

ROA 63
2 pgs

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 11/06/2017

TIME: 03:04:00 PM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00010073-CU-BC-CTL** CASE INIT.DATE: 03/21/2017

CASE TITLE: **Larry Geraci vs Darryl Cotton [Imaged]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

APPEARANCES

After entertaining the arguments of counsel and taking the matter under submission on 11/3/17, the Court confirms the tentative ruling overruling the general demurrer to causes of action 1-4 in the Second Amended Cross-Complaint.

Tentative (as confirmed by the Court)

The general Demurrer (ROA # 52) of Plaintiff and Cross-Defendant LARRY GERACI ("Cross-Defendant" or "Geraci") to causes of action 1 - 4 in the Second Amended Cross-Complaint ("SAC-C") filed on August 25, 2017, by Defendant and Cross- complainant DARRYL COTTON ("Cotton" or "Cross-Complainant"), is OVERRULED.

Cross-Defendant's Answer to the SAC-C must be filed and served within twenty (20) days of this hearing.

1st COA: BREACH OF CONTRACT

Cross-Defendant argues that the written memorandum is contradicted by the alleged oral agreement, and as a result violates the statute of frauds. Cross-Defendant argues: "In the instant case, the only writing signed by both parties is the November 2, 2016 written agreement, which explicitly provides for a \$10,000 down payment ('earnest money to be applied to the sales price'); in fact, the agreement acknowledges receipt of that down payment. Cotton is alleging that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the written term of a \$10,000 down payment." However, this argument lacks merit because the written memorandum attached to the SAC-C is unclear. The acknowledgement as to payment of \$10,000 does not necessarily mean that the total deposit was not, in fact, \$50,000 (such that \$40,000 remained due). As alleged, there is no conflict. In addition, it is not clear whether the statute of frauds applies to an agreement to negotiate a real estate agreement in good faith.

Cross-Defendant also argues that this cause of action does not allege an actionable breach. This

argument also lacks merit. Numerous California cases have expressed the view the law provides no remedy for breach of an "agreement to agree" in the future. *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal. App. 4th 1251, 1256. On the other hand, in an appropriate case, a party may seek to enforce a valid, enforceable contract to negotiate the terms of an agreement in good faith. *Id.* at 1257. "Persons are free to contract to do just about anything that is not illegal or immoral. Conducting negotiations to buy and sell ice cream is neither." *Id.* (footnote omitted). The SAC-C sufficiently alleges breach of an agreement to negotiate in good faith.

2nd COA: INTENTIONAL MISREPRESENTATION
3rd COA: NEGLIGENT MISREPRESENTATION
4th COA: FALSE PROMISE

Cross-Defendant argues that the SAC-C does not allege facts which are sufficient to establish the element of justifiable reliance because "the misrepresentations Cotton is claiming reliance upon are in direct conflict with the clear, unambiguous written agreement signed by Cotton." This argument lacks merit.

Reasonable reliance on the alleged misrepresentation is an essential element of fraud. *Wagner v. Benson* (1980) 101 Cal. App. 3d 27, 36 ("At trial, reliance may be demonstrated to be unreasonable in light of plaintiffs' intelligence and experience."). The agreement to conduct further negotiations toward a comprehensive agreement does not necessarily conflict with the very short acknowledgement of a pending sale and the receipt of "good faith earnest money." This element is sufficiently alleged, and this is an issue of fact that cannot be determined via this Demurrer.

Cross-Defendant also argues that "promises about future actions without the intent to perform simply cannot support a claim for negligent misrepresentation." An action based on a false promise is a type of intentional misrepresentation, i.e., actual fraud. *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153, 159. The specific intent requirement precludes pleading a false promise claim as a negligent misrepresentation. *Id.* Making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform and, therefore, does not constitute a false promise. *Id.* On the other hand, "[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, he or she may plead in the alternative and make inconsistent factual allegations." *Edmon & Karnow, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2017)* at ¶ 6:242. For example: A Complaint seeking damages for fraud may properly allege both intentional misrepresentation and negligent misrepresentation. *Id.* 6:243. Each version of the facts or each legal theory should be pleaded in a separate cause of action in the Complaint. *Id.* at 6:244. This argument lacks merit because this cause of action is alleged as an alternative to the claim of false promise. Sufficient facts are alleged supporting negligent misrepresentation.

IT IS SO ORDERED

Joel R. Wohlfeil

Judge Joel R. Wohlfeil