Filed 9/20/12 Peluso Mexican Cheese v. Reynoso CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PELUSO MEXICAN CHEESE et al., Plaintiffs and Appellants, v. RENE REYNOSO et al., Defendants and Respondents.	B229772 (Los Angeles County Super. Ct. No. VC053536)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvonne T. Sanchez, Raul A. Sahagun, and Thomas I. KcKnew, Jr., Judges. Affirmed.

Boudreau Williams and Jon R. Williams for Plaintiffs and Appellants.

Silver & Freedman and Mitchell N. Reinis for Defendants and Respondents.

Peluso Mexican Cheese (Peluso)[1] and Henry Guerrero (Guerrero) (collectively appellants) appeal from a judgment entered in favor of Rene Reynoso, Ruth Reynoso, Arthur Reynoso, and El Alteno Foods, Inc. (El Alteno) (collectively respondents) after the trial court sustained, without leave to amend, respondents' demurrer to appellants' fourth amended complaint (4AC). We affirm the judgment.

BACKGROUND

1. The original complaint

The original complaint (OC) in this action was filed on May 1, 2009, by one plaintiff, Peluso. It alleged six causes of action: breach of contract, fraud, conversion, imposition of constructive trust, accounting and appointment of receiver, and declaratory relief.

The complaint alleged that Peluso is a California corporation which manufactures and distributes cheese products, owned by Guerrero, Susana Marcks (Marcks), and Frank Castellanos (Castellanos) as trustee of the Castellanos Family Trust (the trust). It further alleged that El Alteno is a California corporation, owned and operated by Rene and Ruth Reynoso, husband and wife (the Reynosos).

Appellants alleged that in February 2005, the Reynosos and El Alteno entered into an agreement to purchase the assets of Peluso Cheese, Inc. (the cheese business) from Frank Peluso. Appellants alleged that they were not parties to this transaction, however

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[1] At the time this appeal was filed, Peluso Mexican Cheese was known as Peluso Company, Inc. On March 13, 2012, respondents filed a motion to dismiss the appeal as to Peluso on the ground that Peluso Company, Inc. was a suspended corporation and therefore could not pursue the appeal. Peluso opposed the motion to dismiss, asking that we provide a short continuance so that Peluso could rectify its corporate status. We granted the continuance. On May 14, 2012, counsel for Peluso filed a declaration with supporting documents indicating that during the process of rectifying its corporate status, Peluso discovered that the "Peluso Company, Inc." name had been taken by an unrelated entity during the time that the corporation's status was suspended. Therefore, before Peluso could be revived, the Secretary of State required that Peluso change its name to "Peluso Mexican Cheese," which is the current name of the entity. Counsel for Peluso filed documents indicating that as of April 23, 2012, Peluso Mexican Cheese was an active California corporation in good standing.

in July 2005 the Reynosos proposed to Guerrero and other investors that they form and capitalize Peluso, which would own and operate the cheese business. According to the allegations, the Reynosos further promised that they would operate the new business for the benefit of the investors. In reliance on these representations, appellants alleged, Guerrero, Marcks and the trust formed and capitalized Peluso on or about July 13, 2005. Appellants alleged that the cheese business had been profitable, but that the Reynosos engaged in illegal conduct to siphon off money from appellants' operations and to artificially suppress income and profits.

2. The first amended complaint

Respondents demurred to the complaint, and a first amended complaint (1AC) was filed.[2] The 1AC contained the same six causes of action as the OC, but was filed by Peluso and a new plaintiff, Guerrero.[3] The factual allegations were different. In the 1AC, appellants alleged that in February 2005, the Reynosos began operating El Alteno, and that El Alteno had "some type of agreement" with the cheese business. In July 2005, the Reynosos orally represented to Guerrero that they had an opportunity to purchase the cheese business. They proposed that Guerrero, Marcks and the trust create and capitalize Peluso and that Peluso would own and operate the cheese business. The Reynosos further represented that they and Arthur Reynoso would operate the cheese business for the benefit of Peluso. Appellants again alleged that they formed and capitalized Peluso on or about July 13, 2005, and that despite its profitability, the Reynosos have engaged in a course of illegal conduct to siphon off money and artificially suppress profits.

On November 6, 2009, the court sustained respondents' demurrer with leave to amend and denied appellants' motion to appoint a receiver. The court reasoned:

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[2] Neither party has included in the record the demurrer to the OC, or the trial court's ruling on that demurrer.

[3] The 1AC noted that Peluso's corporate status was suspended for a brief period of time in 2009, due to the nonpayment of corporate taxes. However, it also noted that those taxes had been paid and that Peluso intended to file a "Certificate of Revivor" upon receipt of that document.

> "The allegations in the amended complaint are inconsistent with those in the original complaint without any explanation. The alleged oral agreement was first alleged to have been made between the suspended corporation and [respondents] yet in the amended complaint the agreement is alleged to have been made between [respondents] and GUERRERO only. Furthermore, [appellants] have not alleged the essential terms of the contract, such as the terms of payment. An agreement to purchase and operate a business requires more detail than alleged.
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> "Similarly, in the fraud claim, [appellants] have changed their allegations concerning the party who was defrauded without explanation. Additionally, the first amended complaint does not identify what representations were false."

The trial court noted that the remaining causes of action failed because Peluso was a suspended corporation and the requirements to bring the causes of action as derivative actions had not been met.

3. The second amended complaint

Appellant's second amended complaint (2AC) was filed on November 25, 2009. Appellants noted that the original complaint contained erroneous allegations which caused confusion. Appellants also noted that Peluso had been revived and could participate in the action. The 2AC alleged causes of action for breach of contract, fraud, conversion, imposition of constructive trust, accounting and appointment of receiver, and declaratory relief.

Respondents filed their demurrer to all causes of action on December 29, 2009. On January 27, 2010, the demurrer was sustained. The court raised the statute of limitations, but noted that respondents disagreed with the "interpretation of the date of accrual based on prior pleadings." Thus the demurrer was not sustained on statute of limitations grounds. The trial court stated:

> "[T]he complaint is still fatally uncertain as to the terms and provisions of this alleged oral contract. The alleged oral contract is not pled with enough information to enforce. To be enforceable a promise must be definite enough that a court can determine whether those obligations have been performed or breached. Bustamante v. Intuit, Inc. (2006) 141 Cal.App.4th 199, 209. Now that it is alleged that Reynosos are

> entitled to share in the profits, the percentages need to be alleged. If they were never agreed upon the contract is too indefinite to be enforced. For instance, before [respondents] can be responsible for 'failing to account for and distribute profits' [appellants] must alleged the percentage share to which they are entitled under the oral agreement."

The court also noted that appellants failed to allege facts supporting the elements of conversion. Specifically, "[n]o allegations specify the property converted and no specific sum is alleged." The court granted leave to amend, indicating "[t]he court is uncertain how the [appellants] can amend and clarify the complaint to state a cause of action, but the overwhelming weight of authority mandates that they be given another opportunity to do so. Therefore, leave to amend is granted."

4. The third amended complaint

Appellants filed the third amended complaint (3AC) on February 24, 2010. The 3AC contained causes of action for breach of contract, fraud, conversion, imposition of constructive trust, accounting, and declaratory relief. Appellants indicated that they had dropped Ruth Reynoso as a defendant because she had filed a petition in bankruptcy. The complaint alleged that the "gist" of the dispute was "the acquisition of the assets of Peluso Cheese, Inc. by the parties." It further alleged that "[a]pproximately $500,000 was invested by [Guerrero] and others and those funds were used to purchase the Cheese Business." As to the allegations regarding the timing of its lawsuit, appellants continued to allege that the contract at issue was formed in July 2005. However, it noted that in July 2008, the Reynosos filed a complaint in San Diego Superior Court case No. 37-2008-00071872-CU-MC-SC (the San Diego action), in which the Reynosos first challenged the ownership of Peluso. Appellants alleged that it was at the time of the filing of the San Diego action that appellants first became aware of the Reynosos's "course of illegal conduct."[4]

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[4] Respondents explain that the San Diego action was "occasioned by the unauthorized removal or conversion, admitted by Guerrero, of $178,000 from the bank account of the cheese business." The money was deposited into accounts over which Guerrero had control. Upon the filing of the San Diego action, an ex parte temporary

On March 19, 2010, appellants hired new counsel. On March 22, 2010, appellants' counsel moved to be relieved as counsel due to a "total breakdown of the attorney-client relationship." On March 22 and 23, 2010, respondents served and filed their demurrer to the 3AC.

Instead of opposing the demurrer, appellants' new counsel attempted to file a fourth amended complaint ex parte. The clerk informed him that he had to get consent of respondents' counsel. No attempt to get any such consent was made, and no opposition to the demurrer was filed. A hearing on the demurrer was held on April 23, 2010. A tentative ruling sustaining the demurrer without leave to amend was issued. Counsel appeared for appellant Guerrero, and was asked why no opposition was filed. Counsel responded that they wanted to file a fourth amended complaint. The trial court ruled that the tentative would stand.

A notice of ruling and order of dismissal with prejudice were signed by the court on May 6, 2010. The ruling stated: "The defects noted in the previous ruling have not been corrected. Instead of adding allegations to clarify the prior uncertainties, [appellants] merely suppressed a previous allegation."

The court also noted that the complaint would be time-barred but for the discovery rule, and that appellants' conclusory allegations that "the breach/misrepresentations were not discovered until July 2008 or 'within the last two years'" were insufficient. Finally the court explained that the complaint "is still fatally uncertain as to the terms and provisions of this alleged oral contract. The contract is not pled with enough information to enforce. To be enforceable a promise must be definite enough that a court can determine whether those obligations have been performed or breached . . . [appellants] do not allege what the compensation would be or how or in what manner profits would be passed through El Alteno. This is the fourth change by [appellants] in alleging the manner in which the REYNOSOs were to receive compensation for their work."

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protective order was obtained to prevent disbursement of the money by Guerrero. On July 25, 2008, pursuant to stipulation, Guerrero was ordered to pay the money to creditors of the business.

On May 7, 2010, appellants filed a motion for reconsideration of the ruling on the demurrer to the 3AC and attached the proposed 4AC on behalf of appellants as well as two new plaintiffs, Marcks and Castellanos, trustee of his family trust. The 4AC reasserted claims against Ruth Reynoso and the other defendants and added four new causes of action for breach of fiduciary duty, conspiracy, constructive fraud, and concealment. The court was without jurisdiction to reconsider dismissal of the action, therefore it denied the motion on June 23, 2010. However, the court suggested that appellants could file a motion to vacate. On July 27, 2010, the court granted appellants' motion to set aside the demurrer and dismissal pursuant to Code of Civil Procedure section 473. The 4AC, dated April 13, 2010, was deemed served and filed as of the hearing date of July 14, 2010.

5. The fourth amended complaint

On September 3, 2010, respondents filed a demurrer and motion to strike portions of the 4AC. Respondents also filed a request for judicial notice. The motions were argued and decided on October 6, 2010. The demurrer to each cause of action was sustained, and the motion to strike was granted. Respondents served a notice of ruling, attaching the tentative decision of the court, which had become its final decision.

In its decision, the court noted that "[t]he defects noted in the previous rulings still have not been corrected." The court further noted that the claims were time-barred, and that appellants' "conclusory allegations" did not meet their burden of showing diligence. The court specified:

> "The allegations were that the oral contract and fraudulent representations occurred [on] July 1, 2005 and 'since the inception' of the relationship. See [OC, 1AC and 2AC]. In the [3AC] for the first time the [appellants] alleged they did not learn of the breaches or fraud until the filing of the 'San Diego Action' in July of 2008. There [are] no allegations that he could not have discovered the business was not transferred, that the [appellants] were not advised about the operations and finances of the business, that the profits would be distributed to [appellants], or that [appellants] were denied access to the plant and books and records. To the contrary, the San Diego Action was filed against GUERRERO because he not only had access to the assets and books, but he improperly took

> $178,000 from the company account. Request for judicial notice. Exhibit A."

The court then went through each cause of action. As to the first cause of action for breach of contract, the court noted that the oral contract was barred by the statute of frauds, Civil Code section 1624.5. It further noted that this cause of action, "instead of improving with each version of the complaint, has become even more uncertain."

As to the second cause of action for breach of fiduciary duty, the court first observed that "the [3AC] had no cause of action for Breach of Fiduciary Duty," therefore this cause of action was added improperly without leave of court. Nevertheless, the court concluded, there were no allegations establishing a special relationship creating a fiduciary duty.

As to the third cause of action for fraud, the court again pointed to the uncertain allegations, explaining:

> "The REYNOSOS allegedly committed fraud because they did not have the intent to perform their representation[s] when they made them in 2005. . . . However, the complaint also alleges that the [respondents] 'operated consistent with their representations' prior to 2008. . . . Thus [appellants] appear to allege that the representations did not become fraudulent until 2008 (to avoid the statute of limitations). This, however, would seem to contradict the [respondents'] alleged intent to deceive at the time the representation was made."

As to the fourth, fifth and sixth causes of action for conspiracy, constructive fraud and concealment, the court noted that these new causes of action could not be added without leave of court. In addition, the court noted that the fraud allegations were defective and there was no fiduciary relationship to support the claims of constructive fraud and concealment.

As to the seventh cause of action for conversion, the court noted that appellants still had not alleged facts supporting the elements of conversion. And as to the eighth, ninth, and tenth causes of action, the court noted that "[t]he allegations supporting these equitable remedies are virtually identical to those previously plead. They are not causes

of action, and the underlying causes of action are defective." The court sustained the demurrer, and, noting that this was appellant's fifth attempt to plead, sustained the demurrer without leave to amend.

On November 24, 2010, respondents' motion for attorney fees was granted in the amount of $70,367.60 against Peluso, Guerrero, Marcks, and Castellanos, as trustee of the trust. Castellanos thereafter moved to set aside the judgment against him because he was improperly named as a plaintiff in the case and had never retained the lawyer who purported to represent him. In his declaration, Castellanos stated that he had sold his interest in Peluso in 2008. Castellano's motion was granted.

On December 22, 2010, Peluso and Guerrero filed a notice of appeal from the judgment of dismissal entered after the court's order sustaining the demurrer to the 4AC.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

Bearing these standards in mind, we review the causes of action in appellants' 4AC.[5]

II. Breach of contract

In order to properly plead a cause of action for breach of contract, appellants are required to plead: (1) the existence of a valid contract; (2) the plaintiff's performance of the contract or excuse for nonperformance; (3) the defendant's breach; and (4) resulting damage. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Appellants argue that they have properly pleaded the elements of their breach of contract cause of action. As to the contract, they alleged that Guerrero, Marcks and Castellanos, as trustee for the trust (known as the "investor group") agreed to invest "[a]pproximately $500,000" towards the purchase of the cheese business. Peluso was formed during that period and was an intended third party beneficiary of the Guerrero-Reynoso oral contract. Rene Reynoso represented that Peluso would be the owner of the cheese business. Appellants claim that they fully performed, with Guerrero and the investor group contributing $500,000 in capital towards the purchase of the cheese business.

As to the breach, appellants alleged that "sometime in October, 2008, through documents filed in the San Diego case, . . . Guerrero and the [investor group] first learned the amount and terms of purchase of the Cheese Company." In addition, for the first time in 2008, the Reynosos challenged the ownership of Peluso, and appellants discovered that the Reynosos had engaged in a course of illegal conduct to direct money from Peluso to themselves and El Alteno.

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[5] Appellants do not argue that their causes of action for conspiracy or declaratory relief should have survived demurrer. Therefore we do not address those causes of action.

A. Statute of frauds

The trial court noted that the alleged contract is barred by the statute of frauds, Civil Code section 1624.5. The statute provides, in part:

> "[A] contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars ($5,000) in amount or value of remedy unless there is some record, as defined in subdivision (m) of Section 1633.2, but solely to the extent permitted by applicable law, that indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed . . . by the party against whom enforcement is sought or by his or her authorized agent."

Civil Code section 1624.5 applies to sales of personalty other than those governed by the Commercial Code, including contracts for the sale of securities and contracts for the sale of movable goods.[6] (Civ. Code § 1624.5, subd. (b).)

Despite the trial court's decision that Civil Code section 1624.5 barred their breach of contract cause of action, appellants did not address the statute in their opening brief. As appellants, it was their obligation to establish that the trial court was wrong. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.) Although appellants address Civil Code section 1624.5 in their reply brief, this effort "comes too late." (*Paterno*, at p. 102.) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. . . . Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]' [Citation.]" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

Even if we were to consider the argument as to Civil Code section 1624.5 set forth in appellants' reply brief, we would reject it. Appellants argue that the statute has no

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6 In their opening brief, appellants discuss Uniform Commercial Code section 2201, which prohibits oral agreements for the sale of goods over $500. Appellants attempt to distinguish this statute on the ground that "the contract in question is not the 'sale of goods.'" Because Civil Code section 1624.5 is the pertinent statute, we decline to address appellants' arguments as they relate to Uniform Commercial Code section 2201.

application in this case because the "essence" of the contract claim is not the sale of personal property but the performance of services by respondents for appellants' benefit. Reading the complaint in the light most favorable to the appellants, appellants argue, the contract must be interpreted to be a contract for respondents' agreement to act as appellants' agents in the acquisition of the cheese business; negotiate a preferential price; form a new corporate entity to take over the assets of the cheese business; and run the day to day operation of that business, among other things.

The allegations of the 4AC undermine this argument. The core allegations regarding the oral contract state that "the Reynosos entered into a business transaction with Guerrero and the [investor group] to acquire the Cheese Business . . . . Approximately $500,000 was invested by Guerrero and the [investor group] at the direction of Rene Reynoso and those funds were used by the Reynosos to purchase the Cheese Business." The alleged oral contract was a contract for the purchase of personalty for approximately $500,000 and was subject to the statute of frauds. A demurrer is properly sustained where the complaint shows on its face that the contract sued upon is within the statute of frauds and does not comply with its requirements. (*Parker v. Solomon* (1959) 171 Cal.App.2d 125, 136.)

B. Uncertainty of the allegations

Further, when a plaintiff pleads the existence of an oral contract, the contract must be "'sufficiently definite (and this is a question of law) for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached.' [Citation.]" (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209 (*Bustamante*).) "'To be enforceable, a promise must be definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.' [Citations.] 'Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.' [Citations.]" (*Ibid.*)

The contract at issue in *Bustamante* consisted of an oral agreement and a set of additional terms listed in an e-mail. (*Bustamante, supra*, 141 Cal.App.4th at p. 209.) The parties allegedly intended to create a joint venture in which they would market software for users in Mexico. (*Id.* at p. 201.) The oral agreement was alleged to have been that Bustamante would "pursue the venture with his best efforts, Intuit would treat Bustamante fairly, and Intuit would not 'circumvent' him or 'do this deal with anybody else.'" (*Id.* at p. 209.) The e-mail further contemplated certain "figures for each party's equity percentage in the Mexico company, an equity reserve for the 'management team,' Bustamante's salary, and Intuit's 20 percent royalty." (*Ibid.*) Additionally, the complaint alleged that Intuit was "'firmly committed to seeing the deal through to completion'" and agreed to "'look at alternative strategies'" in the event Bustamante was unable to secure the necessary funding. (*Ibid.*)

Faced with these terms, the Court of Appeal determined that the agreement was unenforceable. The court stated: "[R]ather than being definite, all of the following terms -- which Bustamante represents as material -- were actually unsettled both before and after the alleged commitment by Intuit: the form and amount of Bustamante's compensation; the extent, duration, and nature of his management role, if any; the amount of Intuit's royalty; the equity percentage held by him, 'the management team,' Intuit, and outside investors; and the liquidity path for both Bustamante and investors." (*Bustamante, supra*, 141 Cal.App.4th at p. 211.)

We are faced with an agreement even more indefinite than that alleged in *Bustamante.* The trial court pointed out this problem, which was apparent in every draft of the complaint. In the OC, Peluso alleged that the Reynosos proposed that Guerrero and the other investors form and capitalize Peluso, which would own and operate the cheese business. It was further alleged that the Reynosos would be employees, but would not become officers, directors or shareholders of Peluso. The allegations in the 1AC changed, indicating that the oral agreement was with Guerrero alone, and that the Reynosos, although not shareholders of Peluso, would keep Guerrero and the other shareholders informed of Peluso's operations and finances and that the profits would be

distributed to the shareholders at the end of each fiscal year. Still as the trial court pointed out, appellants did not allege the essential terms of the contract such as the terms of payment. For the first time in the 2AC, appellants alleged that Guerrero and the other investors invested "approximately $500,000" which the Reynosos would use to purchase the cheese business. And although it was alleged that respondents would "account for and share profits from the Cheese Business with Guerrero," no percentages were alleged. In sustaining the respondents' demurrer, the court noted that if such percentages were never agreed upon, "the contract is too indefinite to be enforced."

The 3AC did not address the problem of the uncertainty of the shareholders' percentages, and new facts were alleged. Specifically, the contract now included the Reynosos's business, El Alteno. Respondents "represented that Peluso would receive the net profits from its operations and the Reynosos would receive profits made by El Alteno derived from El Alteno's purchase and resale of cheese and cheese products from Peluso." The trial court noted that appellants had failed to plead additional allegations to clarify the prior uncertainties, and concluded that the complaint is "still fatally uncertain as to the terms and provisions of this alleged oral contract."

The 4AC is no help in rectifying the uncertainty of the alleged oral agreement. New allegations stated that the Reynosos would use the investors' "approximately $500,000" to "acquire the Cheese Business through El Alteno and that the Reynosos would cause the Cheese Business to be transferred to a corporation to be owned by Guerrero and the [investor group]." There were no allegations regarding the terms of the purchase, the percentage of the shareholders, or the manner in which the profits would pass to the appellants. Under the circumstances, the alleged oral contract is too uncertain to be enforceable, and the demurrer to this cause of action is affirmed. (*Bustamante, supra,* 141 Cal.App.4th at p. 209.)[7]

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[7] Because we have determined that appellants' breach of contract cause of action is barred under Civil Code section 1624.5, and that the trial court properly sustained a demurrer to this cause of action on the ground that the contract is too uncertain to be

III. Breach of fiduciary duty

Preliminarily, appellants pled this cause of action without leave of court. The demurrer to this cause of action was properly sustained on this ground. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 (*Harris*).) Further, respondents' motion to strike this cause of action was granted, and appellants have not challenged this ruling on appeal.

Even if we were to consider this cause of action, we would find that appellants have failed to allege the elements. In order to properly plead a breach of fiduciary duty cause of action, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) its breach; and (3) damage proximately caused by that breach. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 483.) The trial court found that there were no allegations suggesting that, if the parties had any relationship at all, that relationship was anything other than contractual.

Appellants argue that they have adequately pled the existence of a fiduciary relationship. They claim that respondents agreed to act as agents for appellants by handling the purchase of the cheese business with appellants' funds, running the cheese business, and managing its day to day operations and financial affairs. Appellants further argue that they have properly pled a breach of that fiduciary relationship. Among other things, appellants allege, respondents fraudulently induced appellants to invest $500,000 by promises they never intended to honor, and improperly transferred the assets of Peluso to entities which they alone owned and controlled.

In support of their position that these allegations lay the basis for a claim of breach of fiduciary duty, appellants cite one published opinion: *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202 (*Tran*). *Tran* involved "the fiduciary and contractual duties owed to an insured by a reciprocal insurer's attorney-in-fact." (*Id.* at p. 1206.) Thus it does not suggest that a fiduciary relationship was created under the facts of this case. Generally, a debtor/creditor relationship such as the one alleged here is not a fiduciary

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enforceable, we find that we need not address the parties' competing arguments regarding the timeliness of this cause of action under Code of Civil Procedure section 339.

relationship. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476.) Further, the "'mere placing of trust in another person does not create a confidential relationship.'" (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 31.) While contracting parties necessarily place trust in each other to perform the contract, contractual trust and confidence gives rise to an implied covenant of good faith, not a fiduciary relationship. (*Wolf, supra*, at p. 31.) Appellants have cited no law suggesting that the relationship between appellants and respondents was a fiduciary relationship. We find that the allegations do not support a finding of such a relationship, therefore the claim is barred as a matter of law.

IV. Fraud

The elements of fraud are: (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Fraud in the inducement is a subset of the tort of fraud, occurring when "'"the promisor knows what he is signing but his consent is *induced* by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable*."'" (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.) Fraud must be pled specifically; general and conclusory allegations do not suffice. (*Lazar, supra*, at p. 645.) "'This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' [Citation.]" (*Ibid.*)

Appellants point to paragraphs 53 to 59 of the 4AC as the basis for their claim of fraud. They allege that respondents fraudulently promised to acquire the cheese business for the benefit of appellants; to form a successor entity for the purpose of running that business; to use their expertise and skill to acquire and run that business for appellants' benefit in exchange for a salary; to account for and distribute profits of the new company to appellants; and to allow appellants reasonable access to that company's financial books and records. Appellants allege that these promises were made with knowledge of their

falsity and the intent to induce appellants to rely on those representations. Appellants were ignorant of the falsity of respondents' promises when they were made, they allege, and justifiably relied on those promises when respondents appeared to be acting in compliance with the agreement. Finally, appellants allege that they were damaged by such fraud.

Appellants cite *Wald v. TruSpeed Motorcars, LLC* (2010) 184 Cal.App.4th 378 (*Wald*), as support for their argument that they have set forth their fraud claim with the requisite specificity. The case involved an alleged breach of an oral agreement between an individual who found and purchased used cars for a used car dealership and the used car dealership. The oral agreement allegedly guaranteed the individual a finder's fee for the used cars he brought to the dealership. (*Id.* at pp. 382-383.) The allegations set forth the terms of the oral agreement in detail: "Wald would locate a used Porsche, and 'propose' the car to TruSpeed. If TruSpeed was 'interested,' Wald and TruSpeed would negotiate a price between themselves. Then Wald would return to the owner and negotiate a lower price: The difference between the Wald-TruSpeed price and the Wald-owner price would be Wald's compensation -- though there was a statement by one of the TruSpeed representatives that Wald would receive no less than $500 per vehicle." (*Id.* at p. 382, fn. omitted.)

The court noted that the individual's fraud claim passed the stringent pleading requirement. The court stated: "Tested under these rules, the complaint passes muster. How: Oral statements made at a meeting. When: June 2008. Where: TruSpeed's offices. To whom: Wald. By what means: Oral statements in which TruSpeed agreed to pay Wald finder's fees." (*Wald, supra*, 184 Cal.App.4th at p. 394.)

Here, the complaint is less specific. We know that the fraudulent misrepresentations are alleged to have been made "[s]ometime in June 2005." We know that they were oral, but there is no allegation regarding the setting of the conversation or conversations that occurred. Therefore the question of "where" is unanswered. The question of "to whom" is also unclear. While it seems that some allegations were made to Guerrero alone, it is also alleged that the "business transaction" was made between the

Reynosos and "Guerrero and the [investor group]." A later, separate agreement is alleged between the Reynosos and Marcks, although Marcks was told to make her check payable to El Alteno.[8] Finally, the answer to the question "by what means" is far less straightforward than it was in *Wald.* All representations were apparently oral, but the terms of the agreement are unclear. It is alleged that the Reynosos represented to Guerrero and the investor group that if Guerrero and the investor group would invest approximately $500,000, the Reynosos would acquire the cheese business, transfer it to a corporation to be formed by Guerrero, and operate the cheese business for the benefit of the corporation to be formed. However, in contrast to *Wald*, the terms of this purported agreement are not alleged at all. There were no allegations regarding the terms of the purchase, the proposed salaries of the members of the Reynoso family, the percentage of the shareholders, or the manner in which the profits would pass to the appellants. Thus the question of exactly what representations were made remains uncertain.

Unlike *Wald*, the key questions of "'*how, when, where, to whom, and by what means the representations were made*'" are not set forth with sufficient particularity. (*Wald, supra*, 184 Cal.App.4th at p. 393.) In fact, it is not even clear what exactly the representations were. Under the circumstances, the fraud allegations do not meet the specificity requirements set forth in *Wald*.

As the trial court pointed out, appellants' fraud allegations also fail to adequately allege respondents' intent to deceive. They allege that respondents had the requisite scienter, or intent to deceive, at the time the representations were made. However, they also allege that prior to the filing of the San Diego case in 2008, the Reynosos "had operated consistent with their representations including paying Marcks the $1,000 per

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8 As set forth in *Wald*, when the defendant is a corporate defendant, "'the plaintiff must further allege *the names of the persons who made the representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written . . . .*'" (*Wald, supra*, 184 Cal.App.4th at p. 393.) While the complaint suggests that the oral agreement was made with the Reynosos, it also suggests that at least one check was made out to El Alteno, which would handle the transaction. Thus not only the question of "to whom," but the question of "by whom," is unclear.

week as agreed and . . . filing . . . 2006 and 2007 income tax returns." These two allegations are contradictory, implying that the representations did not become fraudulent until 2008.

Appellants argue that respondents always intended to breach their agreement and usurp the cheese business, but they concealed that plan and otherwise made it seem as though they were performing in accordance with the parties' agreement. Again, this argument is unavailing. If respondents operated in accordance with the agreement for two years, they were not carrying out a fraud during that time.

In sum, appellants have failed to set forth a claim for fraud. The trial court properly sustained respondents' demurrer to this cause of action.

V. Constructive fraud

Preliminarily, appellants pled this cause of action without leave of court. The demurrer to this cause of action was properly sustained on this ground. (*Harris, supra*, 185 Cal.App.4th at p. 1023.) Further, respondents' motion to strike this cause of action was granted, and appellants have not challenged this ruling on appeal.

Even if we were to consider it, appellants' failure to allege a fiduciary relationship between the parties is fatal to this cause of action. A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304.) Consequently, a fiduciary's failure to share material information with the principal is constructive fraud. "'"Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." [Citation.]'" (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415.)

As set forth above in section III, the allegations do not support a finding that the relationship between appellants and respondents was a fiduciary relationship. Therefore appellants' claim of constructive fraud fails.

VI. Concealment

Preliminarily, appellants pled this cause of action without leave of court. The demurrer to this cause of action was properly sustained on this ground. (*Harris, supra*,

185 Cal.App.4th at p. 1023.) Further, respondents' motion to strike this cause of action was granted, and appellants have not challenged this ruling on appeal.

In addition, the allegations of the complaint do not support a cause of action for concealment. "[T]he elements of a cause of action for fraud based on concealment are: '"(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]" [Citation.]' [Citation.]" (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.) Appellants argue that they have properly pled this cause of action, as they have alleged that respondents were their agents and were in exclusive possession of the material facts regarding the purchase of the cheese business.

Appellants base this cause of action on the existence of a fiduciary relationship between the parties. The demurrer to this cause of action is therefore well taken, because a fiduciary relationship was not properly alleged. In the absence of such a confidential relationship, the plaintiff is required to allege all of the elements of fraud. (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 738.) As set forth above in section IV, appellant has failed to do so.

Respondents' demurrer to this cause of action was properly sustained.

VII. Conversion

Preliminarily, respondents' motion to strike this cause of action was granted, and appellants have not challenged this ruling on appeal.

In addition, appellants have failed to set forth a claim for conversion. The elements of this cause of action are: (a) the plaintiff's ownership or right to possession of the property at the time of the conversion; (b) the defendant's conversion by a wrongful act or disposition of property rights; and (c) damages. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507.) "'It is not necessary that there be a manual taking

of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]' [Citation.] Money can be the subject of an action for conversion if a specific sum capable of identification is involved. [Citation.]" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451-452.)

As the trial court pointed out in ruling on the demurrer to the 3AC, "no allegations specify the property converted and no specific sum is alleged." In sustaining the demurrer to this cause of action in the 4AC, the court noted that appellants' complaint continued to lack these essential elements of the conversion claim. Appellants make no effort to allege a specific sum. The 2AC, 3AC, and 4AC all allege nothing more than an "approximate" total investment by an investor group consisting of two individuals and a trust. Nor do they allege the percentage of each shareholder's alleged interest in the cheese business. Instead, they claim that they "have not had an opportunity to fully investigate the mismanagement and conversion of corporate funds [by] the Reynosos and their related illegal conduct and will amend this complaint as additional information is acquired or discovered."

In the absence of a specific indication of any appellant's ownership interest in the property, or a specific sum of money, respondents' demurrer to appellants' cause of action for conversion was properly sustained.

VIII. Constructive trust

Preliminarily, respondents' motion to strike this cause of action was granted, and appellants have not challenged this ruling on appeal. Furthermore, appellants are not entitled to a constructive trust. "A constructive trust is an equitable remedy to compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto. [Citations.]" (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600.) In order to be entitled to the remedy of constructive trust, the plaintiff must establish a "'fraud, breach of fiduciary duty, or other act which entitles the plaintiff to some relief.'" (*Ibid.*)

Because appellants have failed to allege a wrongful act entitling them to relief, they may not seek a constructive trust.

IX. Accounting

An action for an accounting lies "in cases of fraud as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one. [Citations.]" (*Smith v. Blodget* (1921) 187 Cal. 235, 242.) A complicated accounting relationship alone is insufficient to permit maintenance of a lawsuit. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594.) "A right to an accounting is derivative; it must be based on other claims. [Citation.]" (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 833-834.) Here, because all of appellants' other claims fail, appellants' claim for an accounting fails as well. (*Ibid.*)

X. The trial court did not abuse its discretion in denying leave to amend

The trial court denied appellants leave to amend because it was appellants' fifth attempt to properly plead. "[A] demurrer may be sustained without leave to amend where it is probable from the nature of the complaint and the previous unsuccessful attempt[s] to plead that the plaintiff cannot state a cause of action." (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 153.) In addition, appellants have not made any showing as to how they can cure the defects in the 4AC. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [appellants have "the burden of proving that an amendment would cure the defect[s]"].) We therefore conclude that the trial court did not abuse its discretion in denying appellants leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST