SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2102625

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: GIGI PAGANI

vs.

DEFENDANT: MICHAEL FOX

NATURE OF PROCEEDINGS: 1) MOTION – LEAVE TO AMEND SECOND AMENDED COMPLAINT
2) MOTION - CONSOLIDATE

RULING

Plaintiff Gigi Pagani's ("Plaintiff") Renewed Motion for Leave to File Third Amended Complaint and to Consolidate ("Renewed Motion") is DENIED.

REQUESTS FOR JUDICIAL NOTICE

Defendant Michael Fox's ("Defendant") unopposed Requests for Judicial Notice Nos. 1-14 are GRANTED. (Evid. Code, §§ 452, subd. (d), 453.)

BACKGROUND

Plaintiff and Defendant were in a non-marital romantic relationship with one another from around 2008 to 2020. When Plaintiff was getting divorced from her prior husband, she was awarded the family home located at 24 Oak Mountain Court ("the home"). However, at the time, the home value was less than the mortgage and Plaintiff was concerned about making the mortgage payments. Ultimately Defendant purchased the home from Plaintiff and her ex-husband in May of 2009 for $953,950. The sale was memorialized in a Standard Residential Purchase Agreement ("Purchase Agreement") signed by Mr. Pagani, Plaintiff, and Defendant. The Purchase Agreement contained an integration clause that explicitly merged any prior agreement "with respect to the property" in the Purchase Agreement. Only Defendant is on title to the home.

Defendant lived at the home with Plaintiff until August of 2020 when the two broke up. After Plaintiff moved of the home, she filed suit against Defendant, alleging the parties had entered into an oral agreement where she would remain a "co-owner" of the home and would split its

appreciation upon their breakup, and that Defendant breached that agreement when he refused to pay her that sum. Defendant denies these claims.

LEGAL STANDARD

Motions for reconsideration are governed by Code of Civil Procedure section 1008, subdivision (b), which provides:

> A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.

Motions for reconsideration under section 1008, subdivision (a), and renewed motions under section 1008, subdivision (b) are closely related. (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 159–60. Internal citations omitted.) A party filing either a motion under section 1008, subdivision (a) or (b) is seeking a new result in the trial court based upon "new or different facts, circumstances, or law." (*Ibid.*)

Section 1008 is expressly jurisdictional, as subdivision (e) explains: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (Code Civ. Proc., § 1008, subd. (e).)

Case law has included the additional requirement that the party seeking to renew a previously denied motion based upon new or different facts "must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212; see also *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 46–47, fn. 15.)

DISCUSSION

Plaintiff's Renewed Motion asks the Court to reconsider two prior motions: (1) Plaintiff's Motion to Consolidate Cases ("Motion Consolidate"), filed April 21, 2023 and denied August 28, 2023 and (2) Plaintiff's Motion for Leave to File a Third Amended Complaint, filed January 22, 2024 and denied on May 7, 2024.

Plaintiff bases her Renewed Motion on these changed circumstances: (1) new trial counsel, (2) revisions to the proposed third amended complaint, (3) a continuance of the October 2024 trial, and (4) the Court's order to bifurcate the trial into jury and bench trials. (Renewed Motion, pp. 1-2.)

Defendant opposes the motion on the following grounds: (1) the Renewed Motion does not meet the procedural requirements; (2) the Renewed Motion does not provide new facts or law; and (3) Plaintiff fails to reasonably explain why she did not raise her purported new facts or law earlier.

New Counsel

Although the introduction to the Renewed Motion identified new trial counsel as a changed circumstance (see Motion p. 1:23-25), the remainder of the Motion is silent on how new trial counsel justifies a change in the Court's prior orders. If new counsel alone, without additional facts or justification, was all a party needed to revisit a Court's prior order, parties could in essence engage in unlimited "bites of the apple" simply by switching attorneys. The Court finds that "new counsel" alone is not a sufficient "changed circumstance" to justify reconsideration of its prior orders.

The Revisions to the Proposed Third Amended Complaint

Most of the Renewed Motion is spent arguing that the Court misinterpreted the applicable law on sham pleadings in its prior ruling. That is not "new" or "different" law under section 1008's requirements. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.)

In *Gilberd* respondent argued that the trial court misinterpreted California law in its initial decision and, therefore, the respondent relied upon "different" law when it reiterated its prior reasoning and authorities. (*Ibid.*) The *Gilberd* court found this contention meritless and "utterly specious." (*Ibid.*) "Since in almost all instances, the losing party will believe that the trial court's 'different' interpretation of the law or facts was erroneous, to interpret the statute as the respondent urges would be contrary to the clear legislative intent to restrict motions to reconsider to circumstances where a party offers the court some fact or authority that was not previously considered by it." (*Ibid.*)

Plaintiff has failed to do so here and the argument about interpretation (or rather misinterpretation) of law previously presented to this Court is not well taken.

Plaintiff also argues that she has revised the third amended complaint to leave in the "words" opposing counsel was concerned about her removing. Not only is this a myopic view of the prior opposition and the Court's ruling on the motion, but Plaintiff failed to present any argument on why this version of the third amended complaint was not able to have been presented in support of the earlier motion. Again, this is not the type of "new" fact that justifies reconsideration under section 1008. By modifying the proposed amended complaint, Plaintiff essentially seeks to modify the prior motion. If a party could manufacture a new fact simply by editing their prior papers, this too would create unlimited "bites at the apple."

Continuance of the October 2024 Trial

On August 6, 2024, the parties voluntarily stipulated to continue the October 22, 2024 trial in order to accommodate family matters of the parties' attorneys. (Stip. & Order to Continue Trial, 8/6/24.) Plaintiff now argues that the new trial date is a new fact or circumstance which justifies reconsideration.

The continuance of the October 2024 trial is indeed a change of circumstances. However, it is not one that justifies a change to the Court's prior orders.

The Court previously heard the Motion for Leave to Amend on April 26, 2024, and trial was set for October 23, 2024. The Motion was heard almost six months before the trial date and the Court found that permitting amendment would prejudice Defendant as it would be an insufficient amount of time to prepare for trial or would necessitate a continuance.

Plaintiff's Renewed Motion is set for hearing on February 14, 2025, and trial is set for April 14, 2025. Discovery cutoff is March 15, 2024. In this case, the time frame between the hearing date and the trial date is closer together (2 months) than when the Court previously considered the Motion (6 months). Accordingly, the reduced time would only weigh in favor of the finding of prejudice and does not justify a change in the Court's prior ruling.

The Court's Order to Bifurcate the Trial into Jury and Bench Trials

Nor is the Court's order to bifurcate the trial into Jury and Bench trials a "new" fact. The Court first set the action for trial on March 18, 2024. At that time, the Court indicated it intended to bifurcate the trial.

"New Law" Presented in Support of Motion

In her Motion, Plaintiff cites statutes and cases which were all published at the time of the relevant hearings. She provides no explanation for her failure to present this law earlier.

For these reasons, the Renewed Motion is DENIED.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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https://marin-courts-ca-gov.zoomgov.com/j/1615162449?pwd=e5SqeATq2HOsxxD7Fhrl3Q7qPFgFZa.1
Meeting ID: 161 516 2449
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2200890

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: DAVID JENNINGS

vs.

DEFENDANT: AUTOMATED MEDIA PROCESSING SOLUTIONS, INC.

NATURE OF PROCEEDINGS: MOTION – SUMMARY ADJUDICATION

RULING

Defendant's motion for summary adjudication is denied.

Allegations in Plaintiff's Third Amended Complaint

Plaintiff David Jennings ("Jennings") alleges that on August 16, 2017, he entered into a written Note and Warrant Purchase Agreement ("Agreement") with Defendant Automated Media Processing Solutions, Inc. ("AMPS"). (Third Amended Complaint ("TAC"), ¶6.) AMPS gave Jennings a Converted Promissory Note (the "Note") dated April 15, 2018. (*Id.*, ¶7.) Pursuant to the Note, AMPS agreed to pay Jennings $1.25 million or such lesser amount as equaling the outstanding balance, together with interest. (*Id.*, ¶8.) Subject to the terms for conversion, all unpaid amounts under the Note were to be due and payable on the earlier of (a) April 15, 2019 at 11:00 am PST; or (2) when, upon or after the occurrence of an Event of Default, the sum owing under the Note is declared due and payable by a Majority in Interest, or made automatically due and payable in accordance with the terms of the Note. (*Id.*, ¶9.) No Event of Default has occurred and the Majority in Interest has not declared the sum owing under the Note due and payable. (*Id.*, ¶10.) Under the Note, the Note automatically "converted" to Preferred Stock in AMPS if AMPS consummated, before repayment of the Note, a "Qualified Equity Financing" or a "Non-Qualified Equity Financing" as defined in paragraph 5 of the Note. (*Id.*, ¶11.) AMPS has not consummated either financing and no Preferred Stock has been offered to Jennings, so the Note has not been converted to Preferred Stock. (*Id.*, ¶12.) Under the Note, if neither a Qualified Equity Financing nor a Non-Qualified Equity Financing had been consummated after a year, the Note would convert to Series-A Stock financing or be extended automatically for successive one-year terms at the option of the holder, until a Qualified Equity Financing occurs. (*Id.*, ¶13.) The Note has not converted to Series-A Stock as no Series-A Stock has been issued to Jennings. (*Id.*, ¶14.) Jennings elected to receive payment in dollars but has only received a partial payment, despite his demands for full payment. (*Id.*, ¶¶15-17.)

Jennings asserts two causes of action for breach of contract against AMPS.

Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal. App. 4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant moving for summary judgment or summary adjudication "has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc. § 437c(p)(2).) "Once the defendant . . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc. § 437c(p)(2).)

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467; Code Civ. Proc. §437c(c).) The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party. (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

Untimely Opposition

Jennings filed his Opposition on February 3rd, only 11 days before the hearing date. The Court strikes the Opposition as untimely and does not consider it. However, even where a motion for summary adjudication is unopposed, the moving party must still establish it is entitled to judgment as a matter of law for its motion to be granted. (See *Harman v. Mono General Hospital* (1982) 131 Cal.App.3d 607, 613.)

Request for Judicial Notice

AMPS's request for judicial notice is denied as the referenced documents are not relevant to the Court's ruling. (See *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 310 n. 4 ["a court must decline to take judicial notice of material that is not relevant"].)

Discussion

AMPS acknowledges there are disputed issues of fact as to its primary defenses of novation, accord and satisfaction, release, estoppel and waiver. Specifically, it notes that it argues that its obligations under the Note were extinguished when it delivered 50 million cryptocurrency coins to Jennings, but Jennings has contended that he agreed only to accept the cryptocurrency as compensation for a delay in payment. Accordingly, AMPS requests that the Court focus solely on its alternative defense that AMPS fully complied with its obligations under the Note.

AMPS argues that the Note automatically converted into AMPS stock and therefore it is not obligated to pay Jennings any amount in dollars under the Note.

AMPS has adequately established that the parties entered into the Agreement and AMPS delivered the Note to Jennings in April 2018. (UMF 5, 6.)

Paragraph 1 of the Note states among other things:

> FOR VALUE RECEIVED, Automated Media Processing Solutions, Inc., a Delaware corporation (the "Company") promises to pay to David Jennings, dated April 15th, 2018 ("Lender"), or the registered assigns, in lawful money of the United States of America the principal sum of $1,250,000 or such lesser amount as shall equal the outstanding principal amount hereof, together with interest . . . All unpaid principal, together with any then unpaid and accrued interest and other amounts payable hereunder, shall be due and payable on the earlier of (i) 11 a.m. pacific time, April, 15th, 2019 (the "Maturity Date"), or (ii) when, upon or after the occurrence of an Event of Default (as defined below), such amounts are declared due and payable by a Majority in Interest (as defined below) or made automatically due and payable in accordance with the terms hereof.

(UMF 8.)

The Note also contains an "automatic" conversion provision and a "voluntary" conversion provision in paragraph 5:

> 5. ***Conversion***
>
> (a) *Automatic Conversion.* In the event the Company consummates, prior to repayment of this Note, (i) an equity financing pursuant to which it sells shares of one or more series of Preferred Stock (the "**Preferred Stock**") with an aggregate sales price of not less than $7.1 million, including any and all Notes that are converted into Preferred Stock (a "**Qualified Equity Financing**"), or (ii) an equity financing that does not constitute a Qualified Equity Financing (a "**Non-Qualified Equity**

> **Financing**") if the Company receives written notice from a Majority in Interest to convert all outstanding Notes in connection with such Non-Qualified Equity Financing, then the outstanding principal amount of and all accrued interest under this Note shall convert into shares of preferred stock at the same price and on the same terms as the other investors that purchase Preferred Stock in the financing, or (iii) if, after one (1) year, none of the above occurs, the Note shall convert into the Series-A Stock financing or be extended automatically for successive one year terms *at the option of the Holder*, until and unless a Qualified Equity Financing occurs."
>
> (b) *Voluntary Conversion.* Upon the closing of any Non-Qualified Equity Financing any Holder may elect on their own behalf to convert any Note they then hold.
>
> (c) *Mechanics of Conversion.* Upon any conversion of this Note, the Lender hereby agrees to execute and deliver to the Company all transaction documents related to the financing, including a purchase agreement and other ancillary agreements, with customary representations and warranties and transfer restrictions (including a 180-day lock-up agreement in connection with an initial public offering), and having the same terms as those agreements entered into by the other purchasers of the Preferred Stock. The Lender also agrees to deliver the original of this Note (or a notice to the effect that the original Note has been lost, stolen or destroyed and an agreement acceptable to the Company whereby the holder agrees to indemnify the Company from any loss incurred by it in connection with this Note) at the closing of the financing for cancellation; *provided, however*, that upon satisfaction of the conditions set forth in this **Section 6(a)**, this Note shall be deemed converted and of no further force and effect, whether or not it is delivered for cancellation as set forth in this sentence.

(UMF 9-11 [emphasis in original].)[1]

It is undisputed that the events defined in paragraph 5(a)(i) and (ii) did not occur. (UMF 12.) As there was no Non-Qualified Equity Financing, there was no voluntary conversion under paragraph 5(b). AMPS does not argue that Jennings chose this option in any event.

Thus if any conversion occurred, it must have been under paragraph 5(a)(iii), i.e., "if, after one (1) year, none of the above occurs, the Note shall convert into the Series-A Stock financing or be extended automatically for successive one year terms *at the option of the Holder*, until and unless a Qualified Equity Financing occurs." AMPS argues that conversion automatically occurred

[1] There is no Section 6(a) in the Note.

under this subsection because it provides for only two options: (a) the Note converts to Series-A Stock financing or (b) Jennings opts to extend the Note automatically for successive one-year terms. Jennings has denied in RFA responses that the Note has automatically extended each successive year. (UMF 15.) Therefore, AMPS argues, the only remaining outcome is that the Note converted to Series-A Stock and Jennings is not entitled to the monetary repayment he seeks in his Third Amended Complaint.

The problem with AMPS's interpretation is that it is contrary to the language in paragraph 1, which provides that AMPS promises to pay "in lawful money . . . the principal sum of $1,250,000 . . . together with interest . . . due and payable on the earlier of (i) 11 a.m. pacific time, April, 15th, 2019 (the "Maturity Date"), or (ii) when, upon or after the occurrence of an Event of Default (as defined below), such amounts are declared due and payable by a Majority in Interest (as defined below) or made automatically due and payable in accordance with the terms hereof." Under this language, if there is no preceding event of default, Jennings is entitled to repayment of the $1,250,000 plus interest "in lawful money" by the Maturity Date, i.e., April 15, 2019. Under paragraph 13 of the Note, AMPS waived demand for payment.

The Court finds the Note ambiguous as to what happens at the one-year Maturity Date of the Note if there has been no prior Event of Default, no Qualified Equity Financing or Non-Qualified Equity Financing, and Jennings has not opted to extend the Note automatically for successive one-year terms. AMPS argues that the evidentiary record reflects that these are the relevant circumstances. (See MPA, pp. 3-4.) Under these circumstances, under paragraph 1, Jennings is entitled to be paid the principal and interest due "in lawful money". Under paragraph 5(a)(iii), the Note is converted to Series-A Stock.

Given the contradictory terms of paragraphs 1 and 5 of the Note, AMPS has not met its initial burden of showing it is entitled to judgment as a matter of law on the two breach of contract claims. The proper interpretation of the Note under the factual circumstances of this case may require parole evidence to show the parties' intent, but this issue has not been briefed by either party. The Court therefore denies AMPS's motion for summary adjudication.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for February, 2025 is as follows:
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Meeting ID: 161 516 2449
Passcode: 073961

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2201191

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: WILLIAM MCDONAGH

vs.

DEFENDANT: BENJAMIN GRAVES, ET AL

NATURE OF PROCEEDINGS: MOTION – OTHER: JUDGMENT ON THE PLEADINGS

RULING

Appearances required.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV2300181

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: STEFANO SCHIAVI

vs.

DEFENDANT: CANDICE O'DENVER, ET AL

NATURE OF PROCEEDINGS: MOTION – DISCOVERY; DISCOVERY FACILITATOR PROGRAM

RULING

Stefano Schiavi's ("Plaintiff") unopposed Motion for Sanctions is Granted in part.

The Court imposes an issue sanction pursuant to Code Civ. Proc. sections 2023.030(b) and 2031.320(c), finding that by transferring the properties at 373 and 377 Ocean Parkway to the Candice Cain O'Denver Trust, Ms. O'Denver made them unreachable to Mr. Schiavi, and that Ms. O'Denver is not the only beneficiary of the Candice Cain O'Denver Trust and there is a spendthrift clause in the Trust that would thwart Mr. Schiavi's efforts to reach the assets.

The Court imposes monetary sanction against Defendant O'Denver in the amount of $9,411.00 as a result of Plaintiff being forced to file the instant motion, pursuant to Code of Civ. Proc. sections 2023.030(a), 2031.320(c), and 2030.290(c). These monetary sanctions are in addition to those already ordered in this case. All monetary sanctions ordered in this case must be paid by Defendant to Plaintiff's counsel by March 23, 2025.

All other relief sought is denied without prejudice.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0003667

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: DANIEL GILDENGORIN

vs.

DEFENDANT: THE STANDARD FIRE INSURANCE COMPANY

NATURE OF PROCEEDINGS: MOTION – STRIKE

RULING

Defendant's motion to strike is denied.

Allegations in Plaintiff's First Amended Complaint

Plaintiff Daniel Gildengorin alleges that he is the owner of real property located at 218 Cleveland Avenue in Mill Valley, which he maintained as one of his two residences. The property was insured by Defendant The Standard Fire Insurance Company ("Standard"). In February 2023, a tree on Plaintiff's neighbors' property fell into an adjacent tree and both trees crashed onto Plaintiff's house. Standard improperly denied the claim on the basis that the residence was not Plaintiff's "residence premises". Plaintiff asserts causes of action for breach of contract and breach of the covenant of good faith and fair dealing, and seeks compensatory and punitive damages, against Standard. Plaintiff also asserts causes of action for negligence and nuisance against his neighbors.

Standard

The court may, upon a motion made pursuant to Code of Civil Procedure Section 435, strike out any "irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc. § 436.) Punitive damages allegations that are not supported by the facts alleged may be subject to a motion to strike. (See *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.)

Punitive damages are generally available where a defendant is guilty of oppression, fraud or malice. (Civ. Code § 3294(a).) "'Malice' is defined as 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others'; 'oppression' is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of

that person's rights.' 'Despicable conduct' is 'conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' [Citation.] 'The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages . . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.'" (*Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442, 454-55 [citations omitted].) "'Conscious disregard' means 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.' Put another way, the defendant must 'have *actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm.'" (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159 [citations omitted] [emphasis in original].)

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff . . . judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255 [citations omitted].) "The mere allegation an intentional tort was committed is not sufficient to warrant an award of punitive damages. Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim." (*Grieves*, 157 Cal.App.3d at p. 166 [citations omitted].)

Discussion

Standard moves to strike the punitive damages allegations in paragraph 24 of the First Amended Complaint and paragraph 5 of the Prayer for Relief. Standard argues that there are insufficient facts alleged to support the request for punitive damages.

"[P]unitive damages may be available when an insured prevails on a tort claim for breach of the implied covenant of good faith and fair dealing." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 225 n. 3.) Merely proving a breach of the implied covenant, however, does not necessarily result in an award of punitive damages. (See *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 328 ["Evidence that an insurer has violated its duty of good faith and fair dealing does not thereby establish that it has acted with the requisite malice, oppression or fraud to justify an award of punitive damages"].)

Standard's motion is denied. Plaintiff alleges that Standard improperly denied his claim on the ground that the property was not Plaintiff's residence when in fact it is one of two residences maintained by Plaintiff. Plaintiff further alleges that Standard failed to act reasonably promptly to communications, conducted an unreasonable and investigation and handling of Plaintiff's claim, failed to affirm or deny coverage within a reasonable time (almost a year) and/or did not attempt in good faith to effectuate prompt, fair or equitable settlement where liability was reasonably clear, misrepresented facts and/or policy provisions to support the denial of Plaintiff's claim, and compelled Plaintiff to institute litigation to recover amounts due under Policy. Plaintiff also alleges that Standard's conduct was part of a larger pattern and practice of conduct involving claims of other similarly situated insureds prior to Plaintiff's losses, was undertaken to deprive Plaintiff of covered insurance benefits, and was done in furtherance of Standard's own

economic interest at the expense of Plaintiff's interests. (First Amended Complaint, ¶¶9, 19, 20, 22-24.) These allegations are sufficient to withstand a motion to strike.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for February, 2025 is as follows:
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Meeting ID: 161 516 2449
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0004433

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: VIRGIL PINA

vs.

DEFENDANT: MARIN COUNTY

NATURE OF PROCEEDINGS: DEMURRER

RULING

County of Marin's ("Defendant") Demurrer is continued to March 14, 2025, at 1:30 p.m. in Department E to be heard with Defendant's Motion to Strike.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/14/25 TIME: 1:30 P.M. DEPT: E CASE NO: CV0004709

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: G. STRATFORD

PLAINTIFF: CYRUS ANSARI vs. DEFENDANT: SELECT PORTFOLIO SERVICING, INC.	

NATURE OF PROCEEDINGS: ORDER TO SHOW CAUSE – PRELIMINARY INJUNCTION

RULING

Plaintiff Cyrus Ansari's ("Plaintiff's") motion for a preliminary injunction is DENIED.

BACKGROUND

This is an insurance dispute. Plaintiff owns his personal residence at 24 Ivy Lane in Woodacre. (Ansari Dec., ¶ 3.) In October 2005, Washington Mutual Bank loaned Plaintiff $665,000 pursuant to a deed of trust. (*Id.* at ¶ 4.) The deed of trust required Plaintiff to obtain property insurance. (*Id.* at ¶ 5.) On April 4, 2022, a notice of default was recorded against the property. (*Id.* at ¶ 6 & Ex. A.)

In March 2023, a tree fell onto the property during a storm and destroyed the roof, causing an estimated $230,000 in damage and rendering the property uninhabitable. (Ansari Dec., ¶¶ 7-8.) 15-16.) Defendant Select Portfolio Services, Inc. ("Defendant"), Plaintiff's loan servicer (Benight Dec., ¶ 11), took out an insurance policy on the property through American Security Insurance Company. (Ansari Dec., ¶ 8.) Plaintiff began to slowly make the required repairs to his property, paying out of pocket with the understanding that American Security Insurance Company would pay Defendant and he would then be reimbursed for the repair expenses. (*Id.* at ¶ 9.) Plaintiff alleges that he was in a contractual relationship with Defendant under the deed of trust and the insurance policy. (Complaint, ¶ 26.)

In August 2024, a notice of trustee's sale was recorded against the property. (Ansari Dec., ¶ 10 & Ex. B.) In October 2024, Plaintiff "received a letter with a [loan] reinstatement amount of $226,787.65." (*Id.* at ¶ 12.) Plaintiff alleges that he cannot pay this because he has not been reimbursed for his out-of-pocket expenses for the repairs. (*Id.* at ¶ 13.)

In December 2024, Defendant told Plaintiff that it had sent him checks for approximately $74,000 on November 9 and for approximately $40,000 on December 2. (Ansari Dec., ¶ 14.) Plaintiff received the $40,000 check, but was unable to cash it as of the date the instant motion was filed because Defendant had a hold on the funds. (*Id.* at ¶ 15.) He says he has not received the $74,000 check. (*Id.* at ¶ 14.) According to the complaint, Defendant continues to withhold insurance proceeds that rightfully belong to Plaintiff. (Complaint, ¶ 28; see also Ansari Dec., ¶¶ 11, 14, 16.) Plaintiff asserts causes of action for breach of contract; breach of the implied covenant of good faith and fair dealing; and violation of the Unfair Competition Law ("UCL", Bus. & Prof. Code, § 17200 *et seq.*).

On December 10, 2024, Plaintiff filed an ex parte application for a temporary restraining order to restrain the trustee's sale of his property, which was scheduled for the next day. (Ansari Dec., ¶ 17.) Defendant did not oppose the application and did not appear at the hearing. (See Dec. 11, 2024 Order.) The Court granted the temporary restraining order and stated that Plaintiff's ex parte application would be considered the moving papers in support of Plaintiff's motion for a preliminary injunction. (*Ibid.*) The Court now considers Plaintiff's request for a preliminary injunction.

LEGAL STANDARD

A preliminary injunction may be granted, among other circumstances, "[w]hen it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action" or "[w]hen it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual." (Code Civ. Proc., § 526, subd. (a).) The purpose of a preliminary injunction is to preserve the status quo until a final determination on the merits. (*Continental Baking Co. v Katz* (1968) 68 Cal.2d 512, 528.) The determination of whether to grant a preliminary injunction rests in the sound discretion of the trial court. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1470 ("*Tahoe Keys*").)

Trial courts evaluate two interrelated factors when deciding whether to issue a preliminary injunction. (*Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1680.) The first is the likelihood that the moving party will prevail at trial. (*Id.* at pp. 1680-1681.) The second is the interim harm the movant would likely sustain if the injunction were denied as compared to the harm the opposing party would likely suffer if the injunction were issued. (*Id.* at p. 1681.) "[T]he greater the [movant's] showing on one, the less must be shown on the other to support an injunction." (*Jamison v. Department of Transp.* (2016) 4 Cal.App.5th 356, 361-62.) The burden is on the moving party "to show all elements necessary to support issuance of a preliminary injunction." (See *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

Motions for a preliminary injunction must be based on a verified complaint or on declarations. (Code Civ. Proc., § 527, subd. (a).) If there is no objection, an affidavit or declaration may be considered even though it contains hearsay or other inadmissible matter. (See *Waller v. Waller* (1970) 3 Cal.App.3d 456, 464.)

DISCUSSION

To prevail on a breach of contract claim, the plaintiff must prove the existence of the contract. (*D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 800.) Similarly, "the existence of a contractual relationship between the parties" is a "prerequisite for any action for breach of the implied covenant of good faith and fair dealing . . . , since the covenant is an implied term in the contract." (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 433.)

There is no evidence before the Court suggesting that there is a contractual relationship between Plaintiff and Defendant. Plaintiff alleges in the complaint that he is in a contractual relationship with Defendant under the deed of trust and the insurance policy. (Complaint, ¶ 26.) An allegation in an unverified complaint is not evidence. Plaintiff never provides any evidence about the contents of the insurance policy other than that it is between Defendant and American Security Insurance Company. (Ansari Dec., ¶ 8.) Plaintiff has offered no evidence that he is either a party or an intended beneficiary (see Civ. Code, § 1559) of the insurance policy. Defendant's evidence indicates that the policy was intended to benefit Plaintiff's lender because Plaintiff did not secure property insurance himself, which left the lender's security interest unprotected. (Benight Dec., ¶ 13-14 & Ex. 5.) There is also no evidence before the Court of what the insurance policy requires, meaning that even assuming Plaintiff has standing to enforce that contract, there is no evidence that anything Defendant did constituted a breach of the contract or unfairly frustrated anyone's right to receive the benefits of the contract. (See *D'Arrigo Bros.*, *supra*, 224 Cal.App.4th 790, 800; CACI No. 325 [elements of breach of the implied covenant]; *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349 ["The [implied] covenant . . . "exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. . . . It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement."].)

As for the deed of trust, Plaintiff relies on a portion of Section 5. There are number of problems with this argument and the Court will not address them all. It suffices to note that the language at issue binds "Borrower" and "Lender." (Benight Dec., Ex. 2, § 5, p. 7; Reply, pp. 4-5.)[1] At the time of its execution, the deed of trust defined "Borrower" as Plaintiff and "Lender" as Washington Mutual Bank. (Benight Dec., Ex. 2, p. 1.) Washington Mutual Bank subsequently assigned its rights under the deed of trust to Deutsche Bank National Trust Company as trustee for WAMU Mortgage Pass-Through Certificates, Series 2005-AR18 (the "Trust"), which is not a party to this action. (Benight Dec., ¶ 10 & Ex. 3.) Plaintiff has not directed the Court to any evidence that Defendant qualifies as the "Lender" under the deed of trust or has any rights under

[1] Plaintiff's reply is the first time he identifies a clause in the deed of trust he contends Defendant breached, or provides *any* details about the deed of trust other than its date of execution, the identity of its beneficiary, the value of the related loan, and the fact that it requires Plaintiff to obtain property insurance. (Ansari Dec., ¶ 5.) (All other evidence the Court has about the content of the deed of trust comes from Defendant, despite the fact that Plaintiff relies on the deed of trust as the foundation of all of his claims.) New arguments are not permitted in a reply brief. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Plaintiff's complaint and/or moving papers should have identified what portion of the deed of trust he contends Defendant breached and how. That they did not, and that Defendant had no way of knowing what contractual language Plaintiff was relying on until Plaintiff filed his reply, would be enough by itself for the Court to reject Plaintiff's arguments as to the deed of trust. (See *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453; accord *Contractors' State License Bd. v. Superior Court* (2018) 23 Cal.App.5th 125, 130, fn. 3.)

that instrument. Defendant is not Plaintiff's lender. It is merely the loan servicing agent on behalf of the Trust. (Benight Dec., ¶ 11 & Ex. 4.)

In summary, Plaintiff has not shown any likelihood of success on the merits as to either of his first two causes of action.

The UCL authorizes a court to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition." (Bus. & Prof. Code, § 17203.) "Unfair competition" is defined in relevant part to "mean and include any unlawful, unfair or fraudulent business act or practice[.]" (Bus. & Prof. Code, § 17200.) "By proscribing 'any unlawful' business act or practice, the UCL 'borrows' rules set out in other laws and makes violations of those rules independently actionable." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 [quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180].) Where a plaintiff seeks to recover under the UCL's "unlawful" prong based on an underlying legal violation, a failure to establish the predicate legal violation means the UCL claim necessarily fails, too. (See *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185.)

The extent to which Plaintiff's UCL claim is predicated on his breach of contract and breach of implied covenant claims is unclear. On the one hand, the complaint states that "Plaintiff's [UCL] allegations are *tethered* to the following violations: Breach of Contract, and Breach of the Implied Covenant. Defendant's violations of federal statutes and common law constitute unlawful business practices under [the UCL]." (Complaint, ¶¶ 52-53 [emphasis in original].) On the other hand, Plaintiff alleges that "Defendant's conduct, as alleged above, constitutes unlawful, *unfair, and/or fraudulent* business practices, as defined in the [UCL]." (*Id.* at ¶ 52 [emphasis added].) Plaintiff appears to have pleaded, at least in conclusory terms, a violation under all three UCL prongs.

Whatever Plaintiff has pleaded, however, it was Plaintiff's burden to establish a likelihood of success on his UCL claim. Plaintiff's argument that he is entitled to relief under the UCL relies *exclusively* on the UCL's "unlawful" prong and his claims for breach of contract and breach of the implied covenant. (Memorandum, pp. 7-8.) As discussed, he has not shown a likelihood of success on either of those claims, so the only argument he has advanced on the merits of the UCL claim fails.

Because Plaintiff has not shown any likelihood of success on any of his causes of action, the Court is required to deny his motion for a preliminary injunction. (*Butt v. State of California* (1992) 4 Cal.4th 668, 678 ["A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim."]; accord *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 309.) The motion is denied.

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