IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar
HONORABLE NICOLE S. HEALY
Department 28, Courtroom I
800 N. Humboldt Street, San Mateo, CA 94401

JULY 31, 2024

IF YOU *INTEND TO APPEAR* ON ANY CASE ON THIS CALENDAR YOU MUST DO ITEM 1 OR ITEMS 2 & 3 BELOW, THE *DAY BEFORE THE HEARING*:

1. **EMAIL Dept28@sanmateocourt.org BEFORE 4:00 P.M., COPIED IN THE SAME EMAIL TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING; or**

2. **YOU MUST CALL (650) 261-5128 BEFORE 4:00 P.M. AND FOLLOW THE INSTRUCTIONS ON THE MESSAGE; and**

3. **YOU MUST GIVE NOTICE BEFORE 4:00 P.M. — BY TELEPHONE OR IN PERSON — TO ALL PARTIES OF YOUR INTENT TO APPEAR PURSUANT TO CALIFORNIA RULES OF COURT, RULE 3.1308(a)(1).**

Failure to comply with item 1, or items 2 *and* 3, will result in no oral presentation.

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TO ASSIST THE COURT REPORTER, the parties are ORDERED to: **(1) state their name each time they speak and only speak when directed by the Court**; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

JULY 31, 2024 Law and Motion Calendar
Judge: Honorable Nicole S. Healy, Department 28

Case	Title / Nature of Case

14:00 LINE 1

18-CIV-04922 JOHN OEHLERT, ET AL.VS. DON M. HEINSOHN, ET AL.

JOHN OEHLERT	SIMON OFFORD
OLENA CHEREDNYCHENKO	MARTIN GLICKFELD

DEFENSE MOTION TO VACATE JUDGMENT

TENTATIVE RULING:

This matter came on for court trial on February 1, 2024. An order after trial was filed on April 10, 2024, and an amended judgment on May 23, 2024. Defendant filed a motion to vacate the judgment pursuant to Code of Civil Procedure, section 663 on June 18, 2024. However, defendant subsequently filed a notice of appeal from the judgment on July 15, 2024. As a result, the court has no jurisdiction to rule on the motion to vacate. ("During the pendency of an appeal, the trial court is without power to hear a motion to vacate judgment from which an appeal has been taken." (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 298 [citations omitted]; *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1303, 1317.)

Therefore, the motion is **ORDERED OFF CALENDAR**.

2:00 LINE 2

23-CIV-05951 JACOB VIGIL VS. GOOGLE LLC, ET AL.

JACOB VIGIL	PRO SE
GOOGLE LLC	RUSSELL L KOSTELAK

DEFENSE HEARING ON DEMURRER TO PLAINTIFFS 2ND AMENDED COMPLAINT

TENTATIVE RULING:

For the reasons stated below, defendant Google, LLC's demurrer to plaintiff Jacob Vigil's May 15, 2024 Second Amended Complaint (SAC) is **SUSTAINED WITHOUT LEAVE TO AMEND** as to all claims asserted against Google, LLC. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard on Demurrer

A demurrer challenges defects that appear on the face of the pleading, or defects apparent from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer assumes that all facts pleaded in the complaint are true, no matter how improbable, but does not assume the truth of contentions, deductions or conclusions of fact or law. (*Ibid.*; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The SAC does not state a cause of action against Google, LLC for "IP infringement." As the Court noted in its May 28, 2024 Order sustaining Google, LLC's demurrer to the First Amended Complaint (FAC), "Intellectual Property [IP] infringement" is not a recognized cause of action …. If plaintiff is asserting a claim against Google for "intellectual property infringement" then plaintiff must identify, specifically, what type of infringement is being alleged." (May 28, 2024 Order at p. 3.) The SAC again includes vague allegations of "intellectual property infringement," without specifying what type of IP infringement plaintiff attempts to allege. In any event, no form of "IP infringement" appears to be sufficiently pled.

First, as noted previously (May 28, 2024 Order at p. 3), a copyright infringement claim against Google would fail for lack of subject matter jurisdiction. (28 U.S.C. § 1338(a); *H.J. Heinz Co. v. Superior Court* (1954) 42 Cal.2d 164, 168-169; *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.* (1984)159 Cal.App.3d 637, 642-643; *Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 986.) Plaintiff also has not alleged the existence of a copyright registration, which, assuming a copyright claim were otherwise permissible (which it is not), would be a prerequisite to asserting a copyright claim. (17 U.S.C. § 411(a); *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* (2019) 586 U.S. 296, 299-300.)

If plaintiff's SAC was intended to allege a trademark infringement claim against Google, it also is insufficiently pled, for each of the reasons stated in Google's moving papers. As argued in the demurrer and not addressed in plaintiff's Opposition brief, a trademark infringement claim requires a foundational allegation relating to plaintiff's exclusive right to use

a specific mark or marks, plus additional required allegations. Here, even if plaintiff had properly pled a right to exclusive use of any trademark(s), which the SAC (like the FAC) does not do, a trademark infringement claim would still be improperly pled.

As stated previously (May 28, 2024 Order at pp. 3-4), a claim of direct trademark infringement requires factual allegations showing that Google actively "used" the alleged trademark(s) in commerce (15 U.S.C. § 1114), which the SAC does not allege. Rather, the SAC alleges that defendant Goldfinch posted materials on YouTube's website. (SAC at p. 4 ¶ 1; *id*. at p. 6 ¶ 3.) Plaintiff's allegations that defendant Goldfinch used plaintiff's alleged trademark(s) does not constitute "use" of any mark by Google or YouTube. (*Lops v. YouTube, LLC* (D.Conn., Mar. 3, 2023) 2023 WL 2349597, at p. *3 ("YouTube cannot be subject to direct liability for trademark infringement based on videos uploaded by third parties").)

As also noted previously (May 28, 2024 Order at p. 4), a cause of action for contributory trademark infringement requires allegations that Google "intentionally induce[d] another to infringe a trademark," which the SAC (like the FAC) does not allege. Plaintiff's Opposition brief suggests that defendant Goldfinch committed "fraud and identify theft" with the assistance of a Google employee, and argues that the Court has authority to "initiate a criminal prosecution" against the Google employee who allegedly assisted defendant Goldfinch. But nowhere does the SAC allege facts suggesting that Google/YouTube, or any of its employees, engaged in intentional wrongdoing. To the contrary, the SAC, as did the FAC, alleges that Google (and its employees) were tricked and/or convinced by defendant Goldfinch that Goldfinch is the rightful owner of the disputed websites, videos, etc. that plaintiff claims actually belong to him. Thus, plaintiff's own allegations in both the FAC and again in the SAC, demonstrate that YouTube had no intent to induce infringement of any trademark, but rather, YouTube was tricked, deceived, or convinced by Goldfinch into believing that Goldfinch owed the alleged "intellectual property." (See FAC, at p. 6, ¶ 1; SAC, at p. 3 ¶ 4; *id*. at p. 6 ¶ 1 ("somebody at YouTube's legal department accepted [Goldfinch's] fraudulent emails" as true.) Plaintiff's allegations that Goldfinch successfully deceived Google/YouTube are fatal to any contributory trademark infringement claim (assuming Plaintiff intends to assert such a claim), because if YouTube believed that Goldfinch was the true owner (as plaintiff has repeatedly alleged), then YouTube cannot have had any intent to induce infringement. (*Tiffany (NJ) Inc. v. eBay Inc.* (2d Cir. 2010) 600 F.3d 93, 106.)

For at least these reasons, the "IP infringement" claim fails to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

The SAC does not state a fraud cause of action against Google, LLC. As with the FAC, the SAC once again makes unclear, conclusory claims that Google, LLC committed "fraud," without specifying what type of fraud is being alleged. Page 4 of the Complaint alleges a "fraud" claim, but states that it is "only directed at defendant Goldfinch." Page 6 of the Complaint assert another "fraud" claim, this time directed against both Goldfinch and Google, LLC. As against Google, LLC, this claim alleges the following:

- Goldfinch fraudulently claimed copyrights over plaintiff's podcast and Youtube channel "with the aid of Youtube LLC's legal department:"
- Somebody at Youtube's legal department accepted [Goldfinch's] fraudulent emails …;
- Youtube gave plaintiff's IP rights to Goldfinch, who impersonated plaintiff;
- Goldfinch fraudulently represented himself as plaintiff with the aid of defendant Google/Youtube;
- Google refused to recognize more than 80 of plaintiff's DMCA copyright counter claims;
- Goldfinch made the representations with the intent to defraud plaintiff; and
- Plaintiff's request to regain publishing rights was ruled in favor of Goldfinch by Youtube.

(SAC at p. 6.)

For some of the same reasons explained above, none of the foregoing allegations sufficiently states a fraud claim against Google, LLC. As stated previously (May 28, 2024 Order at p. 4), fraud must be pled with specificity rather than with general and conclusory allegations.

Like the FAC, the SAC, does not identify the form of fraud being alleged. Assuming plaintiff intended to allege fraud by intentional misrepresentation (CACI 1900), the cause of action is not properly pled. Fraud must be pled with specificity, meaning "a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made." (*West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.780, 792-793.) "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.4 153, 157.)

Like the FAC, the SAC does not allege that Google, as distinguished from defendant Goldfinch, made any false statement(s), or concealed any fact, or engaged in any intentional wrongdoing. The SAC does not allege that Google/YouTube had any intent to induce plaintiff's reliance on any false representation, nor that plaintiff reasonably relied on any misrepresentation by Google/Youtube. As noted above, to the contrary, the SAC again alleges that YouTube was "tricked" by defendant Goldfinch. (See FAC, at p. 3, ¶ 4; *id*. at p. 6, ¶ 1; SAC at p. 6 [someone at YouTube's legal department "accepted" defendant Goldfinch's fraudulent actions making it appear that Goldfinch was the owner of plaintiff's IP]; *id*. at p. 6 [alleging that Goldfinch was impersonating plaintiff, and thereby convinced YouTube that Goldfinch owed the subject "IP"]; *ibid*. [alleging that Goldfinch "fraudulently presented himself as plaintiff Jacob Vigil of his successful podcast "INFINITE PLANE SOCIETY" and "TIM OZMAN"]; *id*. at 3, ¶ 2 [quoting Goldfinch's admission that Goldfinch intended to trick and/or deceive YouTube, and did trick and/or deceive YouTube, into thinking that Goldfinch, rather than plaintiff, is the owner of the disputed content].) Plaintiff's repeated allegations that defendant Goldfinch, via his own fraud,

deceived and/or convinced YouTube into believing that Goldfinch owned the disputed "IP" are irreconcilable with, and directly undermine, the purported fraud claim against Google, LLC. The SAC's conclusory reference to YouTube being "complicit" in Goldfinch's wrongdoing is unsupported by any alleged facts, and as noted, this conclusory allegation contradicts numerous allegations and Admissions that YouTube was deceived by Goldfinch as to who own(s) the "IP."

For at least these reasons, no fraud claim is properly pled against Google, LLC.

The SAC does not state a cause of action against Google, LLC for "intentional infliction of emotional distress" (IIED). The Court previously sustained Google's demurrer to this claim in the FAC, on grounds that the FAC's underlying factual allegations of intentional conduct were directed only against defendant Goldfinch, and not Google. The same is true with the SAC, which again alleges that defendant Goldfinch engaged in intentional wrongdoing and/or fraud in his successful effort to deceive and/or trick YouTube into believing that Goldfinch was the creator and owner of websites, videos, etc. (content) that plaintiff alleges actually belonged to plaintiff. As such, the SAC alleges intentional wrongdoing by Goldfinch, but not YouTube. (See, e.g., SAC, at p. 3 ¶ 6 ["Goldfinch did this to inflict emotional duress on [] Jacob Vigil."].) Accordingly, the SAC does not state a claim for IIED against Google, LLC. (See also *Hassel v. Bird* (2018) 5 Cal.5th 522, 540-41 [47 U.S.C. § 230 shields Yelp from IIED claim, to the extent that plaintiff sought to treat Yelp as the publisher of website content].)

The SAC does not state a cause of action against Google, LLC for "hacking." Plaintiff's SAC re-asserts this claim against Google, LLC, following the Court's sustaining of the prior demurrer to this claim in the FAC. But the SAC still does not allege that Google "hacked" any of plaintiff's social media websites, or "hacked" anything belonging to plaintiff. As with most of plaintiff's allegations, the SAC's "hacking" allegations are directed only against defendant Goldfinch. (SAC, at p. 5 ¶ 1 ["Goldfinch hacked the Plaintiff's social media sites, including Wordpress.org, Linkdn.com [sic], Gmail.com, Kickstarter.com, Video, and Gravatar.com."].) Even if the "hacking" allegations were directed against Google/YouTube, plaintiff would lack standing to bring this criminal claim in a civil complaint. (See Penal Code, section 502, subdivision (c) [which does not appear to provide a civil right of action].)

The SAC does not state a cause of action against Google, LLC for "cyber-stalking." Following the previous demurrer, the SAC appears to re-assert against Google, LLC a claim for "cyberstalking." Even assuming arguendo that this were a recognized civil cause of action, the SAC asserts no factual allegations remotely suggesting that Google/YouTube engaged in anything that can be reasonably characterized as "cyberstalking." Again, the relevant allegations are directed only against defendant Goldfinch. (SAC, at p. 5 ¶ 2 [a continuous stalking campaign by … Goldfinch."].)

The SAC's purported claims for defamation and "identity theft" are not asserted against Google, LLC. (See SAC [asserting these claims only against defendant Goldfinch].)

To the extent the SAC seeks to treat Google, LLC as the publisher of defendant Goldfinch's online content, with some exceptions, Title 47, United States Code, section 230(c)

generally shields Google from liability. Plaintiff's SAC again appears to allege that Google wrongfully permitted/allowed Goldfinch to post defamatory content through an imposter account on YouTube. (SAC, at p. 3 ¶ 5; *id*. at p. 4 ¶¶ 2-5.) As stated previously, Section 230 generally shields an interactive computer service (such as Google or YouTube) from liability where Google is being treated as the publisher of third-party content. That is, where a plaintiff seeks relief for an injury allegedly caused by content created and uploaded by a third party (such as defendant Goldfinch), Section 230 generally shields an online platform against claims based on the platform's role of publishing or hosting that content. (*Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 209-210.) To the extent the SAC seeks to hold Google/YouTube liable for publishing Goldfinch's channel on YouTube, with some exceptions (such as for infringement claims), Section 230 would presumptively bar such claims against Google/YouTube.

Plaintiff's request in the Opposition brief for a "criminal prosecution" of Google, and for an order granting "summary judgment" in plaintiff's favor, are misplaced. In his Opposition to the demurrer, plaintiff argues that the Court can and should initiate a criminal prosecution against Google/YouTube and the You/Tube employee who the Opposition brief suggests "assisted" Goldfinch in his allegedly unlawful acts. Criminal prosecutions are outside the scope of the Court's task when ruling on a demurrer, and there is no evidence before the Court that Google/YouTube or any of its employees committed any crime. Plaintiff's Opposition brief also requests that the Court grant "summary judgment" in plaintiff's favor, which the Court cannot do, as no such motion has been filed.

B. Conclusion

Plaintiff has now filed three versions of his Complaint, and this is the Court's second order sustaining Google, LLC's demurrer to all asserted claims. On demurrer, the plaintiff bears the burden of showing how the complaint can be amended to properly state a cause of action against the demurring party. (*McKenney v. Purepac Pharm. Co*. (2008) 167 Cal.App.4th 72, 78 [the burden of demonstrating a reasonable possibility that the defect(s) can be cured by amendment "is squarely on the plaintiff."].) Plaintiff has made no such showing. Accordingly, as to all causes of action asserted against Google/YouTube in the SAC, the demurrer is **SUSTAINED WITHOUT LEAVE TO AMEND.**

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, defendant Google/YouTube's counsel shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 LINE 3

23-CIV-06088 CARIN MARIE ZELLER VS. DAVID ROBERT RAPHAEL, ET AL.

CARIN MARIE ZELLER	JONATHAN M BOWNE
DAVID ROBERT RAPHAEL	MICHAEL INDRAJANA

DEFENSE HEARING ON DEMURRER

TENTATIVE RULING:

Defendant Dave Robert Raphael's (defendant or Raphael) Unopposed Demurrer to plaintiff Carin Marie Zeller's (plaintiff or Zeller) Complaint is **OVERRULED**.

Defendant Raphael's Request for Judicial Notice is **GRANTED** as to exhibit A for the documents' existence as plaintiff's verified discovery responses and otherwise **DENIED**. (See *Middlebrook–Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038.)

Defendant Dave Robert Raphael shall file an answer to the Complaint within ten (10) days of notice of entry of this Order. (Cal. Rules of Court, rule 3.1320(g); Code Civ. Proc., § 472b.)

As a preliminary matter, despite multiple stipulations and orders to continue meeting and conferring, defendant Raphael does not indicate whether he has met and conferred with plaintiff Zeller in person, by telephone, or by videoconference as required by law. (See Code Civ. Proc., § 430.41, subd. (a); May 31, 2024 Declaration of Michael B. Indrajana [Indrajana Decl.], ¶¶ 2–3.) Nevertheless, an insufficient meet-and-confer process is not grounds for ruling on the merits of a demurrer. (See Code Civ. Proc., § 430.41, subd. (a)(4).) The parties are reminded to strictly comply with all further meet-and-confer requirements to avoid future hearings being continued or ordered off calendar.

Raphael demurs unopposed to each of the four causes of action asserted against him in the Complaint, primarily based on the extrinsic evidence of which he requests judicial notice.

A. First Cause of Action: Breach of Contract

The Complaint's first cause of action is for breach of an oral agreement allegedly entered into by Zeller and Raphael "in or about 2017." (Dec. 21, 2023 Complaint, ¶ 8.) The Complaint alleges that initially, the agreement did not include much in the way of terms: it was simply an agreement to negotiate specific scopes of work and prices in proceeding with a project to improve real estate. (*Ibid.*) Pursuant to that agreement, Zeller and Raphael then agreed to "various scopes of work," which Raphael completed and for which Zeller paid all sums requested. (*Id.*, ¶ 9.)

Though Raphael is alleged to have completed the agreed-upon work, the performance was purportedly insufficient, lacking in quality and workmanship and resulting in defects in the "framing, roofing, exterior elements, electrical, plumbing, interior finishes, windows and doors,

and more." (Complaint, ¶ 10.) The Complaint alleges that this defective work constituted a breach of the agreement. (*Ibid.*)

Raphael contends that these allegations fail to state a cause of action for breach of an oral contract for two reasons: (1) the contract is invalid under the statute of frauds, and (2) judicially noticeable evidence shows the alleged contract did not exist.

1. Statute of Frauds

"An agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless it is in writing or memorialized in a writing subscribed to by the party to be charged. (Civ. Code, § 1624, subd. (a)(1).) "The important words are 'by its terms'; i.e., only those contracts which expressly preclude performance within a year are unenforceable." (1 Witkin, Summary of Cal. Law (11th ed. 2024) Contracts, § 364.)

> To fall within the words of the provision . . . , the agreement must be one of which it can truly be said *at the very moment it is made*, 'This agreement is not to be performed within one year'; in general, the cases indicate that *there must not be the slightest possibility that it can be fully performed within one year*.

(*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343 fn. 2, quoting 2 Corbin on Contracts (1960) § 444, at pp. 534–535.)

While Raphael points out that the Complaint's allegations are vague as to whether all performance was in fact completed within one year of the initial agreement "in or about 2017" (Complaint, ¶ 8), there is no indication that Zeller and Raphael expressly agreed that either the work or the payments could not or would not be completed within one year of the initial agreements. That is, as alleged, performance of the oral contact was possible within one year of the making of the contract, regardless of whether performance was in fact not completed until after a year. Raphael also requests judicial notice of Zeller's verified discovery responses, but — even were the Court to consider them — they do not show that the parties agreed to prohibit or preclude performance within a year. (May 31, 2024 Request for Judicial Notice [RJN], exh. A, at p. 8, ll. 9–25.)

Accordingly, the statute of frauds does not invalidate the alleged oral contract, and the demurrer to the first cause of action cannot be sustained on this basis.

2. Evidence of Non-existence of Contract

Raphael also contends that, independent of the statute of frauds, judicially noticeable evidence shows that no contract was ever formed. In her discovery responses, Zeller states:

> The Agreement did not at the outset include any specified scope of work or price. Instead, the agreement envisioned a series of work elements would be agreed upon as the Project moved forward, with Raphael providing pricing and payment

> requests for the agreed upon work. These separate modifications were not in writing.

(RJN, exh. A, p. 8, ll. 15–22.)

Raphael argues that, because there were no specified terms such as a scope of work or price, the 'Agreement' was never an enforceable contract formed by offer and acceptance.

In resolving a demurrer, a court may take judicial notice of discovery responses and disregard the complaint's conflicting allegations. (*Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 83.) However, the responses must be inconsistent to the point of contradiction. (See, e.g., *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605–605 [finding plaintiff's statements not "so inconsistent with facts alleged" as to "render the complaint demurrable"].) Here, far from being inconsistent, the majority of the response repeats the allegations of the Complaint verbatim. (See Complaint, ¶ 8.)

And, regardless of the extrinsic evidence, the Complaint adequately alleges the existence of a contract. The Complaint alleges that, whether or not the parties' initial agreement to negotiate further work was an enforceable contract, Zeller and Raphael later agreed to particular scopes of work for which he requested particular payment and that these agreements were fully executed. (Complaint, ¶ 9.) While the Complaint is to a certain extent unclear as to the specific legal theory underpinning the cause of action (e.g., whether the further agreements constituted modifications to the initial agreement or separate contracts), it adequately alleges the existence of the contract requiring the performance of non-defective construction work in exchange for payment.

Raphael also requests judicial notice of documents he purports to be the City of Woodside's official records pertaining to the project that is the subject of the Complaint. He argues these documents show that Zeller was the true general contractor for the project and thus that Zeller and Raphael did not agree for Raphael to serve as the general contractor. (See RJN, exh. B, WOODSIDE000004, 48, 97–99.)

However, the Court cannot take judicial notice of these documents for Raphael's requested purpose. For "judicial notice at the demurrer stage:"

> the truth of a document's contents will not be considered unless it is an judgment, statement of decision, or order [citations]; the truth of statements may be accepted when made by a party but not those of third parties or an opponent [citations]; and the contents of a document may only be accepted "where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." [Citations.] And the general rule is that the truthfulness and interpretation of a document's contents are disputable.

(*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103–1104.)

Even were the Court to take judicial notice of the fact that the requested documents are official records of the City of Woodside, whether they concern the project in the Complaint,

whether the "Carin Cartt" identified in the records is in fact Zeller, and whether Zeller was in fact the only contractor or general contractor are not "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

Accordingly, the evidence that may be considered at this stage does not contradict the Complaint's allegations of the existence of an oral contract between Zeller and Raphael, and the demurrer to the first cause of action is therefore overruled.

B. Second Cause of Action: Negligence

The Complaint's second cause of action is for negligence, based on Raphael's alleged breach of his duty as a building contractor to perform his work in a competent manner. (Complaint, ¶¶ 15–16.) Raphael contends that judicially noticeable evidence shows that he owed no duty to Zeller, because Zeller was the owner-builder for the project.

Raphael offers no authority for the proposition that a contractor does not need to take reasonable care in performing work for an owner-builder. Nevertheless, the evidence he relies upon are the same purported records of the City of Woodside discussed above. And, for the same reasons, the Court may not take judicial notice of the fact that Zeller was the supervising contractor for the project.

Accordingly, the demurrer to the second cause of action is overruled.

C. Third Cause of Action: Fraud & Deceit

The Complaint's third cause of action is for fraud and deceit by way of misrepresentation, based on Raphael's false statements that certain payments were required to complete the project. (Complaint, ¶¶ 19–24.) Raphael contends that the allegations are insufficient to meet the heightened pleading standard required to plead a cause of action for fraud.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) These elements must be pleaded with specificity, including "facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Id.*, at p. 645.)

In the context of false claims for payment, the requisite specificity is achieved by alleging a false claim for payment, the time period in which the claims were made, in what manner the claims were false, and that payment was made in reliance on the claim. (See *State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Company* (2023) 90 Cal.App.5th 1119, 1137–1138, as modified on denial of reh'g (May 30, 2023).) The Complaint alleges each of these: Raphael made claims for payment during the performance of the project in 2017 and 2018 (Complaint, ¶¶ 9, 19), the claims were false because they were not required for construction costs as claimed but

were intended for Raphael's personal use (*id.*, ¶¶ 19–20, 22), and Zeller made the payments as requested in reliance without knowledge that the claims were baseless (*id.*, ¶¶ 21, 24).

Furthermore, even for fraud, "less specificity is required when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy; even under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party. (*Lauckhart v. El Macero Homeowners Assn.* (2023) 92 Cal.App.5th 889, 904 [brackets, quotation marks, citations, & ellipses omitted].) The falsity of any particular request for payment is presumably within Raphael's unique knowledge as the alleged requestor and as the person most familiar with the work for which the payments were intended.

Accordingly, the demurrer to the third cause of action is overruled.

D. Fourth Cause of Action: Conversion

The Complaint's fourth cause of action is for conversion, based on the taking of specific funds intended to be used on the project. Notably, there appears to be a typographical error in the allegation, as the Complaint alleges that "Plaintiff took possession of such cash, and intentionally appropriated and misused it, and interfered with Plaintiff's use and intentions for the said funds, which was to pay for the Project." (Complaint, ¶ 27.)

Conversion by the defendant's wrongful act or disposition of property rights is a necessary element of a cause of action. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) Generally, the rule of liberal construction of pleadings does not "permit the insertion, by construction, of averments which are neither directly made nor within the fair import of those which are set forth. On the contrary, facts necessary to a cause of action but not alleged must be taken as having no existence." (*Feldesman v. McGovern* (1941) 44 Cal.App.2d 566, 571.)

However, the fourth count does not stand alone and instead incorporates the preceding allegations of the Complaint. (Complaint, ¶ 28.) This includes the allegations found under the preceding cause of action — that Raphael acquired the cash by fraud and converted it to his own use. (*Id.*, ¶¶ 19–20.) Therefore, the Complaint adequately alleges wrongful conduct on the part of Raphael.

He nevertheless also contends that there is no cause of action stated for conversion because the Complaint merely alleges the taking of a generalized amount of money. Indeed, "[m]oney cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.)

However, the Complaint alleges that the cash taken consisted of "[s]pecific funds from [Zeller's] cash assets [that] were earmarked for the Project, to pay Project costs." (Complaint, ¶ 27; see *id.*, ¶ 19.) This is sufficient, as a plaintiff need only allege a sum or sums that are ascertain*able*, not that they have been ascertain*ed*. (See *Mendoza v. Continental Sales Co.* (2006)

140 Cal.App.4th 1395, 1400–1401, 1405 [allegation that agent sold fruit at higher price than reported and kept profit, without identifying specific sales or amounts, was sufficient].) Thus, the fact that Zeller's discovery responses reveal that she is still investigating which sums were converted does nothing to show that the sums are incapable of ascertainment. (See RJN, exh. A, pp. 4–5.)

Accordingly, the demurrer to the fourth cause of action is overruled.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for plaintiff shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 LINE 4

23-CIV-06088 CARIN MARIE ZELLER VS. DAVID ROBERT RAPHAEL, ET AL.

CARIN MARIE ZELLER	JONATHAN M BOWNE
DAVID ROBERT RAPHAEL	MICHAEL INDRAJANA

DEFENSE MOTION TO STRIKE PORTIONS OF COMPLAINT

TENTATIVE RULING:

Defendant Dave Robert Raphael's (defendant or Raphael) Unopposed Motion to Strike Portions to plaintiff Carin Marie Zeller's (plaintiff or Zeller) Complaint is **GRANTED IN PART** and **DENIED IN PART.**

Defendant Raphael's Request for Judicial Notice is **GRANTED** as to exhibit A for the documents' existence as plaintiff's verified discovery responses and otherwise **DENIED**. (See *Middlebrook–Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038.)

As a preliminary matter, despite multiple stipulations and orders to continue meeting and conferring, defendant Raphael does not indicate whether he has met and conferred with plaintiff Zeller in person, by telephone, or by videoconference as required by law. (See Code Civ. Proc., § 435.5, subd. (a); May 31, 2024 Declaration of Michael B. Indrajana [Indrajana Decl.], ¶¶ 2–3.) Nevertheless, an insufficient meet-and-confer process is not grounds for ruling on the merits of a motion to strike. (See Code Civ. Proc., § 435.5, subd. (a)(4).) The parties are reminded to strictly comply with all further meet-and-confer requirements to avoid future hearings being continued or ordered off calendar.

Defendant Dave Robert Raphael shall file an answer to the Complaint within ten (10) days of notice of entry of this Order. (Cal. Rules of Court, rule 3.1320(g); Code Civ. Proc., § 472b.)

Raphael moves to strike the allegations stating that he served as a contractor in connection with the project that is the subject of the Complaint and to strike the request for attorney's fees from the prayer.

A. Contractor Allegations

Raphael contends that the allegations that he acted as a contractor are false, referencing Zeller's verified discovery responses and records from the City of Woodside.

In her discovery responses, Zeller states:

> The Agreement did not at the outset include any specified scope of work or price. Instead, the agreement envisioned a series of work elements would be agreed upon as the Project moved forward, with Raphael providing pricing and payment

> requests for the agreed upon work. These separate modifications were not in writing.

(RJN, exh. A, p. 8, ll. 15–22.)

Raphael argues that, because there were no specified terms such as a scope of work or price, the 'Agreement' was never an enforceable contract formed by offer and acceptance, and therefore he could not have served as a contractor. Raphael provides no authority that an enforceable contract is necessary to serve as a 'contractor.'

Raphael also requests judicial notice of documents he purports to be the City of Woodside's official records pertaining to the project that is the subject of the Complaint. He argues these documents show that Zeller was the true general contractor for the project and thus that Zeller and Raphael did not agree for Raphael to serve as the general contractor. (See RJN, exh. B, WOODSIDE000004, 48, 97–99.)

However, the Court cannot take judicial notice of these documents for Raphael's requested purpose. At the pleading stage:

> the truth of a document's contents will not be considered unless it is an judgment, statement of decision, or order [citations]; the truth of statements may be accepted when made by a party but not those of third parties or an opponent [citations]; and the contents of a document may only be accepted "where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." [Citations.] And the general rule is that the truthfulness and interpretation of a document's contents are disputable.

(*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103–1104.)

Even were the Court to take judicial notice of the fact that the requested documents are official records of the City of Woodside, whether they concern the project in the Complaint, whether the "Carin Cartt" identified in the records is in fact Zeller, and whether Zeller was in fact the only contractor or general contractor are not "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

Accordingly, the evidence that may be considered at this stage does not show that the allegations that Raphael acted as a contractor are false, and the request to strike them is therefore denied.

B. Prayer for Attorney's Fees

The Complaint includes attorney's fees as a remedy requested on the second cause of action for negligence. (Complaint, p. 9, l. 6.) "[I]n the absence of an express agreement or statute, each party to a lawsuit is responsible for its own attorney's fees." (*Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1, 5; see Code of Civ. Proc., § 1021.)

There is no basis for the requested fees here, and the phrase "attorney fees and" at line 6 of page 9 is hereby stricken from the Complaint.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for plaintiff shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 LINE 5

23-CLJ-02619 I.Q. DATA INTERNATIONAL, INC. VS. ASHLEY P. EJANDA, ET AL.

I.Q. DATA INTERNATIONAL, INC.	MATTHEW PERKINS
ASHLEY P. EJANDA	PRO SE

DEFENSE MOTION TO VACATE DEFAULT JUDGMENT

TENTATIVE RULING:

Initially, the court notes that defendant has not provided the correct address for the hearing. Department 28 is located at the Central Courthouse, Courtroom I, 800 North Humboldt St., San Mateo, CA 94401. (*See* Cal. Rules of Court, Rule 3.1110 [the Notice "must specify" the location of the hearing].)

Defendant Ashley P. Ejanda's Motion to Vacate Default Judgment (Motion) is **DENIED**.

A. The Motion Was Not Properly Served

Defendant filed two proofs of service with the moving papers, each of which includes defendant's declaration that she served the papers herself, in violation of Code of Civil Procedure, section 1013a, subdivision (1). Defendant also included a "Certificate of Service" with the moving papers stating that she served the moving papers herself, in violation of section 1013a, subdivision (2). The Certificate of Service also lacks the declaration required by Code of Civil Procedure, section 2015.5.

B. The Motion Does Not Request that the Default Be Set Aside

The Motion states only that defendant moves to set aside the default judgment signed by the Court on December 7, 2023, and filed the following day (Default Judgment), rather than the default entered against her on September 1, 2023, *and* the Default Judgment. If the underlying default has not been set aside, then no other reasons to set aside a default judgment need be considered. As explained by the court in *Cumberpatch v. Nolan*:

> Plaintiffs attack that order [vacating default judgment] on many grounds. One of them is decisive, namely, that defendant Ray's default has never been set aside. Therefore it is unnecessary to consider the others, for the reason that ". . . even if there were a sound basis for reversing the order, such a reversal would serve no useful purpose. Neither the motion to set aside the default judgment nor this appeal from the denial of that motion is an attack upon the entry of the default. Even if the judgment were now vacated, such action would be abortive. The entry of default, from which appellant does not seek relief by this appeal, stands of record against him and entitles the city to a judgment upon its complaint."

(*Cumberpatch v. Nolan* (1954) 125 Cal.App.2d 205, 207 (1954) [internal citations omitted].)

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for plaintiff shall prepare for the Court's signature a written order consistent with the Court's ruling, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and by the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

JULY 31, 2024 Law and Motion Calendar
Judge: Honorable Nicole S. Healy, Department 28

2:00 LINE 6

24-CIV-00298 SANDRA OLIVERA VS. JORGE ALBERTO MONGE, JR, ET AL.

SANDRA OLIVERA	ARSEN SARAPINIAN
JORGE ALBERTO MONGE	P. CHRISTIAN SCHELEY

MOTION TO INTERVENE

TENTATIVE RULING:

Initially, the court notes that plaintiff has provided the improper address for the hearing. Department 28 is not located in Redwood City as the notice states, but instead at the Central Courthouse, Courtroom I, 800 North Humboldt St., San Mateo, CA 94401. (See Cal. Rules of Court, Rule 3.1110 [the Notice "must specify" the location of the hearing].)"

The unopposed motion of Ace American Insurance Company to intervene in this action is **GRANTED** pursuant to Code of Civil Procedure section 387, subdivision (d)(1)(A) and Labor Code section 3853. The proposed complaint in intervention, attached as Exhibit A to the declaration of Katherine Hanson shall be filed no later than ten (10) days from notice of entry of order.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, intervenor's counsel shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00 LINE 7

24-UDL-00649 SARA DAVENPORT VS. RICHARD MEDINA, ET AL.

SARA DAVENPORT	PAUL K. LEE
RICHARD MEDINA	FRANCOIS X. SORBA

DEFENSE MOTION TO SET ASIDE DEFAULT JUDGMENT

TENTATIVE RULING:

Defendant Richard Medina's Motion to Set Aside Default and Default Judgment is **GRANTED** pursuant to Code of Civil Procedure, section 473, subdivision (b).

Defendant moves for discretionary relief from entry of default pursuant to Code of Civil Procedure, section 473, subdivision (b), under which relief may be granted "upon any terms as may be just … from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." In ruling on a motion for relief from default, doubts are to be resolved in favor of relief, and an order denying relief is scrutinized more carefully on appeal than one granting relief. (*Lasalle v. Vogel* (2019) 36 CA5th 127, 134.) Discretionary relief under Section 473, subdivision (b) is available within a reasonable time; there must be some evidence as the basis for the exercise of the court's wide discretion in determine whether the time taken to file such a motion is reasonable. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137.)

Defendant bases his request for relief on his emotional distress, and his mistake in trusting plaintiff's representations "that everything was fine, that they could get back together, that one day he will get his properties back," and that papers being served were just formalities. (MP&A iso Motion, at pp. 2:25 – 3:23.) Plaintiff argues that defendant's defenses relate to title, which is not to be adjudicated in this action, and that emotional distress did not exist in defendant's legal actions beginning on June 7, 2024. (Opp. at pp. 2:20 – 3:6.)

Defendant obtained counsel on June 10, 2024. From that date, it took 25 days until July 5, 2024 for this Motion to be filed. Counsel for defendant explains that he had to travel twice "from San Anselmo to San Carlos" in order to meet with his client before this Motion could be filed, and that it was extremely difficult to bring this Motion in light of "Mr. Medina's condition and feelings for Ms. Davenport." (Declaration of Francois X. Sorba [Sorba Decl.], ¶¶ 10-11.)

With respect to the question of defenses relating to title, defendant's proposed First Amended Answer contains a number of additional defenses, including that the property is subject to the Tenant Protection Act of 2019 and plaintiff failed to comply with it, that the Complaint fails to state a cause of action, that plaintiff waived, changed, or canceled the notice, that the notice or the complaint were issued or filed to retaliate, that plaintiff accepted rent to cover a period of time after the expiration of the notice, and other defenses. (Declaration of Paul K. Lee [Lee Decl.], ¶ 3, exh. 2.) The issue of whether title is to be adjudicated in this action is therefore

not dispositive to the question of whether defendant should be afforded an opportunity to defend this action on the merits.

The default and default judgment for possession entered in this action are hereby **SET ASIDE** and **VACATED**. Defendant is to file a responsive pleading within five (5) court days of notice of entry of this order.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, defendant's counsel shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to California Rules of Court, Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the California Rules of Court. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

POSTED: 3:00 PM