

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY**

MINUTE ORDER

DATE: 12/21/2012

TIME: 01:30:00 PM

DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly

CLERK: Judit Bako

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: K. Schwieterman

CASE NO: **37-2012-00056843-CU-BT-NC** CASE INIT.DATE: 08/31/2012

CASE TITLE: **Pirozzi vs. McWilliam [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Demurrer / Motion to Strike

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APPEARANCES

John Victor Gaule, counsel, present for Plaintiff(s).

Tracy Jones, specially appearing for counsel Craig M Nicholas, present for Defendant(s).

All parties submit(s) on the Court's tentative ruling.

The Court MODIFIES the tentative ruling as follows:

Preliminary Procedural Matters / Judicial Notice

Defendants Richard McWilliams and Upper Deck Company, Inc.'s ("defendants") request for judicial notice is granted.

Defendants' request that the Court refuse to consider plaintiff's untimely served opposition is denied. The Court, in its discretion, overrules defendants objections because in their reply brief defendants addressed the opposition on the merits and therefore suffered no actual prejudice.

Substantive Ruling

Defendants Richard McWilliams and Upper Deck Company, Inc.'s ("defendants") demurrers to the first, second, third, fourth, fifth and sixth causes of action are sustained with **15** days leave to amend.

Defendants' motion to strike is granted with leave to amend in part and moot in part based on the Court's

ruling sustaining defendants' demurrers to the first, second, third, fourth, fifth and sixth causes of action are sustained with 10 days leave to amend, with the exception of the motion to strike plaintiffs' claim for damages or rescission at paragraph 43 under the Fifth Cause of Action for violation of the UCL. Specifically, in their fifth cause of action for violation of the UCL, plaintiffs allege: "As a result, Plaintiffs have suffered and continues [sic] to suffer damages in a sum of an amount according to proof at trial and Plaintiff is entitled to rescind the Contract between the parties and above described agreement as set forth above." (Complaint, ¶ 43.) Plaintiffs' only remedies under the UCL are restitution or injunctive relief, not damages or rescission.

Alter Ego allegations

In *Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co.*, (1947) 80 Cal.App.2d 879, 883, the Court held that: "The court will not disregard the corporate entity unless it is necessary to prevent fraud or injustice. (*Id.*) "Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity." *Id.* The essential facts supporting an alter ego theory "must be pleaded." (*Meadows v. Emmett & Chandler*, 99 Cal.App.2d 496, 498-499 (1950).) This requires facts showing that "recognition of the corporate entity would sanction a fraud or promote injustice ... and that to recognize their separate entities would aid the consummation of a wrong." (*Id.* at 499.)

In this case, defendants contend that plaintiffs' Complaint collectively references Mr. McWilliam with Upper Deck, Company, Inc. but does not state any facts demonstrating Mr. McWilliam's personal participation in or facilitation of the alleged events. Defendants note that to overcome this insufficiency, plaintiffs attempt to allege an alter ego theory by including minimal boilerplate language found in Paragraph 8. Defendants assert that these allegations lack any corresponding facts showing Mr. McWilliam shares a unity of interest with Upper Deck such that they lack separate personalities and that inequity will result unless Mr. McWilliam and Upper Deck are treated as one. Defendants assert that the Complaint's use of a collective reference and alter ego theory alone does not bypass the requirement that a plaintiff must state sufficient facts to plead a cause of action against an individual defendant. Furthermore, defendants demur on the grounds that Plaintiffs' failure to state any facts whatsoever demonstrating Mr. McWilliam's involvement in the alleged events reflects the need to protect Mr. McWilliam as an individual from these unwarranted and unsupported allegations against him personally. This Court finds defendants contentions as to plaintiffs failure to allege sufficient alter ego allegations are well taken.

Moreover, defendants contend that the Complaint also fails to factually support its request that the Court disregard Upper Deck's corporate entity "to prevent fraud or injustice." (*Id.*) As set forth by defendants in their demurrer, there are no facts showing Mr. McWilliam's participation, and thus, no supporting facts necessitating the Court completely disregard Upper Deck as a distinct and separate corporate entity in order to prevent fraud or injustice. The Court finds defendants' contentions regarding the insufficiency of plaintiffs alter ego liability allegations are well taken. Plaintiffs have **15** days leave to amend.

First cause of action for fraud

Second cause of action for concealment

Defendants correctly contend that allegations of fraud must be pled with particularity so that the court can weed out nonmeritorious actions before defendant is required to answer. (*Id.* [emphasis added].) "Fraud must be pled specifically, general and conclusory allegations do not suffice." (See *Alfaro v. Community Housing Imp. System & Planning Ass'n, Inc.* (2009) 171 Cal.App.4th 1356, 1384 [quoting *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Ca1.4th 979, 993].)

Defendants correctly point out that this particularity requirement necessitates pleading facts which show how, when, where, to whom and by what means the representations were tendered or material facts withheld. (Id.) Plaintiffs do not meet these heightened pleading standards for either fraud claim. In this case, because plaintiffs allege that defendants affirmatively told them that "Defendant did not own, control, dominate, use [or] manage the Distributing Entities," plaintiffs are required to specifically plead fraud. Plaintiffs also misguidedly cite *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1262, for the proposition that plaintiffs do not need to plead the language of the specific representations relied upon. *Morgan* was a class action dealing primarily with UCL and FAL claims concerning AT&T's marketing campaign advertising the advanced features of its network. (*Morgan, supra*, 177 Cal.App.4th at p. 1262.) There, the court did not require plaintiff to actually plead each representation because there was a widespread marketing campaign consisting of many different advertisements that were designed to communicate a central misrepresentation. (Id.) Even so, plaintiffs 47-page third amended complaint contained multiple examples of the specific misrepresentations made, including excerpts from press releases, advertisements, and SEC filings. (Id. at pp. 1245-46.)

Unlike the facts in *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1262, which is a class action case, plaintiffs in this case fail to sufficiently plead specific examples of what was said, by whom, or when. Defendants should not be left to speculate that sometime "between 2005 through October 2009 and beyond," one of Defendants' agents allegedly said or wrote that "Defendant did not own, control, dominate, use [or] manage the Distributing Entities." The Court finds that plaintiffs' general fraud allegations are insufficient to put defendants on notice of the claims against them, rendering it difficult for defendants to respond to the Complaint. As such, the Court sustains defendants' demurrer to Plaintiffs' fraud claims, with leave to amend.

Moreover, defendants' demurrer on the grounds that plaintiffs' fraud causes of action, as currently alleged, are barred by the statute of limitations, is well taken. Defendants assert that plaintiffs agree that a three-year statute of limitations applies to fraud claims. (Cal. Civ. Proc. § 338; Opposition p. 7, 11. 6-9.) Defendants contend that plaintiff fails to plead with requisite particularity any false representation that was made in the very narrow window between September 4, 2009 (three years prior to filing the Complaint) and October 2009. The Court agrees with the defendants that if plaintiffs intend to rely on the discovery rule and the continuing tort theory to save their fraud claims, then, plaintiff allege facts showing how the delayed discovery rule applies to this action. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Ca1.4th 797, 808 [citing *McKelvey v. Boeing NorthAmerican, Inc.* (1999) 74 Cal.App.4th 151, 160].) In the case at bar, as currently alleged, plaintiffs have failed to sufficiently plead facts showing application of the delayed discovery rule to the facts of this case.

Third cause of action for conspiracy

Plaintiff's failure to sufficiently allege viable causes of action for fraud or breach of the covenant of good faith and fair dealing, requires that the Court must also sustain demurrer to plaintiffs' third cause of action for conspiracy. As argued by defendants in their demurrer, a claim for conspiracy cannot stand without pleading the underlying elements of the tort or wrong to which the defendants conspired. (See *Kerr v. Rose* (1999) 216 Cal.App.3d 1551, 1564.) Moreover, the Court notes that a corporation and its agents, officers, or directors cannot conspire with one another. (See e.g., *Applied Equipment, supra*, 7 Ca1.4th at p. 512; *Doctors' Co. v. Superior Court* (1989) 49 Ca1.3d 39, 47.) In their complaint, plaintiffs allege that Mr. McWilliam is the owner, President, and CEO of Upper Deck. (Complaint, ¶ 4.) Consequently, as a matter of law, neither of the identified defendants in the complaint can be held liable under a conspiracy theory. If there are unidentified DOE defendants with whom defendants may have conspired, plaintiffs must allege so. As the complaint currently stands, no other conspiracy is alleged except between Upper Deck and Richard McWilliam. Therefore, the Court sustains defendants'

demurrer to Plaintiffs' cause of action for conspiracy.

Fourth cause of action for breach of the covenant of good faith and fair dealing

Plaintiffs fourth cause of action for breach of the covenant of good faith and fair dealing: (1) fails to identify a contract; (2) fails to show that defendant Richard McWilliam was a party to any contract at issue; (3) fails to allege that plaintiffs fulfilled the alleged contract terms or that defendants breached the alleged contract; and (4) fails to adequately address defendants' demurrer on the statute of limits grounds.

A cause of action for breach of the covenant of good faith and fair dealing claim has a two year statute of limitations. (See Cal. Civ. Proc. § 339; *Richardson v. Allstate Ins. Co.* (1981) 117 Cal.App.3d 8, 12-13.) Here, plaintiffs allege that the business relationship between Plaintiffs and Upper Deck ended October 26, 2009. (Complaint, ¶ 10.) As such, plaintiffs had two years, or until October 26, 2011 to file their claim for breach of the covenant of good faith and fair dealing against these defendants. Defendants contend that plaintiffs filed this action 11 months too late and their bad faith claim is statutorily barred. Moreover, defendants position that the delayed discovery rule does not save plaintiffs' cause of action for breach of the covenant of good faith and fair dealing for the same reasons it does not save plaintiffs' fraud claims, as these causes of action are currently alleged, is well taken. The Court sustains defendants' demurrer to plaintiffs' fourth cause of action for bad faith, with **15** days leave to amend.

Fifth cause of action for unfair and deceptive business practices

Here, plaintiffs fail to allege sufficient facts constituting fraud and concealment that fall within the meaning and/or scope of B&P Code § 17200. Consequently, plaintiffs fail to plead with the requisite specificity the conduct they believe constitutes these demurring defendants' "unlawful, unfair and fraudulent business practices." "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of Calif., Inc.* (1994) 14 Cal.App.4th 612, 619.) Moreover, unless plaintiffs can amend their complaint to establish facts showing how the delayed discovery rule applies to the facts of this case, their fifth cause of action for unfair and deceptive business practices appears to be barred by the applicable statute of limitations. California Business & Professions Code section 17208 states: "Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued." Here, plaintiffs' allege facts indicating that their causes of action accrued in 2005, when they discovered defendants' supposed interest in the entities. Defendants' demurrer to the fifth cause of action is sustained with **15** days leave to amend.

Sixth cause of action cancellation of a written instrument

In their demurrer, defendants point out that where the grounds for cancellation of a written instrument are fraud or concealment, in order to plead entitlement to cancellation, a plaintiff must plead facts showing fraud or concealment with the same specificity required if plaintiffs sole relief sought were damages. (See *Carlson v. Farm Land Inv. Co.* (1917) 32 Cal.App. 538 (sustaining demurrer of a complaint to cancel a land contract where plaintiff failed to allege false statements relied upon were made with the intent to deceive plaintiff).) Because Plaintiffs' sixth cause of action for cancellation of a written instrument is based on inadequately pled underlying claims for fraud and/or breach of the covenant of good faith and fair dealing, it is also subject to defendants' demurrers. Moreover, the Court sustains the demurrer to plaintiffs' sixth cause of action for cancellation of a written instrument, to provide plaintiffs with an opportunity to identify which contract should be cancelled. Defendants contend that plaintiffs' failure to distinguish which contracts it seeks to cancel makes it impossible for defendants to respond to this cause of action. The Court sustain the demurrer to plaintiffs' sixth cause of action for cancellation of a written instrument, with **15** days leave to amend.

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demonstrating Mr. McWilliam's involvement in the alleged events reflects the need to protect Mr. McWilliam as an individual from these unwarranted and unsupported allegations against him personally. This Court finds defendants contentions as to plaintiffs failure to allege sufficient alter ego allegations are well taken.

Moreover, defendants contend that the Complaint also fails to factually support its request that the Court disregard Upper Deck's corporate entity "to prevent fraud or injustice." (*Id.*) As set forth by defendants in their demurrer, there are no facts showing Mr. McWilliam's participation, and thus, no supporting facts necessitating the Court completely disregard Upper Deck as a distinct and separate corporate entity in order to prevent fraud or injustice. The Court finds defendants' contentions regarding the insufficiency of plaintiffs alter ego liability allegations are well taken. Plaintiffs have **15** days leave to amend.

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Moreover, defendants' demurrer on the grounds that plaintiffs' fraud causes of action, as currently alleged, are barred by the statute of limitations, is well taken. Defendants assert that plaintiffs agree that a three-year statute of limitations applies to fraud claims. (Cal. Civ. Proc. § 338; Opposition p. 7, 11. 6-9.) Defendants contend that plaintiff fails to plead with requisite particularity any false representation that was made in the very narrow window between September 4, 2009 (three years prior to filing the

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Fifth cause of action for unfair and deceptive business practices

Here, plaintiffs fail to allege sufficient facts constituting fraud and concealment that fall within the meaning and/or scope of B&P Code § 17200. Consequently, plaintiffs fail to plead with the requisite specificity the conduct they believe constitutes these demurring defendants' "unlawful, unfair and fraudulent business practices." "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of Calif., Inc.* (1994) 14 Cal.App.4th 612, 619.) Moreover, unless plaintiffs can amend their complaint to establish facts showing how the delayed discovery rule applies to the facts of this case, their fifth cause of action for unfair and deceptive business practices appears to be barred by the

applicable statute of limitations. California Business & Professions Code section 17208 states: "Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued." Here, plaintiffs' allege facts indicating that their causes of action accrued in 2005, when they discovered defendants' supposed interest in the entities. Defendants' demurrer to the fifth cause of action is sustained with 10 days leave to amend.

Sixth cause of action cancellation of a written instrument

In their demurrer, defendants point out that where the grounds for cancellation of a written instrument are fraud or concealment, in order to plead entitlement to cancellation, a plaintiff must plead facts showing fraud or concealment with the same specificity required if plaintiffs sole relief sought were damages. (See *Carlson v. Farm Land Inv. Co.* (1917) 32 Cal.App. 538 (sustaining demurrer of a complaint to cancel a land contract where plaintiff failed to allege false statements relied upon were made with the intent to deceive plaintiff).) Because Plaintiffs' sixth cause of action for cancellation of a written instrument is based on inadequately pled underlying claims for fraud and/or breach of the covenant of good faith and fair dealing, it is also subject to defendants' demurrers. Moreover, the Court sustains the demurrer to plaintiffs' sixth cause of action for cancellation of a written instrument, to provide plaintiffs with an opportunity to identify which contract should be cancelled. Defendants contend that plaintiffs' failure to distinguish which contracts it seeks to cancel makes it impossible for defendants to respond to this cause of action. The Court sustain the demurrer to plaintiffs' sixth cause of action for cancellation of a written instrument, with **15** days leave to amend.

IT IS SO ORDERED.

Timothy M. Casserly

Judge Timothy M. Casserly