

**DEPARTMENT THREE
JUDGE STEPHEN GIZZI
707-207-7303
TENTATIVE RULINGS SCHEDULED FOR
TUESDAY, FEBRUARY 27, 2024**

The parties may appear via Zoom with the exception of trials, trial management conferences, order for examinations and mandatory settlement conferences. The information for the Zoom meeting is set forth below.

The tentative ruling shall become the ruling of the court unless a party desiring to be heard contacts the judicial assistant of the department hearing the matter by 4:30 p.m. on the court day preceding the hearing, and further advises that such party has notified the other side of its intention to request a hearing. A party requesting a hearing must notify all parties of the request to be heard by 4:30.

**MARK VANDENBURGH v. WILLIAM FORD TRUST
Case No. CU23-04555**

Demurrer

TENTATIVE RULING

Defendant WILLIAM FORD TRUST demurs to Plaintiff MARK VANDENBURGH's complaint against it alleging breach of contract and "deliberate indifference, harmful disregard for life, emotional distress, [and] civil rights."

The court has not received opposition to the demurrer.

The complaint states no factual allegations in support of any cause of action. Not having filed opposition, Plaintiff does not demonstrate how leave to amend would be productive.

Defendant's unopposed demurrer is sustained without leave to amend.

**. ALBERT D. SEENO CONSTRUCTION CO. v. DISCOVERY BUILDERS, INC.,
VILLAGES AT FAIRFIELD, LLC, and ALBERT D. SEENO III
Case No. CU23-04663**

DISCOVERY and SEENO III's Demurrer and Motion to Strike

TENTATIVE RULING

Defendants DISCOVERY BUILDERS, INC. (“DISCOVERY”) and ALBERT D. SEENO III (“SEENO III”) demur to Plaintiff ALBERT D. SEENO CONSTRUCTION CO.’s complaint alleging causes of action for conversion, common counts, unjust enrichment, and violation of Business and Professions Code section 17200. Summarized, Plaintiff’s complaint alleges that Plaintiff, DISCOVERY, SEENO III, and Defendant VILLAGES AT FAIRFIELD, LLC (“VILLAGES”) participated in a development project for the City of Fairfield for which Plaintiff and co-developers who are not presently parties were awarded public facility fee credits. Plaintiff alleges that Defendants converted the fee credits to their own use by applying the credits to Defendants’ separate development projects.

DISCOVERY and SEENO III also move to strike the complaint’s allegations of and prayer for punitive damages.

Legal Standard on Demurrer. “The function of a demurrer is to test the sufficiency of the complaint as a matter of law.” (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint is sufficient if it alleges ultimate rather than evidentiary facts, but the plaintiff must set forth the essential facts of his or her case “with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent” of the plaintiff’s claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5 [ultimate facts sufficient].) The Court “assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Necessary Parties to Action. Code of Civil Procedure section 389 provides that a person subject to service of process, whose joinder will not deprive the court of subject matter jurisdiction, “shall” be joined as a party to an action if in his absence complete relief cannot be afforded or he claims an interest relating to the subject of the action and disposition of the action in his absence may impede his ability to protect that interest or open up an existing party to a substantial risk of multiple or inconsistent obligations. The court “shall” order that such a person not joined be made a party.

Subdivision 3(h)(iii) of the contract between Plaintiff and the City of Fairfield, the part that provides for the fee credits at the heart of this litigation, reads as follows: “Developer and, at its option, any affiliated entity of Developer, shall receive full City AB 1600 Public Facilities fee credits per dwelling unit to be constructed by Developer and such affiliated entities anywhere in the City in the amount of the Cost of Construction. The credits shall become available upon execution of this Agreement. The availability of this credit shall survive the termination of this Agreement.” (Complaint at ¶¶ 9, 11, Exhibit A.) The definitions section at the beginning of the contract defines “Developer” as Plaintiff, Seecon Financial & Construction Co., Inc. (“Seecon”), West Coast Home

Builders, Inc. (“West Coast”), and Fieldcrest Development, Inc. (“Fieldcrest”) all together. (*Id.* at ¶ 9, Exhibit A.)

The fact that three developers other than Plaintiff are entitled to use of the fee credits means that this is an action where parties other than Plaintiff have an interest in the outcome and failing to join them could open up the defendants to a substantial risk of multiple and/or inconsistent obligations if those other parties are left to take action in different suits. Seecon, West Coast, and Fieldcrest are necessary parties to this litigation.

However, the court finds that those parties’ present absence is not a basis for demurrer. The court instead orders that Seecon, West Coast, and Fieldcrest be joined as plaintiffs.

Conversion; Common Counts. The elements of a cause of action for conversion are (1) the plaintiff’s ownership or right to possession of property, (2) the defendant’s disposition of that property in a manner inconsistent with the plaintiff’s property rights, and (3) damages. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.)

The complaint alleges that the entities defined as “Developer,” including Plaintiff, gained a right to public facility fee credits upon execution of the development contract. (Complaint at ¶¶ 9, 11, Exhibit A.) This was not a merely contingent or promised benefit because the contract specifies that the fee credits would be awarded “per dwelling unit to be constructed,” not for each dwelling unit actually constructed, and that the credits “shall become available upon execution of this Agreement.” (*Ibid.*) Plaintiff alleges that DISCOVERY took hundreds of thousands of dollars of fee credits for its own, sole benefit without Plaintiff’s consent, so establishing a conversion of property causing damage. (Complaint at ¶ 13.)

Plaintiff’s cause of action for common counts seeks the same recovery as its cause of action for conversion, founding itself on the same facts, and so stands with its cause of action for conversion. (Complaint at ¶¶ 16-26; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394-395.)

Business and Professions Code Section 17200. Business and Professions Code section 17200 prohibits unfair, unlawful, or fraudulent business practices. A cause of action pursuant to this statute must plead with particularity the facts supporting the violation. (*Khoury v. Maly’s of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) An unfair business practices claim commonly borrows violations of other laws to create an independently actionable claim but need not always; practices may also be unfair or fraudulent despite not technically being unlawful. (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 837.) Plaintiff does not allege that Defendants violated any statute other than section 17200, so it does not state a claim for unlawful business practices predicated on borrowing a violation of another law.

Per *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 “unfair” conduct in the context of section 17200 actions brought by a

defendant's competitor, as opposed to actions brought by a consumer, means conduct threatening an incipient violation of antitrust law, violating the spirit of such law through effects comparable to a direct violation, or otherwise significantly threatening or harming competition to cases alleging unfair competition from a party's direct competitor.

Plaintiff and Defendants are competitors in the development business, so *Cel-Tech* applies. Plaintiff's allegations do not have any clear relationship to a threatened violation of antitrust law or other significant harm to competition. Plaintiff does not allege "unfair" business practices.

A "fraudulent" business practice is one that is likely to deceive the general public. (*Patricia A. Murray Dental Corp. v. Dentsply International, Inc.* (2018) 19 Cal.App.5th 258, 271.) Nothing about Defendant's alleged misappropriation of fee credits for development projects could be said to be likely to deceive the general public.

Plaintiff does not allege any form of unlawful, unfair, or fraudulent business practices.

Unjust Enrichment Cause of Action. Unjust enrichment is not a cause of action but rather a restitution claim. (*Hill v. Roll International Corporation* (2011) 195 Cal.App.4th 1295, 1307.) It does not describe a theory of recovery but the result of a failure to make restitution under circumstances where it is equitable to do so. (*Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448.) A separate claim for restitution is redundant where a party has adequate remedies at law. (*Sepanossian v. National Ready Mixed Concrete Co.* (2023) 97 Cal.App.5th 192, 207-208.) Plaintiff has an adequate remedy available already through its conversion and common counts causes of action, which seek to recover the same fee credits that allegedly unjustly enriched DISCOVERY and SEENO III. There is no space for a separate claim for restitution.

Sufficiency of Pleading Regarding SEENO III. The complaint lacks factual allegations of SEENO III's acts supporting his presence as a defendant in his individual capacity. The mere allegation that he controls DISCOVERY and VILLAGES is not sufficient to plead any cause of action against him as an individual.

Motion to Strike. Code of Civil Procedure section 436, subdivision (a) permits a court to strike out any irrelevant, false, or improper matter inserted in any pleading, upon a motion or in its discretion. Irrelevant matters are those not essential to the statement of a claim or defense or not pertinent to or supported by an otherwise sufficient claim or defense and demands for relief not supported by the allegations. (Code Civ. Proc. § 431.10.) "The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice;" therefore, a motion to strike may not be based upon extrinsic evidence such as a declaration. (Code Civ. Proc. § 437, subd. (a).)

Civil Code section 3294, subdivision (a) provides that punitive damages are only available in actions not arising from breach of contract if is "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."

This means that a plaintiff's pleading asking for punitive damages must plead facts to support a finding of oppression, fraud, or malice. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) "Malice" means conduct intended to cause injury or despicable conduct carried on with a willful and conscious disregard of the rights or safety of others; "oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights; and "fraud" means intentional misrepresentation, deceit, or concealment of a material fact with intention to cause injury. (Civ. Code § 3294, subd. (c).) "Despicable" conduct refers to that which is "base, vile, or contemptible" and is something more than simple willful and conscious disregard for others. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.)

Punitive damages are available in conversion actions but the requisite malice, fraud, or oppression must still be shown. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1151.)

Plaintiff does not allege malice, oppression, or fraud. Plaintiff alleges only the bare fact of conversion of the fee credits. Disregarding all conclusory allegations that Defendants acted maliciously, fraudulently, or oppressively, the only allegation remaining to support punitive damages is that "[w]ithout [Plaintiff's] knowledge or consent, Defendants used a portion of the fee credits for development projects separately owned by Defendants." (Complaint at ¶ 13.) This does not contain a sufficient factual description of Defendants' acts to demonstrate intent to injure, fraudulent behavior, or conscious disregard for the rights of others.

There is insufficient factual support for punitive damages in the complaint.

Leave to Amend. Leave to amend is appropriate where pleading deficiencies are amenable to correction. (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768.) The court finds that the identified pleading deficiencies in Plaintiff's section 17200 claim, causes of action against SEENO III, and prayer for punitive damages could be corrected.

Conclusion. DISCOVERY and SEENO III's demurrer is sustained with leave to amend with regard to Plaintiff's cause of action for violation of Business and Professions Code section 17200 against both Defendants and with regard to Plaintiff's causes of action for conversion and common counts against SEENO III.

DISCOVERY and SEENO III's demurrer is sustained without leave to amend with regard to Plaintiff's cause of action for unjust enrichment against both Defendants.

DISCOVERY and SEENO III's demurrer is otherwise overruled.

DISCOVERY and SEENO III's motion to strike is granted with leave to amend

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