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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MIN MAW INTERNATIONAL, INC., et al., Cross-complainants and Appellants, v. DAVID SHAO WEI FANG, et al., Cross-defendants and Respondents.	B272477 (Los Angeles County Super. Ct. No. BC561165)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Reversed in part with directions.

Gary Hollingsworth for Cross-complainants and Appellants.

Thompson Coe & O'Meara, Frances M. O'Meara, Stephen M. Caine and Holly M. Teel, for Cross-defendants and Respondents.

Min Maw International, Inc. (Min Maw) and Ju-Tsun (George) Chang (Chang) appeal from the judgment of dismissal of their cross-complaint against David Shao Wei Fang (Fang) and David S.W. Fang, a Professional Law Corporation (Fang PLC). The judgment of dismissal was entered after the trial court sustained demurrers to some causes of action alleged against Fang and Fang PLC, and granted judgment on the pleadings as to others.

We conclude that the trial court properly sustained demurrers and/or granted judgment on the pleadings as to the first four causes of action (breach of contract to pay salary, breach of contract to pay rent, equitable indemnity, and equitable contribution), but erred in sustaining the demurrer to the fifth cause of action (fraud) as to Fang. Accordingly, we reverse the judgment of dismissal and direct the trial court to reinstate the fraud cause of action as to Fang.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Complaint

Xia Sun (Sun) and Solar Plus, Inc. (Solar Plus) filed an action for fraud, promissory estoppel, conversion, conspiracy, breach of fiduciary duty, and common counts against Chang and Min Maw on October 20, 2014. The operative complaint alleged:

In 2010, Sun began the process of obtaining an EB-5 visa, with the goal of becoming a permanent resident of the United States. An EB-5 investor must invest $500,000 in a United States company that will preserve or create at least ten full-time jobs. As part of the EB-5 process, Sun created Solar Plus, a California corporation, and deposited $500,000 in its bank account. Sun then hired Chang, who was the president of Min

Maw, as Solar Plus's general manager, and agreed to rent office and warehouse space from Min Maw for $3,000 per month.

While Solar Plus was being managed by Chang, Sun was communicating her knowledge of Solar Plus's operations to the United States Citizenship and Immigration Service (USCIS) for the purpose of obtaining the EB-5 visa. By the end of 2013, Sun reported to the USCIS that Solar Plus was profitable and had created at least ten full-time jobs. In September 2014, the USCIS concluded that these representations were false and denied Sun's visa application.

On information and belief, Sun alleged "that unbeknownst to her until 2014, the Solar Plus, Inc. business operated by [Chang] was a sham in all respects. More specifically, [Sun] alleges that the so-called customer deposits were largely or entirely funds that had been circulated back from funds paid out to [Min Maw]. [Sun] alleges that her $500,000 in capital was ultimately transferred by [Chang] to either [Min Maw] or to [persons] or entities of [Chang's] choosing, not to the benefit of any proper business operation by Solar Plus, Inc. [Sun] alleges that [Chang] intentionally provided false or misleading information to her or her agents knowing that she was providing such information to the USCIS, in order to conceal his true activities. [Sun] alleges that [Chang], without her knowledge, considered her $500,000 investment as merely an opportunity to unjustly enrich himself and/or his company by $500,000, and he created and managed the false structure of Solar Plus, Inc. in order to accomplish that unjust enrichment."

II.
The Cross-Complaint

Chang and Min Maw filed a cross-complaint against Sun, Solar Plus, and Sun's attorney, Fang. The first amended cross-complaint asserted five causes of action: (1) breach of contract to pay salary; (2) breach of contract to pay rent; (3) equitable indemnity; (4) equitable contribution; and (5) fraud. It alleged as follows:

Sun employed Chang as Solar Plus's business manager between May 2010 and June 2014. Pursuant to written contracts, Solar Plus agreed to pay Chang wages of $2,000 per month, and to lease commercial premises located at 18350 East San Jose Avenue, City of Industry, from Min Maw for $3,000 per month. However, Solar Plus never paid Chang any wages, and it did not fully pay the rent owed.

Attorney Fang assisted Sun in incorporating Solar Plus for the sole purpose of applying for an investor visa. Fang designed a business plan whereby Solar Plus would purchase goods from suppliers in Taiwan and then sell them to Min Maw. Each buy/sell transaction was approved by Sun, and Sun approved each payment to suppliers. Sun and Fang hired Min Maw's employees to work for Solar Plus, and Fang asked Solar Plus's bookkeeper to prepare records showing that employment taxes were withheld from each employee's wages, including Chang's. However, Chang and his employees were not paid any salary by Sun or Solar Plus.

On September 18, 2015, Chang filed an amendment to the first amended cross-complaint, substituting Fang PLC for a Roe defendant. Thereafter, on October 20, 2015, Chang filed a second amended cross-complaint, which, according to Chang's counsel,

made changes only to "paragraphs 24, 50, 55, [and] 82, and prayer for relief which state the term of the lease and the amount of damages sought."

The trial court sustained demurrers to some of the causes of action of the first and second amended cross-complaints, and subsequently granted judgment on the pleadings as to the remaining causes of action. On April 4, 2016, the trial court entered a judgment of dismissal of the second amended cross-complaint with respect to Fang and Fang PLC.

Chang and Min Maw timely appealed from the judgment of dismissal.

STANDARD OF REVIEW

On appeal from a judgment of dismissal after an order sustaining a demurrer or from judgment on the pleadings, our standard of review is de novo: we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (*Burd v. Barkley Court Reporters, Inc.* (2017) 17 Cal.App.5th 1037; *Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.)

DISCUSSION

Chang and Min Maw (sometimes referred to collectively as Chang) contend that all five causes of action in the cross-complaint were properly pled, and therefore the trial court erred in resolving the cross-complaint on the pleadings. As we now discuss, Chang's contention has merit with respect only to the fifth cause of action as to Fang.

I.
First and Second Causes of Action
(Breach of Contract)

The first and second causes of action allege that Sun and Solar Plus breached written agreements to pay Chang a salary of $2,000 per month, and to pay Min Maw rent of $3,000 per month. Fang and Fang PLC were not alleged to be parties to the written employment and lease contracts, but nonetheless were alleged to be liable for the breaches of contract because "using his image and authority as an attorney, [Fang and Fang PLC] guaranteed Chang that he would be paid . . . . Fang and Sun falsely stated to Chang that Chang would receive the salary [and rent payment] as soon as Sun had the money to pay and/or as soon as the investor visa was approved."

The trial court sustained Fang's and Fang PLC's demurrers to the first and second causes of action without leave to amend, noting that neither Fang nor Fang PLC were alleged to be parties to the breached agreements, and any alleged oral "guarantee" violated the statute of frauds.

On appeal, Chang's entire argument for reversing the order sustaining the demurrers to the first and second causes of action is as follows: "By personally vouching for [] Sun's performance under the contract, Fang became a party, in that Chang would not have agreed to continue working or deliver possession of Min Maw's space without the personal guarantee given by Fang, and without Fang using his image and authority as an attorney to facilitate the fraud perpetrated against Chang and his company. *Such personal guarantee is a contract*." (Italics in original.) In other words, Chang appears to assert—without citation to any legal authority—that "personally vouching for Sun's

performance" gave rise to an enforceable contract against Fang and Fang PLC.

Chang's contention does not support reversal. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) An appellant must do so "through reasoned argument, citation to the appellate record, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685; see also *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80.) Here, as we have said, Chang has provided *no* legal support for his contention that an enforceable contract was created by Fang "personally vouching for Sun's performance." Accordingly, because he has not provided argument based on appropriate citations establishing the trial court erred, Chang has forfeited these claims on appeal. (*Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 ["We deem the failure to support [appellant's] statement with reasoned argument a forfeiture."]; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956 [" 'We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' "]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument . . . allows this court to treat the contentions as waived"].)

II.
Third Cause of Action
(Equitable Indemnity)

The third cause of action is for equitable indemnity. "Generally, 'indemnity refers to "the obligation resting on one party to make good a loss or damage another party has incurred." ' [Citations.] There are two basic types of indemnity: express indemnity, which relies on an express contract term providing for indemnification, and equitable indemnity, which embraces 'traditional equitable indemnity' and implied contractual indemnity. [Citation.]" (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573.)

" 'The doctrine of comparative equitable indemnity is designed to do equity among defendants.' [Citation.] The purpose of equitable indemnification is to avoid the unfairness, under the theory of joint and several liability, of holding one defendant liable for the plaintiff's entire loss while allowing another potentially liable defendant to escape any financial responsibility for the loss." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 212.)

The right to indemnity flows from payment of a joint legal obligation on another's behalf. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110 (*Western Steamship*).) Thus, " 'a fundamental prerequisite to an action for partial or total equitable indemnity is an *actual monetary loss through payment of a judgment or settlement*.' [Citation.]" (*Ibid.*, italics added; see also *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506 ["It is well settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through

payment."]; *Boyajian v. Ordoubadi* (2010) 184 Cal.App.4th 1020, 1027 ["a cause of action for equitable indemnity does not exist until the underlying loss is paid."].)

In the present case, the cross-complaint does not allege that Chang has suffered an "actual monetary loss." (*Western Steamship*, *supra*, 8 Cal.4th at p. 110.) To the contrary, it reflects that Chang has *yet to suffer* such a loss:

"65. If, upon trial of this matter, [Chang is] held legally responsible to [Sun and Solar Plus] for the damages alleged in the underlying Complaint, [Chang] *will have been damaged* as a legal result of the acts and omissions of [Fang and Fang PLC] . . . in an amount equal to the total sums which the trier of fact awards [Sun and Solar Plus] . . . .

"66. If, upon trial of this matter, it is found that [Chang was] at fault, . . . then [Chang] *will be exposed to liability* far in excess of liability attributable to [his] fault . . . . Should [Chang] be held liable to [Sun and Solar Plus], then such liability *will be* solely of a passive, secondary, vicarious and derivative nature predicated upon the direct, primary, active, and affirmative acts and/or omissions of [Fang and Fang PLC] not resulting from [Chang's] conduct. By reason of the foregoing allegations [Chang is] entitled to be indemnified by [Fang and Fang PLC] for any and all amounts which *may in good faith be paid* by way of compromise, settlement, or judgment . . . ." (Italics added.)

As the above-quoted language makes clear, Chang has not and cannot allege an actual monetary loss, which is an essential element of a claim for equitable indemnity. Accordingly, the trial court properly resolved the third cause of action on the pleadings.

III.
Fourth Cause of Action
(Equitable Contribution)

The fourth cause of action is for equitable contribution. " 'Equitable contribution is the right to recover from a co-obligor who shares a liability with the party seeking contribution.' [Citation.] . . . The right to seek equitable contribution 'is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor.' " (*Underwriters of Interest Subscribing to Policy Number A15274001 v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721, 728.)

Like an action for equitable indemnity, an action for equitable contribution does not accrue "until payment is made, 'because one is injured by another's wrongful act *when one pays more than one's proper share*." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) ¶ 15:297, p. 15-56; see also *Fireman's Fund Ins. Co. v. Sparks Const., Inc.* (2004) 114 Cal.App.4th 1135, 1151 [claims for equitable indemnity and contribution did not accrue until joint tortfeasor paid injured party's claim]; *Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 879 ["Where the claim is one for indemnification or contribution, it accrues when the indemnitee or party seeking contribution suffers a loss through payment of a judgment debt (or settlement) or through payment of more than

his fair share of damages."].) Thus, for the reasons discussed in section II, *ante*, Chang has not alleged an essential element of a claim for equitable contribution, and the trial court properly resolved the fourth cause of action on the pleadings.

IV.
Fifth Cause of Action
(Fraud)

The fifth and final cause of action is for fraud. " ' "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." ' [Citation.]" (*Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.)

"Each element of a fraud claim must be pleaded with specificity. [Citation.] 'The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made . . . .' " (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008.) "The specificity requirement serves two purposes: 'to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action.' [Citation.]" (*Ibid.*)

A representation "generally is not actionable unless it is about 'past or existing facts.' " (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458.) Nonetheless, a false promise "to perform in the future" can support an intentional—but not a negligent—misrepresentation claim. (*Ibid.*, citing *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158–159 (*Tarmann*).) "[O]ne type of deceit [i]s 'A promise, made without any intention of performing it.' As Witkin explains, 'A

false promise is actionable on the theory that a promise implies an intention to perform, that *intention to perform or not to perform* is a state of mind, and that misrepresentation of such a state of mind is a misrepresentation of *fact*. The allegation of a *promise* (which implies a representation of intention to perform) is the equivalent of the ordinary allegation of a representation of fact.' " (*Tarmann*, *supra*, 2 Cal.App.4th 153, 158–159.)

In the present case, the fifth cause of action alleged that Fang committed fraud as follows:

"78. At all times, Fang as Sun's only immigration attorney was fully informed by Chang about the debt owed to Chang and Min Maw. Each time, Fang, using his image and authority as an attorney, guaranteed Chang he would be paid. Further, [in April 2010], and continuing from time to time thereafter, Fang had numerous opportunities to and did inspect Solar Plus' accounting and employment records, as well as the bank statements, and was fully informed that Chang was not paid any salary and that Min Maw was owed the monthly rent payments. Yet, Fang decided to still submit fraudulent records to [the] IRS and the USCIS in relation to the EB-5 investor visa application for Sun by not disclosing the debt owed to [Chang]. Fang well understood that should he disclose the correct data in the application, it would be denied by the USCIS. Fang wanted to get the visa application approved in order to earn the attorney fees from Sun. Fang did not want the application he handled for Sun to fail in any way. In the meantime, Fang continued to give work instructions and assignments to Chang, and kept Chang working without pay. Fang continued to ask Sun to occupy and use Min Maw's office space for the sole purpose [of facilitating] the EB-5 visa application, yet knowingly without making rent payment[s]

to Chang and Min Maw. Fang therefore actively participated in the fraud by instructing Sun to make up the two agreements, and Fang himself guaranteed Chang that he would be paid, when Fang knew well that he could not provide any guarantee. Fang therefore joined Sun to have caused the debt. Fang actively participated in defrauding Chang and the fraud was intentional because he did not want to see Sun's visa application sabotaged.

"79. Fang guaranteed Chang that the debt would be paid, and gave his instructions and assignments to Chang at his law office located at City of Industry, California, at all times between April, 2010 to June, 2014. During the same time period, Fang also had his staff contact Chang occasionally by phone or fax to transmit his instructions and assignments to Chang. [¶] . . . [¶]

"81. [Chang] relied upon Cross-defendants' representations that the wages and rent would be paid on time, pursuant to Fang's guarantee using his image and authority as an attorney, and in reliance on said representations, Chang continued working for Sun and Solar Plus, and delivered possession of the premises located at 18350 East San Jose Avenue, City of Industry, CA, 91748 to Solar Plus, as described above.

"82. As a direct and proximate result of the fraud and deceit practices by Cross-defendants herein, [Chang has] been damaged in an amount subject to proof at trial, but no less than $285,056.00 . . . ."

We conclude that these allegations are sufficient to state a cause of action for fraud against Fang, but not against Fang PLC. As described above, Chang alleged that Fang (1) misrepresented that Sun would pay Chang and Min Maw the salary and rent they were due, (2) "knew well that he could not provide any

guarantee," (3) "intentional[ly]" defrauded Chang "because he did not want to see Sun's visa application sabotaged," (4) induced Chang's reliance on Fang's representations, such that Chang "continued working for Sun and Solar Plus, and delivered possession of the premises located at 18350 East San Jose Avenue, City of Industry," and (5) caused Chang damages "in an amount subject to proof at trial, but no less than $285,056.00." These allegations were sufficient at the pleading stage to state a cause of action for fraud against Fang. They are not sufficient to state a claim against Fang PLC, however, because there are no allegations of fraudulent conduct by Fang PLC.

Fang relies on a number of legal doctrines to urge that notwithstanding the above, the demurrer to the fifth cause of action was properly sustained without leave to amend. Each of the claims is without merit:

First, Fang contends that the fraud claim is barred because it is based on an alleged oral guarantee that violates the statute of frauds. However, Fang cites no authority to suggest that the statute of frauds bars tort claims, and our Supreme Court has specifically rejected this proposition, holding in *Tenzer v. Superscope, Inc*. (1985) 39 Cal.3d 18, 29 as follows: "A series of cases have held that an action for fraud cannot be maintained where the allegedly fraudulent promise is unenforceable as a contract due to the statute of frauds. The rule was stated in *Kroger v. Baur* (1941) 46 Cal.App.2d 801, 803, as follows: 'Appellant contends that his action is not upon the invalid agreement, but is an action for damages for fraud, upon the theory that the oral promise to pay him a commission was made without any intention of performing it and for the purpose of inducing him to waive a written memorandum. If the law can be

thus nullified by the transparent device of predicating a tort action upon the invalid oral promise on the ground that the promisor did not intend to perform it, then the section might just as well be stricken from the statute. To license such a circuitous procedure to evade the provisions of such legislation would be to nullify and destroy its wholesome effect and the protection it affords against fraud.' [Citations.] [¶] But the *Kroger* rule has been criticized and, in 1978, Justice Kaus—then sitting on the Second District Court of Appeal—invited this court to disapprove it. *Today we accept his invitation*. . . ." (Italics added.)

Second, Fang urges that the purported oral guarantee was not knowingly false when it was made. The contention is without merit. Although Chang must produce evidence of Fang's intent to mislead him *to survive a nonsuit* (*Tenzer v. Superscope, Inc.*, *supra*, 39 Cal.3d at p. 30), at the pleading stage all that is required is that Chang *allege* an intent to deceive (*Hales v. Ojai Valley Inn & Country Club* (1977) 73 Cal.App.3d 25, 30). He has done so.

Third, Fang contends that the fraud claim fails because the alleged submission of false data to the USCIS could not have caused damage to Chang. Although Fang is unquestionably correct that Chang cannot state a claim for fraud based on damages to someone else, the complaint alleges that Fang's alleged fraudulent conduct damaged not only the USCIS, but Chang as well. It asserts: "[I]n reliance on [Fang's] representations, Chang continued working for Sun and Solar Plus, and delivered possession of the premises," damaging Chang "in an amount subject to proof at trial, but no less than $285,056.00 . . . ." This is sufficient at the pleading stage to state a claim for damages proximately caused by fraud.

Finally, Fang asserts that Chang's fraud claims are barred because "the allegations [Fang] was [Sun's] attorney are incompatible with a 'conspiracy' " and by the agent immunity rule. According to Fang, "Under the agent's immunity rule, an agent is not liable for conspiring with the principal when the agent is acting in an official capacity on behalf of the principal. [Citations.] An attorney acting within the scope of his or her official duties who is not personally bound by the duty violated may not be held liable for civil conspiracy (including, as here, conspiracy to commit 'fraud'), even though he or she may have allegedly participated in the conspiracy or fraud underlying the injury." Whatever the merits of these assertions, they are not dispositive of Chang's fraud claim, which does not depend on an attorney-client conspiracy. Rather, as we have described, the complaint alleges that Fang personally and falsely represented to Chang that he would be paid, that Chang relied on that representation, and that Chang suffered damages as a result. Thus, as to Fang, the fifth cause of action was adequately pled.

DISPOSITION

The judgment of dismissal is reversed. On remand, the trial court is directed to reinstate the fifth cause of action (fraud) of the second amended cross-complaint as to Fang only. Each party shall bear its own appellate costs.

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EDMON, P. J.

We concur:

LAVIN, J.

CURREY, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.