Citation.]" [Citations.]

There is a non-exclusive list of factors which the court must consider in reaching a determination on the application of the alter ego doctrine. No one factor will govern the determination. The trier of fact must look to all the circumstances. The court in *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817 held, "Whether the facts are sufficient to warrant disregard of the corporate entity is largely a question for the trial court."

Here, after having had an opportunity to amend, plaintiff OCI has alleged a unity of ownership and interest between VSP/ JG and Romero such that the separate personalities of the corporations and the shareholder do not exist and plaintiff OCI has now included an allegation that an inequity will result if the corporate entities are treated as the sole actors. The minimum necessary allegations to plead alter ego have been met. "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.)

Accordingly, defendant Romero's demurrer to plaintiff OCI's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

2. Defendants VSP and Romero's demurrer to the sixth cause of action [fraud] of plaintiff OCI's FAC is OVERRULED.

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The court in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."

In relevant part, the FAC alleges, "Defendant VSP represented to Plaintiff, as evidenced by the language of the Pool Contract, that Defendant VSP would use certain materials and brands in construction of the Swimming Pool and Spa." (FAC, ¶76.) "Defendant VSP intentionally used materials and equipment that were inconsistent with those called for in the Pool Contract, including but not limited to Hayward brand equipment instead of Pentair and Polaris, and thereafter attempted to conceal the use of such inferior materials and equipment." (FAC, ¶77.)

Insofar as Plaintiff alleges concealment, defendants question how they could conceal materials which were used in plain sight and shown to/ approved by the owners of the Project Site before installation. However, defendants' argument relies upon their assertion that the purportedly concealed materials and brands are easily, plainly, and clearly distinguishable and recognizable to Plaintiff but such a factual assertion does not appear on the face of the pleading or from any judicially-noticed facts. Nor does the FAC include defendants' factual assertion that the owners of the Project Site were shown and/or approved the materials/ brands prior to installation.

Defendants also repeat an argument they made in their earlier demurrer to the original complaint that the alleged misrepresentation does not amount to fraud and instead merely asserts a breach of contract. "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) While the failure to use the materials represented may constitute a breach of contract, the failure to do so coupled with fraudulent intent is

what gives rise to a claim for fraud. Although they could have been stated more succinctly, plaintiff OCI does make allegations of fraudulent intent. (See FAC, ¶¶77 – 78.) (Cf. 5 Witkin, California Procedure (4th ed. 1997) Pleading, §684, p. 143—"Intent, like knowledge, is a fact. Hence, the averment that the representation was made with the intent to deceive the plaintiff, or any other general allegation with similar purport, is sufficient.")

For the reasons discussed above, defendants VSP and Romero's demurrer to the sixth cause of action of plaintiff OCI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

III. Order.

Defendant Romero's demurrer to plaintiff OCI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

Defendants VSP and Romero's demurrer to the sixth cause of action of plaintiff OCI's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

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Calendar Line 5

Case Name: Ivan Milan Pantic v. Santa Clara County Sheriff
Case No.: 22CV428600

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Calendar Line 6

Case Name: Nathaniel Villareal et al. v. Richard Vasquez et al.
Case No.: 22CV398119

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Calendar Line 7

Case Name: Karen Kochenburg v. Sharla Coleman
Case No.: 23CV412043

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Calendar Lines 8 – 9

Case Name: Dr. Tal Lavian v. CRADAR, A1 LLC
Case No.: 23CV412522

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Calendar Line 9

Case Name: Dr. Tal Lavian v. CRADAR, A1 LLC
Case No.: 23CV412522

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Calendar Line 10

Case Name: Tonya O'Kray v. General Motors
Case No.: 21CV377923

Plaintiff brings a motion for attorney's fees and costs following settlement of this action, as agreed by the parties in the Settlement Agreement and as authorized by law. Plaintiff has filed a Request for Judicial Notice in support of their motion.

Defendant opposes the motion, and argues that fees claimed were unnecessary/excessive and should be reduced.

As an initial matter, the court is required to take judicial notice as requested of orders from other courts, under Evidence Code sections 452 and 453. Plaintiff's request is GRANTED. However, the court is not required to rely upon these orders from other jurisdictions and has not done so in deciding the current motion before this court only on the evidence and argument presented in this case.

The court disregards and will not rule on plaintiff's evidentiary objections to defendant's declaration in opposition, brought without specific authorization under the law in this regular law and motion proceeding. (Cf., the procedure expressly authorized by law under Code of Civil Procedure section 437c and California Rules of Court, rules 3.1352 and 3.1354.) The court has considered only admissible evidence in issuing its order in this case.

The court finds that the fees and costs claimed by plaintiff to have been reasonable, and reasonably incurred in this case. The motion for attorney's fees and costs is GRANTED, in part. The court awards the lodestar amount claimed, and does not find a multiplier to be reasonable or appropriate in this action. Thus, the total amount awarded is $40,210.73, which is the lodestar amount plus recoverable costs, without applying a multiplier to the lodestar.

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Calendar Line 11

Case Name: Claudia Phan v. Charles Jin-Young Lee
Case No.: 22CV393142

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Calendar Line 12

Case Name: Vojin Oklobdzija v. SambaNova Systems, Inc.
Case No.: 23CV427979

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -