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SUPERIOR COURT OF CALIFORNIA, COUNTY OF YUBA

DEAN SWANSON, MARK BOWIN,)	NO. YCSCCVCV 05-0251
)	
Plaintiffs,	)	NOTICE OF DEMURRER OF
	)	DEFENDANT
	)	JAMES R. OVERTON TO
	)	PLAINTIFFS'
v.	)	FIRST-AMENDED COMPLAINT;
	)	POINTS
	)	AND AUTHORITIES; REQUEST FOR
PRESTON KILMAN; NANETTE	)	JUDICIAL NOTICE
KILLMAN, JAMES R. OVERTON	)	DATE: July 18, 2005
and LISA COOPER	)	TIME: 10:00 a.m.
Defendants.	)	DEPT: TBA
_____)	

TO PLAINTIFFS, DEAN SWANSON AND MARK BOWIN, and THEIR

ATTORNEYS OF RECORD IN THIS CASE:

NOTICE IS HEREBY GIVEN that Defendant, **JAMES R. OVERTON** demurrers to the First-Amended Complaint on file in this case. The hearing on the Demurrer is set for hearing on July 18, 2005, at 10:00 AM, or as soon thereafter as the matter may be heard in Department TBA of the above-entitled

court, located at 463 Second Street, Yuba City, California.

YOU ARE HEREBY FURTHER PUT ON NOTICE THAT the grounds for **OVERTON'S** Demurrer to the entire First-Amended Complaint is that there is no enforceable executory contract amongst the parties and that no cause of action can be stated against this demurring party nor any party to this action for breach of contract. The grounds for this alternative Demurrer to the Second Cause of Action is that the First Amended Complaint fails to state any facts sufficient to constitute a cause of action for negligent or intentional misrepresentation against this demurring party under **Code of Civil Procedure §430.10(e)**.

Defendant, **OVERTON's**, Demurrer is based upon this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities and Request for Judicial Notice in support of the Demurrer filed concurrently herewith, all the pleadings in the Court's file as well as any and all notes, memorandum, writings or other documents in the Court's file as well as evidence, whether oral or documentary which may be presented at the hearing on the Demurrer.

Date: _____ **RICH, FUIDGE, MORRIS & IVERSON, INC.**

By: _____
ANTHONY E. GALYEAN
Attorneys for Defendant Overton

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendant, **JAMES OVERTON**, hereby Demurrers to the entire First- Amended Complaint and, in the alternative, to Second Cause of Action, as it is the only cause of action stated against him in the First- Amended Complaint ("Complaint") of Plaintiffs, **DEAN SWANSON and MARK BOWIN** on file in this matter.

The grounds for this Demurrer to the entire First- Amended Complaint is that there is no enforceable executory contract amongst the parties and that no cause of action can be stated against this demurring party nor any party to this action. The grounds for this alternative Demurrer to the Second Cause of Action is that the First Amended Complaint fails to state any facts sufficient to constitute a cause of action for negligent or intentional misrepresentation against this demurring party under **Code of Civil Procedure §430.10(e)**.

ARGUMENT

I. Demurrer to Entire First-Amended Complaint Because There Was No Enforceable Contract Between The Parties After January 15, 2005

Defendants are entitled to an order of this Court sustaining Defendants' Demurrer to the First-Amended Complaint without leave to amend because there is no enforceable contract in effect between any of the parties to this action because the

real estate purchase contract had expired as of January 15, 2005. By operation of their First Amended Complaint, Plaintiffs are requesting that this Court do great violence to one of the longest standing doctrines in Anglo-American jurisprudence: the Statute of Frauds.

Plaintiffs attached the Contract signed by the parties to Plaintiff Dean Swanson's Declaration. Pursuant to **Evidence Code § 452, Permissive Judicial Notice**, the court can take judicial notice of "Records of (1) any court of this state".

In the case at bench, Plaintiff filed the Purchase and Sale Agreement with this Court as exhibits to the Declaration of Dean Swanson. The Purchase and Sale Agreement and its exhibits are "records" of this court which **OVERTON** is requesting that this Court take judicial notice of so that the same can be considered by this Court.

The Agreement itself gives a closing date of January 15, 2005. (See Agreement at ¶ 2). The Agreement further states that "Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing signed by Buyer and Seller." (See Agreement at ¶ 29.)

In **Cobbs v. Cobbs** (1942) 53 C.A.2d 780, 783, where a prior oral promise contradicted the terms of the written agreement the court found that the oral promise was ineffective under the parol evidence rule and "cannot be the foundation of either a contract or tort action." The same principle applies here.

Moreover, **Civil Code § 1698** provides in pertinent part:

(a) A contract in writing may be modified by a contract in writing....

In the case at bar, the Agreement itself states that all changes are to be in writing. No change affecting the closing date was put in writing. Accordingly, by its own terms, the contract expired at the close of escrow on January 15, 2005, Plaintiffs' wishes to the contrary notwithstanding. Here, Plaintiffs had access to the necessary information regarding the closing date and they had **actual knowledge** of the closing date. Thus, they should not be heard to complain that they relied on allegedly contrary oral representations when they had actual knowledge the correct date themselves and examined the contract. **Elkind v. Woodward** (1957) 152 C.A. 2d 170, 176.

The Agreement deals with the sale of land. Accordingly, **Civil Code § 1624** applies. Under both the terms of the contract itself and **Civil Code § 1698**, the closing date can only be modified by a writing addressing the same. Here, Plaintiffs have produced none.

CCP § 430.10 Grounds For Objection To Complaint, reads in pertinent part as follows:

The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer as provided in **Section 430.30**, to the pleading on any one or more of the following grounds:

"... (e) The Pleading does not state facts sufficient to constitute a cause of action. . . .

(f) The Pleading is uncertain".

In this case, the First-Amended Complaint on its face does not state a cause of action against any of the defendants in this case because it clearly bears out that the contract had expired.

In pertinent part, **Section 28** of the contract, which Plaintiffs have placed before the court in their pleadings, reads as follows:

"Time Of Essence; Entire Contract; Changes:

Time is of the essence. All understandings between the parties are incorporated in this agreement. Its terms are intended by the parties to be final complete and exclusive expression of their agreement with respect to its subject matter"

In this case, the contract very clearly states on **Page 1, Section 1D** that close of escrow shall occur on January 15, 2005. In the case of *Katemis vs. Westerlind* (1953) 120 Cal App 2nd 537, the Court sitting in review ruled that where "time is of the essence" in the contract, an action to specifically enforce the agreement will not lie if the closing date has passed and performance was not completed. Here, at **Section 1D** of the parties' agreement, the closing date is expressly stated that it will be January 15, 2005. At **Section 28** the contract clearly states that time is of the essence. This is exactly what the court was discussing as the general rule in the *Katemis* case. In that case, the Plaintiff was allowed to seek specific performance because time was not made of the essence in that contract. The same cannot be said of the case at bench. Here,

it was very clear that this language was included in the agreement and that escrow had to close on or before January 15, 2005.

The above principles have been reiterated and applied in more modern opinions. **Pittman vs. Canham (1992) 2 Cal App 4th 556**, the court dealt with the issue of "Time Of The Essence" and a hard-stated closing date. In that case, escrow was to close 30 days from acceptance. Escrow was opened November 24, 1987. Accordingly, the closing date was December 24, 1987. In that case, the buyers did not timely perform by offering payment of the purchase price. Accordingly, the sellers then re-contracted and sold the property to a third party for a higher sales price. In the ensuing lawsuit, the Court of Appeals sitting in review of the failed buyer's appeal ruled as follows:

Here, because time was made the essence of the contract, the failure of both parties to tender performance by December 24, 1987 discharged both from performing. Neither party can hold the other in default and **no cause of action to enforce the contract arises** (Citations provided) (Id. at 560) (emphasis added)

In accordance with the very clear ruling of **Pittman**, where time is made of the essence in the real estate contract, just as in the case at bench, if escrow does not close by the date stated in the contract, "**no cause of action to enforce the contract arises**" thereafter.

The above rule is exactly the reason why this court should sustain Overton's demurrer to the First-Amended Complaint

without leave to amend under **CCP § 430.10 (e)**. Under that subsection, a demurrer can be successfully taken to a complaint where it cannot state facts sufficient to constitute causes of action. Here, it is very clear under the ruling in **Pittman** that because they did not pay the purchase price on or before January 15, 2005 Plaintiffs should not be now heard to complain or raise a cause of action based upon their failure to do so.

Based upon the above truths which are not in dispute and the dictates of **CCP §§ 430.10** and **430.30**, this Court can, and safely should, sustain **OVERTON's** demurrer to First Amended Complaint, in its entirety without leave to amend and dismiss this case.

II. Demurrer to Second Cause of Action For Uncertainty

The grounds by which this court can sustain Defendants' demurrer to the Second Cause of Action are set forth in **Code of Civil Procedure § 430.10, Grounds For Objection To Complaint**.

In pertinent part, this section provides as follows:

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in **Section 430.30** to the pleading any one or more of the following grounds:....

(e) the pleading does not state facts sufficient to constitute a cause of action.

(f) the pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible."

Code of Civil Procedure § 430.30 states:

(a) When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

(b) When any ground for objection to a complaint or cross-complaint does not appear on the face of the pleading, the objection may be taken by answer.

In *Small v. Fritz Co., Inc.* (2003) 30 C4th 167, 184, it states the well known rule that: "In California, fraud must be pled specifically; general and conclusory allegations do not suffice." Speaking specifically on negligent misrepresentation the Supreme Court in *Small*, a stockholder action, ruled that negligent misrepresentation must also be specifically pled. *Id.* The court further implied that the requirement of specific pleading of negligent misrepresentation be applied in other actions as well and must be plead with the same specificity as fraud. *Id.* This reasoning was very recently followed in *Cadlo v. Ownes-Illinois, Inc.* (2005) 125 Cal. App. 4th 513, where, in a non-stockholder case for negligent misrepresentation, the court used the specific pleading standard applied in fraud cases.

In *Committee on Children's Television, Inc. v. General Foods Corporation* (1983) 35 Cal. 3d 197, 216, the Supreme Court articulated the following:

"General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged." "Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), **and the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.**" *Id.* (Emphasis added).

The particularity requirement of pleading every element necessitates pleading facts which "show *how, when, where, to whom, and by what means the representations were tendered.*" Hills Trans. Co. v. Southwest (1968) 266 Cal. App.2d 702, 707. (Emphasis added)

In Cadlo, supra, it states:

"The well-known elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. (Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 173 [132 Cal. Rptr. 2d 490, 65 P.3d 1255] (Small).) **The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance.** (Ibid.) In both causes of action, the plaintiff must plead that he or she actually relied on the misrepresentation. (Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1088-1089 & fn. 2 [23 Cal. Rptr. 2d 101, 858 P.2d 568] (Mirkin).)"**Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged.** (Small, supra, 30 Cal.4th at p. 184.) The policy of liberal construction of pleadings is not generally invoked to sustain a misrepresentation pleading defective in any material respect. (Ibid.) Thus, the mere assertion of "reliance" is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance. (Ibid.)" (Emphasis added)

Plaintiffs' First-Amended Complaint is not specific in any respect and does not specifically address each element as required for a negligent misrepresentation cause of action. The Plaintiffs do not plead what misrepresentations were made. The First Amended Complaint attributes only two broad statements to Defendants.

First:"numerous material and factual representations to plaintiffs about Kilman and about the Property"

Second:

that the defendants "negligently misrepresented the terms and conditions pursuant to which plaintiffs could acquire the Property, the closing date with respect thereto and, ultimately, the obligations to be imposed upon plaintiffs in order to acquire the property."

These statements are entirely void of **what** was said, **when** it was said, by **whom** it was said, any specific **false statements**, and any facts showing that Plaintiffs relied upon the statements, as required by the Hills Court. Cadlo, supra, states that "the mere assertion of "reliance is insufficient." This is exactly what the Plaintiffs have asserted in the case at hand and this is all they have asserted.

The damage element plead by the Plaintiffs is insufficient as it is devoid of any showing of damages sustained. What Plaintiffs have stated in regard to damages is: "Plaintiffs have sustained substantial damages, all according to proof at the time of trial," which does not give any amount of damages sustained and does not even state what kind of damages Plaintiffs are pursuing.

By implication, it would appear that Plaintiffs are also alleging the tort of Negligent Interference. The central wrong in an interference tort is the unlawful interference with a business opportunity through methods which are not within the privilege of fair competition. 5 Witkin, Summary of Cal. Law (9th ed. 1988) **Torts**, § 652, p. 740.

"Plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." Limandri v. Judkins (1997) 52 Cal. App. 4th 326, 340.

It is also implied by Limandri that negligent interference must be plead specifically. Id. at 349. This reasoning/rule was again followed in another case regarding an alleged negligent interference, Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1113, where that court implied that negligent interference must be plead specifically.

The general rule in California is **against** finding any duty for negligent interference, as opposed to intentional interference with the performance of a contract between third parties. Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 636-637. This general rule is subject to only one exception which is not applicable in this case, where there is a "special relationship" between the parties. J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799. The existence of a special relationship is determined by examining six factors set forth in Biakanja v. Irving (1958) 49 Cal.2d 647, 650, which are:

(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.

Here, Plaintiffs' First Amended Complaint is plainly deficient:

1) it contains no allegations as to the existence of a special relationship between Defendant Overton and the Plaintiffs;

2) there is no showing of a close connection between the defendants conduct and any injury sustained;

3) there is not any indication of moral blame attached to any conduct by Defendants;

4) it is devoid of any specific intentional acts or negligent facts showing wrongful statements that disrupted the contractual relationship, or damage resulting from the alleged interference.

The Plaintiffs' allegations regarding this cause of action are clearly vague and uncertain.

Pursuant to **Code of Civil Procedure § 430.30** the Demurrer may be sustained when the grounds appear on the face of the complaint. In this case, the grounds by which this court may sustain Defendants' Demurrer may be taken

directly from the face of Plaintiffs' First-Amended Complaint and the Agreement attached to Plaintiff Swanson's supporting declaration. The Complaint clearly does not allege facts sufficient for a cause of action, as shown above.

These flaws are evident from the face of the Complaint. As such, they lay grounds for the sustaining of Defendants' requested demurrer under **Code of Civil Procedure § 430.30** because the Complaint fails to properly state the facts necessary to plead a cause of action for negligent misrepresentation or negligent interference.

CONCLUSION

This Court should sustain Defendant's Demurrer to the Second Cause of Action Without Leave To Amend for the reasons set forth above.

Date: _____ **RICH, FUIDGE, MORRIS & IVERSON, INC.**

By: _____
ANTHONY E. GALYEAN
Attorneys for Defendant Overton

REQUEST FOR JUDICIAL NOTICE

Defendant, James R. Overton, in conjunction with his Motion for a Demurrer set to be heard on July 18, 2005, requests the Court, pursuant to provisions of **Evidence Code**

§452 (d) to take judicial notice of its own records and specifically all papers and records filed in conjunction with Plaintiff's Complaint, namely the Declaration of

Plaintiff Dean Swanson with Exhibits 1 and 2 attached
thereto.

Date: _____ **RICH, FUIDGE, MORRIS & IVERSON, INC.**

By: _____
ANTHONY E. GALYEAN
Attorneys for Defendant Overton