
PARTIES/ATTORNEYS

Plaintiff	Heidi De Mayo	Daniel Knight
Defendant	Alfred Oseguera	Adrian Andrade

TENTATIVE RULING

For all the reasons discussed below, the demurrer to the first cause of action for specific performance and the second cause of action for breach of contract is sustained with leave to amend for a pleading that anticipates the statute of frauds; the demurrer to the third cause of action for breach of good faith and fair dealing and the fourth cause of action for breach of fiduciary duty is sustained with leave to amend.

The motion to strike is moot.

This is an action for partition and damages. Plaintiff Heidi De Mayo filed her complaint on June 6, 2024, against defendants Alfred Oseguera, Benjamin Lerner, Guaranteed Rate, Inc. dba Certainty Home Lending and Flagstar Bank. The complaint alleges the following causes of action: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of fiduciary duty against Lerner, Flagstar, and Guaranteed Rate Inc.; (4) accounting against Oseguera; (5) professional negligence against Lerner, Flagstar, and Guaranteed Rate Inc.; (6) fraudulent concealment against Lerner, Flagstar, and Guaranteed Rate Inc.; (7) disgorgement of profits against Oseguera. On November 6, 2024, the court sustained the demurrer of Flagstar as the third, fifth, and sixth causes of action of the complaint.

On August 19, 2024, Alfred Oseguera filed a cross-complaint against De Mayo in which he alleges that he and De Mayo entered into a business arrangement to purchase and reconstruct residential properties. De Mayo would finance the properties and Oseguera would undertake reconstruction/repairs to resell the property for profit. In June 2020, De Mayo and Oseguera selected property located at 1148 Pinot Solo in Santa Maria with the intention that De Mayo would purchase the property for Oseguera to have a place to reside for himself and his daughters. Oseguera would have a one percent (1%) interest and De Mayo would have ninety-nine (99%) per cent interest in the property while Oseguera

would perform all repairs and needed construction. De Mayo would then sell her 99% interest to Oseguera for \$395,000, plus reimbursement of \$20,000 advanced for renovations upon the close of his purchase. Oseguera obtained a loan on the property in the amount of \$450,000 and paid DeMayo the sum of \$440,000. De Mayo refuses to convey her 99% interest to Oseguera. His cross-complaint alleges: (1) specific performance; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; and (4) breach of fiduciary duty.

De Mayo challenges each cause of action by demurrer and moves to strike selected allegations. Before filing a demurrer or motion to strike, the moving party must meet and confer in person or by telephone with the party who filed the pleading to attempt to reach an agreement that would resolve the objections to the pleading and obviate the need for filing the demurrer. (Code Civ. Proc. §§ 430.41, subd. (a); 435.5, subd. (a).) The court notes that no meet and confer declaration was submitted. Although the determination that the process was insufficient is not grounds to overrule the demurrer or deny the motion to strike (*id.*), the court is not required to ignore the defect. (See *Dumas v. Los Angeles County Bd. of Supervisors* (2020) 45 Cal.App.5th 348, 355, fn. 3.) The court requires strict adherence with all procedural requirements. Any defects in the future may result in sanctions.

Legal Standards Applicable to Demurrer

A demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Code of Civil Procedure §430.10(e) provides for a demurrer on the ground that a complaint fails to state a cause of action. A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.)

1st (Specific Performance) and 2nd (Breach of Contract) Causes of Action

De Mayo asserts these causes of action are insufficiently pled. Because these causes of action are interrelated, the court will discuss them together.

To state a claim for breach of contract, a plaintiff must allege (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. (*D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 800.) In addition to the elements of a standard breach of contract, a complaint for specific performance must allege the following: (1) A specifically enforceable type of contract, sufficiently certain in its terms; (2) adequate consideration, and a just and reasonable contract; (3) plaintiff's performance, tender, or excuse for nonperformance; (4) the defendant's breach; and (5) inadequacy of the remedy at law. (*Darbin Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239

Cal.App.4th 399, 409.) In addition, the defense of the statute of frauds must be anticipated in the complaint. (See *Darbun Enterprises v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409, fn. 5; *Loper v. Flynn* (1946) 72 Cal.App.2d 619, 621.)

De Mayo argues that the claim for specific performance is not supported by law because “[Oseguera] did not completely perform his side of the contract by failing to make payments to [De Mayo] and still seemingly lacks the willingness and ability to do so.” (Demurrer, p. 7, ll. 7-9.) Whether there is an evidentiary basis for this assertion remains to be seen. But for purposes of a demurrer, the court is confined to the allegations made on the face of the pleading. Here, the cross-complaint alleges that Oseguera performed under the contract. (Cross-Complaint, ¶ 14.)

DeMayo argues that the cross-complaint fails to allege that specific performance is required. Stated another way, this amounts to an argument that Oseguera failed to allege the inadequacy of his remedy at law. The cross-complaint alleges that there is no adequate remedy at law. (Cross-Complaint, ¶ 25.) The factual allegations reveal that the relevant subject matter is the conveyance of real property. (Cross-Complaint, ¶¶ 11-16.) It is a familiar legal principle that a damage award is generally an inadequate remedy for a breach of real estate contract, and therefore courts routinely grant a plaintiff's request for specific performance. (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472–473; see also Civ. Code 3387—“It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is a presumption affecting the burden of proof.”) The court finds the inadequacy of the remedy at law to be adequately pled.

De Mayo argues that the cross-complaint fails because the contract was not attached, nor were the operative provisions pled. When an action is “founded upon a contract,” the complaint is subject to demurrer if “it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.” (Code Civ. Proc., § 430.10, subd. (g).) “In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language.” (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198–199.)

Oseguera points out that he has attached the written contract to the cross-complaint as Exhibit A, which is a letter from De Mayo dated August 19, 2020 and addressed “To Whom it May Concern;” it asserts her ownership of a 99% interest in the property located at 1148 Pino Solo Drive; indicates she would like her interest sold to Mr. Alfred Seguera for \$395,000 within the next 60 days or by October 31,

2020 at the latest; and indicates that in addition to the purchase price, she would like him to reimburse her \$20,000 advanced for renovations. Although the exhibit does, at a minimum, provide evidence of an oral contract, the allegation is insufficient for purposes of specific performance. The statute of frauds provides that contracts for the sale of real property or of an interest therein “are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent.” (Civ. Code. 1624, subd. (a)(3).) As stated above, the defense of the statute of frauds must be anticipated in the complaint. (See *Darbun, supra*, 239 Cal.App.4th at 409, fn. 5; *Loper, supra*, 72 Cal.App.2d at 621.) The cross-complaint alleges the parties entered into a “written Agreement to confirm their arrangement” (Cross-Complaint, ¶ 13) but the attached exhibit (“See Exhibit A [as] a true and correct copy of the Agreement incorporated here by reference”) is a letter written to an unidentified third party. Oseguera makes no legal argument to support the conclusion that a letter written to an unidentified third party qualifies as a written contract as between Oseguera and De Mayo. The court sustains the demurrer on this point but allows leave to amend for a more nuanced pleading.

3rd (Breach of Good Faith and Fair Dealing) Cause of Action

The rules for pleading a breach of the implied covenant of good faith and fair dealing are settled. “Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement. Simply stated, the burden imposed is that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. Or, to put it another way, the implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose. This rule was developed in the contract arena and is aimed at making effective the agreement's promises. The precise nature and extent of the duty imposed ... will depend on the contractual purposes.” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393 [cleaned up]; *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 429; see CACI No. 325 [elements of claim].) The plaintiff must allege “a reasonable relationship between the defendant's allegedly wrongful conduct and the express terms or underlying purposes of the contract.” (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 528, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.) The implied covenant cannot, however, “impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 554.)

An implied covenant claim that “seeks simply to invoke” the express terms of the parties' contract “is superfluous.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352.) “If the allegations do not go beyond the statement of a mere

contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.” (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at 1395.) To plead a separate breach of covenant claim, the plaintiff must offer allegations “demonstrat[ing] a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party.” (*Id.*)

De Mayo challenges this cause of action, essentially asserting that it is simply duplicative of the breach of contract cause of action. Clearly, the causes of action share some of the same attributes. In the breach of contract cause of action, the alleged acts are that De Mayo “breached the agreement by failing to transfer and convey her 99% interest to Cross-complainant.” (Cross-Complaint, ¶ 28.) In the implied covenant claim, Oseguera identifies the culpable acts as: “Cross-defendant, however, refused and continues to refuse to transfer the 99% interest to Cross-complainant as required under the written agreement, thus denying Cross-complainant the benefits under the contract. [¶] By refusing to transfer her interest thus denying cross-complainant the benefits do him under the contract, cross-defendant did not act fairly and in good faith. (Cross-Complaint, ¶ 35-36.) These allegations alone make no material distinction between the causes of action.

Oseguera points to authority that observes that “the covenant of good faith finds particular application in situations where one party is invested in discretionary power affecting the rights of others.” (*Carma Developers Inc. v. Marathon Development California Inc.* (1992) 2 Cal.4th 342, 372.) In such cases, the covenant will be implied when one party is given absolute discretion over whether to perform. (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 803.) He argues that “Here, DeMayo had the complete discretion when, if ever, she would transfer her 99% interest in the residence in which Oseguera resided. She held the title over him as if she had complete power over Oseguera and his family.” (Opposition, p. 7, ll. 18-21.)

The facts of this case vary greatly from those cited by Oseguera. In *Carma*, the parties had entered into a lease agreement which stated that if the tenant procured a potential sublessee and asked the landlord for consent to sublease, the landlord had the right to terminate the lease, enter into negotiations with the prospective sublessee, and appropriate for itself all profits from the new arrangement. In the passage relied on by Oseguera, the court recognized that “[t]he covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another.” (*Carma*, *supra*,

2 Cal.4th at 372) The court expressed the view that “[s]uch power must be exercised in good faith.” (*Id.*)

In *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, a bank was given discretion to set non-sufficient fund (NSF) charges to be paid by the customer. The contention was made that since the charges were subject to the bank's sole discretion, the contract lacked mutuality and was, in fact, illusory. By its ruling that “[u]nder California law, an open term in a contract must be filled in by the party having discretion within the standard of good faith and fair dealing,” the court in *Perdue* was able to impose an objective standard and save an otherwise illusory agreement. Interjection of the implied covenant was “indispensable to effectuate the intention of the parties” and was “justified [by] legal necessity.”

A similar resolution was reached in *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, where it was alleged that a contract permitting the buyer of sugar beets to set the price to be paid was illusory. The court implied an obligation to set the price fairly in accordance with the covenant of good faith and fair dealing, thus protecting the enforceability of the agreement. (*Id.* at p. 484.)

No such illusory obligation has been alleged here. The fact that De Mayo *in fact* withheld a transfer of her interest, while supportive of the breach of contract cause of action, does not implicate the duty of good faith and fair dealing. The court therefore finds this cause of action to be duplicative of the breach of contract cause of action. The demurrer is sustained with leave to amend.

4th (Breach of Fiduciary Duty) Cause of Action

This cause of action alleges that De Mayo was a licensed investment broker and provided investment services to Oseguera; that she violated her duties “in that she had him obtain a large loan on the subject property over which he would be responsible yet would have only 1% interest in the title to the property despite paying \$415,000 to Cross defendant.

“The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach.” (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.) “Whether a fiduciary duty exists is generally a question of law.” (*Marzec v. Public Employees’ Retirement System* (2015) 236 Cal.App.4th 889, 915.) De Mayo asserts that Oseguera has failed to allege the existence of a fiduciary duty between the parties.

Oseguera asserts that the fiduciary relationship is based on a partnership. (Corp. Code, § 16404, subd. (a)—“The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care. . . .”)

However, the cross-complaint fails to allege sufficient facts to support this theory. The association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership. (Corp. Code, § 16202, subd. (a).) Here, the cross-complaint alleges:

“Cross-complainant Alfred L. Oseguera and Cross-defendant Heidi Demayo, began a business and intimate relationship in 2019 to develop and sell residential properties. Cross-complainant would assist Cross-defendant in selecting properties to purchase and Cross-defendant DeMayo would finance the purchase of properties. Cross-complainant would undertake reconstruction or necessary repairs in order for Cross-defendant to resell the property for profit.”

(Cross-Complaint, ¶ 11.)

This allegation does not suggest that the association was intended to carry on a business for profit. Without more, it is unclear whether the parties entered into a partnership. The demurrer to the 4th cause of action for breach of fiduciary duty is sustained with leave to amend.

Motion: Strike

A defendant may move to strike “the whole or any part” of a complaint if, as pertinent here, it is “irrelevant.” (Code Civ. Proc. §§ 435, subd. (b), 436.) Like a demurrer, the grounds for a motion to strike must appear on the face of the challenged complaint or from matters properly subject to judicial notice. (Code Civ. Proc. § 437.) In assessing such a request, the court reads the allegations of the operative pleading “as a whole, all parts in their context, and assume their truth.” (*Mitchell v. Atwell Islands Water Dist.* (2020) 45 Cal.App.5th 624, 628; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53 [complaint's allegations “are assumed to be true”].)

De Mayo moves to strike the following allegations from the cross-complaint:

- Paragraph 10, “Cross-Defendant orchestrated the series of events in order to defraud Cross- Complainant and interfere with his personal life.”
- Paragraph 11, “Cross-Complainant Alfred L. Oseguera and Cross-Defendant Heidi De Mayo, began a business and intimate relationship in 2019 to develop and sell residential properties.”
- Paragraph 27, “Cross-Defendant a licensed investment adviser.”

Oseguera argues that these allegations are all relevant to the 3rd cause of action for breach of the covenant of good faith and fair dealing and the 4th cause of

action for breach of fiduciary duty. As neither of these causes of action survive demurrer, the motion to strike these allegations is moot. However, for future purposes the court will remind cross-complainant that “the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff’s proof need not be alleged.” (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) The court will also observe to cross-defendant that “use of the motion to strike should be cautious and sparing. We have no intention of creating a procedural “line item veto” for the civil defendant.” (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.0

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See [Remote Appearance \(Zoom\) Information | Superior Court of California | County of Santa Barbara](#).)