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DEPARTMENT O - LAW AND MOTION RULINGS


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FILED
 Superior Court of California
 County of Los Angeles

Case Number: 21PSCV00399 **Hearing Date:** January 4, 2022 **Dept:** O

JAN 04 2022

Sherri R. Carter, Executive Officer/Clerk

By  Deputy

1. **Defendant DelTerra Real Estate Services, Inc. dba DelTerra Group's Demurrer to Plaintiff's First Amended Complaint is SUSTAINED without leave to amend. An Answer is ordered to be filed within 20 days.**

2. **Defendant DelTerra Real Estate Services, Inc. dba DelTerra Group's Motion to Strike Portions of Plaintiff's First Amended Complaint is GRANTED in part (i.e., as to the first request and fourth request [as it pertains to the second cause of action]) and is otherwise DENIED as moot.**

Background

Plaintiff Bassett Unified School District ("Plaintiff") alleges as follows:

On or about April 21, 2015, Plaintiff entered into a Program and Construction Management Agreement ("Agreement") with DelTerra Real Estate Services, Inc. dba DelTerra Group ("DelTerra"). DelTerra unilaterally billed the total allowable fee, regardless of the actual level of work performed by DelTerra, the status and progress of the Bond Program, or the actual level of completion of the projects. DelTerra provided a schedule of seven projects to be performed over 36 months, but only completed two of these projects. In June 2018, DelTerra requested an amendment to the Agreement with a fee increase of \$389,906.00 to continue providing program management services and presented a new Program and Construction Management Agreement in 2019 with additional fees totaling \$796,245.00. DelTerra failed to properly bill/invoice, resulting in overpayment, failed to properly obtain close-out and certification of various projects, failed to provide and maintain records and documents, failed to provide all documents requested by Plaintiff for review and audit and made decisions and recommendations that made or likely made DelTerra financially interested.

On September 17, 2021, Plaintiff filed a First Amended Complaint ("FAC"), asserting causes of action against DelTerra and Does 1-100 for:

1. Breach of Contract
2. Breach of Fiduciary Duty
3. Negligence
4. Fraud—Intentional Misrepresentation
5. Constructive Fraud
6. Negligent Misrepresentation

1. Demurrer

Legal Standard

A demurrer may be made on the grounds that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

When considering demurrers, courts read the allegations liberally and in context. In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905 [citations omitted].) At the pleading stage, a plaintiff need only allege ultimate facts sufficient to apprise the defendant of the factual basis for the claim against him. (*Semole v. Sansoucie* (1972) 28 Cal. App. 3d 714, 721.) "[A] demurrer does not, however, admit contentions, deductions or conclusions of fact or law alleged in the pleading, or the construction placed on an instrument pleaded therein, or facts impossible in law, or allegations contrary to facts of which a court may take judicial knowledge." (*S. Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732 [citations omitted].)

Discussion

DelTerra demurs, pursuant to Code of Civil Procedure § 430.10, subdivision (e), to the fourth and fifth causes of action in Plaintiff's FAC, on the basis that they both fail to state facts sufficient to constitute a cause of action.

The elements of a cause of action for intentional misrepresentation are "(1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.) "The elements of the cause of action for constructive fraud are: (1) fiduciary relationship; (2) nondisclosure (breach of

fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516, fn. 14.) "Fraud must be pleaded with specificity. . . [t]o withstand a demurrer, the facts constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by references to the general policy favoring the liberal construction of pleadings." (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782 [emphasis in original].) "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 (emphasis in original), quoting *Hills Trans. Co. v. Southwest* (1968) 266 Cal.App.2d 702, 707.)

"The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

In support of its fourth cause of action, Plaintiff alleges that, though the Agreement provided the Agreement "shall end when the District issues notices of completion for all Campus Projects and all punch list items for all Campus Projects are completed or waived by the District," DelTerra's President and CEO, Luis Rojas ("Rojas") "falsely represented to the District, after the Agreement had been approved by the District's Board, that the all [sic] of the projects contemplated under the Agreement could be completed in [a] 36-month period," even though Rojas "knew or should have known" that this could not be done. (FAC, ¶ 41.) Plaintiff further alleges that Rojas falsely claimed that the term of the Agreement was for 36 months and submitted invoices representing that DelTerra had completed certain work or services. (*Id.*, ¶ 44.)

In support of its fifth cause of action, Plaintiff alleges that DelTerra breached its fiduciary duty "by failing to provide material facts and information in the invoices for payment that were inaccurate and/or incomplete," but fails to specify what those material facts were. (*Id.*, ¶ 55.)

Plaintiff does not allege when or by what means Rojas's alleged representations were made, nor does Plaintiff allege knowledge of falsity. Plaintiff alleges that the Agreement had already been approved by the District's Board prior to Rojas's alleged representation that the Agreement could be completed within 36 months. Plaintiff does not allege facts reflecting that DelTerra intended Plaintiff to rely on the alleged representations, nor does Plaintiff allege facts reflecting actual and justifiable reliance. It is unclear to the court how the reliance element in particular may be established, inasmuch as both Plaintiff and DelTerra were parties to the Agreement and possessed copies of same.

DelTerra's demurrer to the fourth and fifth causes of action is sustained. At the hearing, Plaintiff did not wish to seek leave to amend the FAC. Therefore, DelTerra

is ordered to file an Answer within 20 days.

2. Motion to Strike

Legal Standard

Pursuant to Code of Civil Procedure section 436, "the court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." The grounds for a motion to strike must "appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 437.)

Discussion

DelTerra moves the court for an order striking out the following portions of Plaintiff's FAC:

1. ¶ 31, 10:21-22 (i.e., the words "fraudulently, and recklessly");
2. ¶ 45, 20:14 (i.e., the words "willingly, and reckless");
3. ¶ 55, 21:26-28 (i.e., "DelTerra breached its fiduciary duty to the District when it willingly and recklessly misled and deceived the District by failing to provide material facts and information in the invoices for payment that were inaccurate and/or incomplete"); and
4. Prayer, ¶ 2 (i.e., as to the second, fourth and fifth causes of action), 24:7.

At the outset, the motion is moot as to DelTerra's second and third requests (and partially as to the fourth request), based upon the ruling made on the demurrer.

Punitive damages may be awarded upon clear and convincing evidence that a defendant has been guilty of oppression, fraud, or malice. (Civil 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 defined as "despicable conduct that subject a person to cruel and unjust hardship in conscious disregard of that person's rights." "Fraud" is defined as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code §3294(c).)

A "conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud, or malice. . .'"

(*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) "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 v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) "[R]ecklessness alone is insufficient to sustain an award of punitive damages." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211.)

Plaintiff seeks punitive damages in connection with its second cause of action, which was not the subject of demurrer. However, "[a] breach of fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages." (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1051 [quotation marks and citation omitted].)

Plaintiff's second cause of action contains mere "buzzwords" and is devoid of any factual allegations showing that DelTerra's conduct was oppressive, fraudulent or malicious.

The court determines that Plaintiff has not sufficiently pled punitive damages; accordingly, the motion to strike is granted in part (i.e., as to the first request and fourth request [as it pertains to the second cause of action]) and is otherwise denied as moot.

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