

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

MINUTE ORDER

DATE: 05/17/2013

TIME: 01:30:00 PM

DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly

CLERK: Trish Dietrich

REPORTER/ERM: Jean Alfafra #7418

BAILIFF/COURT ATTENDANT: F. Wuatelet

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) telephonically.

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

Stipulation for Appointment of Official Reporter Pro Tempore given orally in open court.

The Court MODIFIES the tentative ruling as follows:

The Court issues the following ruling on defendants Richard McWilliam's and Upper Deck Company, Inc.'s demurrer and motion to strike portions of plaintiffs Joseph Pirozzi and J&T Hobby LLC's first amended complaint:

Preliminary Procedural Matters / Judicial Notice

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

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 overruled.

Defendants' motion to strike is granted without leave to amend with regard to the punitive damages

allegations solely as to Richard McWilliams.

Defendants' motion to strike is denied with regard to the punitive damages allegations at paragraphs 30, 40 and 46. (FAC, ¶¶ 30, 40, 46.)

Defendants' motion to strike is granted without leave to amend with regard to the damages allegations at paragraph 60 of the fifth cause of action. (FAC ¶ 60.)

Defendants' motion to strike is denied with regard to the allegations to rescind: "As a result, Plaintiff is entitled to rescind the last written contract entered into between J&T Hobby and Upper Deck in 2007 and its corresponding personal guarantee between Pirozzi and Upper Deck as well as any and all other personal guarantees between Pirozzi and Defendants, and each of them." (FAC ¶ 68.)

Defendants' motion to strike is denied with regard to the allegations of the Prayer at paragraph 6, page 17.

Defendants' are ordered to answer the first amended complaint within 20 days of the date of this ruling.

Statute of Limitations

Here, as set forth in their FAC and Opposition to Defendants' demurrer, Plaintiffs have not asserted breaches of the terms of the contract; rather, they have asserted fraud based on Defendants' alleged misrepresentations, placing at issue the validity of the contract itself and Plaintiffs' entire business relationship with Defendants.

The Supreme Court of California recently held, "[F]raud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds." *River'sland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Ca1.4th 1169, 1182.

In such cases, evidence of fraud challenging the validity of an agreement is not prohibited by the parol evidence rule. The parol evidence rule does not merely serve an evidentiary purpose, it is a rule of substantive law and determines the enforceable and incontrovertible terms of an integrated written agreement. *Id.* At 1174. One broad exception to the parol evidence rule is where the validity of the agreement is the fact in dispute and in that case the parol evidence rule does not exclude evidence relevant to that issue. *Id.*; Code Civ. Proc. § 1856(0). The Provision rests on the principle that the parol evidence rule, intended to protect the terms of a valid written contract, should not bar evidence challenging the validity of the agreement itself. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* 55 Ca1.4th at 1174.

In this case, Plaintiff's First Amended Complaint's fraud allegations challenge the validity of the entire contract. Based on the fraud allegations, it is disputed as to whether the parties freely entered the contract and therefore the contractual limitations period upon which Defendants rely in their demurrer does not resolve this issue at this stage of the proceedings. As long as Plaintiffs have sufficiently alleged fraud as to the validity of the contract, for purposes of demurrer, the contractual limitations period does not apply. (See *River'sland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Ca1.4th 1169, 1182.) Therefore, Defendants demurrer to the FAC based on the two year contractual statute of limitations reducing the statutory limitations period is overruled.

Standing of Joseph Pirozzi

The real party in interest is the person possessing the right sued upon by reason of the substantive law. *Ventura County Ry. Co. v. Hadley Auto Transport* (1995) 38 Cal.App.4th 878, 880. The primary purpose underlying the requirement that an action be brought in the name of the real party in interest is to protect a defendant from a multiplicity of suits and the further annoyance and vexation at the hands of other claimants to the same demand. *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 149.

Contrary to Defendants contentions, Joseph Pirozzi has standing as to the Personal Guarantee contract. Moreover, the Court notes that Defendants have not contested J&T Hobby LLC's standing on any of the causes of action. With regard to Joseph Pirozzi's standing, Mr. Pirozzi alleges that he entered into a personal guarantee as a result of Defendants' fraud and is entitled to set aside the personal guarantee and seek compensation he personally suffered as a result of the guarantee. (FAC ¶¶ 12, 25, 29, 33, 36, 65, 66, 68.) Defendants demurrer based on the standing of Joseph Pirozzi is overruled.

First cause of action for fraudSecond cause of action for concealment*Fraud - active deceit*

The elements required to state a cause of action for fraud based on active deceit are: (1) misrepresentation; (2) knowledge of falsity (or "scienter"); (3) intent to defraud (induce reliance); (4) justifiable reliance; and, (5) resulting damage. *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.

Fraud - concealment

The elements required to state a cause of action for fraud based on concealment are: (1) Defendant concealed or suppressed a material fact; (2) defendant was under a duty to disclose the fact to the plaintiff; (3) defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) plaintiff was unaware of the fact and (5) would not have acted in the same way knowing of the concealed or suppressed fact; (6) causation; and (7) the plaintiff sustained damage. *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 96; *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748.

At paragraphs 15 through 22 of the First Amended Complaint ("FAC") Plaintiffs set forth eight specific misrepresentations of material facts concerning Defendants' repeated denials and concealment of facts allegedly vital to the business relationship between Plaintiffs and Defendants. Plaintiffs allege that Defendants repeatedly denied and concealed that they had interests in distributors competing directly with Plaintiffs and that they were giving Plaintiffs' competitors' preferential treatment, selling products to them at lower prices and providing them with more desirable and limited products. At paragraph 25, Plaintiffs allege that, had they known the true facts they would have rescinded all contracts with Defendants, never entered into subsequent contracts, and would have ceased business with Defendants. Moreover, Plaintiffs allege that they justifiably relied on these representations. For purposes of demurrer, the allegations that Plaintiffs would have not acted as they did absent the misrepresentations and concealment and justifiably relied on such, are sufficient to establish the materiality of the misrepresentations and concealment and reliance. (See FAC paragraphs 15-22, 25, 26, 27 and 28.) At paragraphs 29 and 30, Plaintiffs allege their resulting damages.

Whether Plaintiffs in this case justifiably relied upon the alleged misrepresentations by Defendants presents a question of fact that cannot be resolved on demurrer. (see *Meyer v. Ford Motor Co.* (1969) 275 Cal.App.2d 90, 105 - The test for determining justifiability of reliance is whether the person claiming

reliance was justified in believing the representation in the light of his or her own knowledge and experience. *Gray v. Don Miller & Assocs., Inc.* (1984) 35 Ca1.3d 498, 503.)

Defendants' demurrer to the first cause of action for fraud and second causes of action for concealment in Plaintiffs' FAC are overruled.

Third cause of action for conspiracy

The elements required to state a cause of action for a conspiracy are: (1) Defendants' agreement to the objective and course of action to injure; (2) wrongful act pursuant to such agreement; and (3) resulting damage. *Berg & Berg Ent., LLC v. Sherwood Partners, Inc.* (2005) 131 Cal. App. 4th 802, 823 (noting elements and contrasting aiding and abetting). See also Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2012) ¶ 6:154 et seq. (citing *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 47, and noting theory is not a separate cause of action).

Here, at paragraph 42 of the FAC, Plaintiffs allege that McWilliam and Upper Deck conspired with Does 1 through 100 to undercut Plaintiffs' prices, usurp the profits of Plaintiffs for themselves, unload undesirable Product on Plaintiffs at uncompetitive prices, exclude Plaintiffs from distributing and selling, limited, in demand or desirable Product, defeat the benefits for which Plaintiffs had contracted, and drive Plaintiffs out of business." These conspiracy allegations are sufficient to constitute a cause of action for conspiracy based on the preceding paragraphs which are incorporated by reference into the third cause of action at paragraph 41. Therefore, Defendants demurrers to the third cause of action for conspiracy are overruled.

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

The elements required to state a cause of action for breach of the implied covenant of good faith and fair dealing are: (1) Existence of contractual relationship; (2) implied duty; (3) breach; and (4) causation of damages. E.g., *Smith v. San Francisco* (1990) 225 Cal.App.3d 38, 49; 1 Witkin Sum. Cal. Law (10th ed. 2005) Contracts § 800.

Here, Plaintiffs fourth cause of action for breach of the covenant of good faith and fair dealing as alleged in the FAC, states facts which are sufficient to constitute a cause of action. Plaintiffs allege facts which establish the existence of a contractual relationship. (FAC 11, 12 and 13.) Plaintiffs allege facts establishing an implied duty to act in good faith in relation to the contracts (FAC 48, 49.) Plaintiffs allege that defendants breached their duty to act in good faith. (FAC 49) At paragraphs 51 and 52, Plaintiffs allege their resulting damages. Defendants' demurrer to Plaintiffs' fourth cause of action for breach of the implied covenant of good faith and fair dealing is overruled.

Fifth cause of action for unfair and deceptive business practices

The elements required to state a cause of action for violation of Business & Professions Code section 17200 are: (1) A business practice; (2) that is unfair, unlawful or fraudulent; and (3) authorized remedy. Bus. & Prof. Code § 17200; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 676; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317 (damages cannot be recovered, but instead injunctive relief and restitution compelling defendant to return money); William L. Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2005) ¶7:116 et seq.; 5 Witkin, California Pro. (4th ed. 1997) Pleading, §§ 735.

Here, Plaintiffs FAC alleges sufficient facts to constitute viable causes of action for fraud, deceit and concealment that fall within the meaning and/or scope of B&P Code § 17200. Plaintiffs have alleged

facts that include the requisite specificity that demonstrate 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.) Therefore, Defendants' demurrer to the fifth cause of action for unfair and deceptive business practices is overruled.

Sixth cause of action cancellation of a written instrument

The elements required to state a cause of action for rescission of contract / instrument are: (1) Consent of the party rescinding or of any jointly contracting party given or obtained by or through: (a) mistake; (1) material to the contract; (2) not the result of neglect of a legal duty;(2) enforcement of the contract as made would be unconscionable; (4) other party can be placed in status quo; (5) party seeking relief gives prompt notice of his election to rescind; and (6) party restores or offers to restore to other party everything of value received under contract; (b) duress; (c) menace; (d) fraud; or (e) undue influence; and (2) exercised by or with the connivance of the party as to whom the party rescinds, or of any other party to the contract jointly interested with such party. Civ. C. §1689; *White v. Berrenda Mesa Water Dist.* (1970) 7 Cal.App.3d 894, 901 (addressing mistake elements).

Rescission of a contract can be predicated upon fraud, either actual or constructive. [CC §§ 1689(b)(1), 1571] Actual fraud consists in any of the following acts, committed by a party to the contract, or with his or her connivance, with intent to deceive another party to the contract, or to induce him or her to enter into the contract [CC § 1572]:

- (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he or she believes it to be true;
- (3) The suppression of that which is true, by one having knowledge or belief of the fact;
- (4) A promise made without any intention of performing it; or
- (5) Any other act fitted to deceive.

Actual fraud is always a question of fact. [CC § 1574]

Civil Code § 1691. Rescission, how effected

Subject to Section 1693, to effect as a rescission as a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind:

- (a) Give notice of rescission to the party as to whom he rescinds; and
- (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so. When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of as a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.

Here, Plaintiffs allege facts which are sufficient to constitute viable causes of action for fraud & deceit and fraud based on concealment with sufficient specificity to place these demurring defendants on notice of the nature of the fraud claims alleged against them. Plaintiffs' sixth cause of action for cancellation of a written instrument is based on the sufficiently pleaded underlying claims for fraud and/or breach of the covenant of good faith and fair dealing. As such, it withstands defendants' demurrers. Defendants' demurrer to plaintiffs' sixth cause of action for cancellation of a written instrument, is overruled.

IT IS SO ORDERED:

Timothy M. Casserly

Judge Timothy M. Casserly