

**DEPARTMENT 50 LAW AND MOTION RULINGS**

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Case Number: BC646882 Hearing Date: July 10, 2017 Dept: 50

*Superior Court of California*

*County of Los Angeles*

*Department 50*

JOHN C. DEPP II, et al.

Plaintiffs,

vs.

THE MANDEL COMPANY, INC., et al.

Defendants.

Case No.: BC 646882

Hearing Date: July 10, 2017

Hearing Time: 8:30 a.m.

**[TENTATIVE] ORDER RE:**

- A. CROSS-DEFENDANTS' DEMURRER TO THE FIRST AMENDED CROSS-COMPLAINT
- B. CROSS-DEFENDANTS' MOTION TO STRIKE THE FIRST AMENDED CROSS-COMPLAINT

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***Background***

This action was filed by John C. Depp II (“Depp”) and Edward L. White (“White”) (jointly, “Plaintiffs”) on January 13, 2017, against The Mandel Company, dba The Management Group (“TMG”), and Joel and Robert Mandel (collectively “Defendants”). Plaintiffs allege that Depp reasonably relied on Defendants to handle his financial and certain legal affairs, and in doing so, lost tens of millions of dollars due to Defendants’ gross mismanagement and fraud.

TMG filed a cross-complaint on January 31, 2017, against Depp, White, Edward White & Co., LLP, Scaramanga Bros., Inc., and L.R.D. Productions, Inc. (collectively, “Cross-Defendants”). On May 1, 2017, TMG filed the operative First Amended Cross-Complaint (“FACC”). The gravamen of the

FACC is that Depp in fact squandered his own money by virtue of his overly extravagant lifestyle that he could not maintain, despite TMG's continued efforts to warn of and protect him from financial ruin. In particular, TMG loaned Depp \$5,000,000 to help him to avoid a financial crisis, \$4.2 million of which is still due. (FACC ¶ 81-92.) TMG asserts causes of action for (1) declaratory relief, (2) and (3) breaches of oral contract, (4) breach of implied contract, (5) breach of written contract, and (6) promissory fraud.

Cross-Defendants now demur to the first and sixth cause of action on the grounds that they fail to state facts sufficient to constitute a cause of action under CCP § 430.10(e).

### ***Demurrer***

“To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged.” (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967.) A demurrer “does not admit contentions, deductions or conclusions of fact or law.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.)

#### **A. Declaratory Relief**

A plaintiff seeking declaratory relief must allege that an actual, present controversy exists, and must state the facts of the respective claims concerning the disputed subject matter. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.) The complaint will be found sufficient if it sets forth facts showing the existence of an actual controversy relating to the parties' legal rights and duties, and requests the court to adjudge these rights and duties. (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A declaratory relief claim should not be used to determine issues that are already engaged by other causes of action. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 324.) On the other hand, a party who has alleged a claim for declaratory relief cannot deny the existence of an actual controversy arising out of the same facts. (*See Ludgate* 82 Cal. App. 4th at 604.)

“The court ... may sustain a demurrer without leave to amend if it determines that a judicial declaration is not ‘necessary or proper at the time under all the circumstances.’” (*DeLaura v. Beckett*

(2006) 137 Cal.App.4th 542, 545; *see also Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648 (demurrer properly sustained where no allegations that declaratory relief would “have any practical consequences.”).)

Cross-Defendants argue that TMG’s declaratory relief cause of action fails because there is no actual controversy for past wrongs and because the issues raised in the claim are already being addressed in other claims before the Court. TMG opposes, arguing that declaratory relief redressing past wrongs is not precluded as long as there is some guidance provided to the parties in making the judgment. TMG further argues that Cross-Defendants cannot deny a judicable controversy exists where they have alleged the same controversy in their First Amended Complaint. Finally, TMG argues that the claim cannot be dismissed as superfluous where it is raised in the same lawsuit and is based on the same or similar conduct as another claim.

The FACC alleges the following in its cause of action for declaratory relief: “Cross-Complainant seeks a declaration that (1) Cross-Defendant Depp authorized and directed all of TMG’s payments on his behalf; (2) TMG always filed Depp’s tax returns timely and only failed to pay the full extent of Depp’s tax obligations because Depp was squandering vast sums of money and had insufficient funds to timely pay all of his taxes; and (3) Depp caused his own financial waste by acting directly contrary to TMG’s repeated advice over the last 17 years and the advice of numerous of Depp’s other advisors.” (FACC ¶ 117.)

The Court finds that these allegations seek declarations solely as to past events. What effect such declarations as to these past events may have on the future conduct of the parties is not alleged, aside from a conclusory allegation that making the declarations has a prospective application based on Cross-Defendants’ set-off claim in the ninth cause of action of the FAC. (FACC ¶ 116.) TMG does not explain how the Court making the above declarations will inform the parties of their future rights and responsibilities. The ninth cause of action of Cross-Defendants’ FAC seeks to enjoin a foreclosure sale selling properties as collateral for a note Cross-Defendants allege is void. This cause of action does not seek a declaration as to future duties of the parties.

Likewise, TMG does not claim that its declaratory relief action is a mirror image of Cross-Defendants’ tenth cause of action for declaratory relief, as was the case in *Ludgate*. There, the insured

was seeking a declaration from the court that its insured was responsible to cover certain claims; in opposition, the insurer was seeking a declaratory judgment that it was *not* responsible for those claims. (82 Cal.App.4th at 604.) Here, the FAC's tenth cause of action is seeking declarations that the agreements between Depp and TMG are voidable and invalid and that Depp is entitled, *inter alia*, to disgorgement and restitution of fees paid to TMG. (FAC ¶ 176.) TMG's action for declaratory relief seeks declarations placing culpability for Depp's financial woes on him, and freeing TMG of any *past* wrongdoing. No results or effects of such declarations on the parties' responsibilities or duties are alleged. Accordingly, the demurrer as to TMG's first cause of action is sustained.

#### B. Promissory Fraud

To plead a cause of action for fraud, Plaintiff must plead facts showing the following elements: (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) Fraud must be pleaded specifically. To survive demurrer, plaintiff must plead facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (Id.) "[C]ontract remedies alone do not address the full range of policy objectives underlying the action for fraudulent inducement of contract" (Id. at 646.)

Cross-Defendants argue that the Economic Loss Rule bars the sixth cause of action. "[W]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) "The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." (*Food Safety Net Services v.*

*Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1130.) The economic loss rule, a rule governing contracts for sale of goods and the purely economic harm that might result in breaches of contract, does not apply here, where TMG alleges fraud supplemental to the breach of contract. It also is not clear that the Economic Loss Rule applies to service contracts rather than contracts for the purchase of goods.

The Court also does not find that TMG's allegations in its promissory fraud cause of action are based on duties arising from any previous agreement between the parties, and do not lie in tort. Contrary to Cross-Defendants' contentions, TMG has not simply alleged that it was not paid for its services, thus constituting a breach of contract. Instead, TMG alleges additionally that all during the final two weeks of March while TMG was working to transition the files, in an effort to induce the completion of the work, Cross-Defendants perpetrated a fraud in misrepresenting repeatedly that they intended to pay when the transition was complete. Thus, it is not simply alleged that Cross-Defendants did not pay for past work, but that Cross-Defendants repeatedly lied about payment in order to induce TMG to do future work and to continue to do that work until completing the transition. (FACC ¶¶ 149-150.) TMG alleged that Cross-Defendants never intended to abide by their promises and TMG reasonably relied on the alleged false promises by doing the 386 hours of work during those last two weeks of March. (*Id.*) TMG has sufficiently alleged the elements of an action for promissory fraud with sufficient specificity, and the demurrer is overruled as to the sixth cause of action.

### ***Motion to Strike***

A court may strike any "irrelevant, false or improper matter inserted in any pleading" or any part of a pleading "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP §436.) "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." (CCP §437.)

Cross-Defendants argue that portions of the FACC must be stricken as they are only included to support TMG's declaratory relief cause of action, which must also be stricken. Defendants further argue

that, even if a demurrer is not sustained or motion to strike not granted as to the first cause of action, these allegations must be stricken as irrelevant to any other causes of action alleged. TMG counters by arguing that the declaratory relief cause of action is proper, and, even if that cause of action is stricken, the allegations should remain because they are relevant to TMG's defenses to Cross-Defendants' claims in the FAC, which, TMG argues, Cross-Defendants acknowledge.

The allegations Cross-Defendants seek to strike are directly relevant to the declaratory relief cause of action, the demurrer to which is being sustained. The question, then, is whether these allegations are relevant to the remaining causes of action, or to some defenses, as TMG argues. The Court finds that they are not. TMG's second cause of action is for breach of oral contract arising out of an agreement that TMG should receive a 5% commission from Depp's payment for *Pirates of the Caribbean*. The third cause of action for breach of oral contract arises out of a debt due on a credit card allegedly used by Depp. The fourth cause of action is also related to a credit card debt allegedly owed by Depp. The fifth cause of action for breach of written contract arises out of an alleged written agreement governing TMG's transitioning their files to Depp's new representatives. Finally, the sixth cause of action relates to the same final transition.

The pages of allegations of Depp's allegedly outrageous spending clearly have no relevance to the 5% commission allegedly owed TMG from the *Pirates of the Caribbean* payout, or to the final work done by TMG on transitioning their files to Depp's new representatives. They would seem more relevant to the allegations of breach of oral contract related to the credit card debts, except that TMG does not specifically allege which exact expenditures by Depp were spent on which card, leading to that debt owed. Without specifics, the Court cannot find they are relevant to any cause of action in the FACC.

CCP § 428.10 governs the filing of cross-complaints. That section states that a cross-complaint may allege "either or both of the following:"

- (a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section 1230.010) of Part 3.

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

Nowhere in that section are defenses to another complaint's claims permitted.

Furthermore, § 428.40 requires that cross-complaints be a separate document. Accordingly, even if it turns out to be true that the allegations may be essential to TMG's defenses to the allegations made in the FAC, they are not essential to the causes of action alleged in the FACC.

Accordingly, Cross-Defendants' motion to strike is granted.

***Leave to Amend***

TMG has not indicated how it can amend the declaratory relief cause of action. Unless it provides some appropriate basis for so doing at the hearing, the demurrer is sustained without leave to amend.

***Conclusion***

The Court sustains Cross-Defendants' demurrer as to the first cause of action without leave to amend and overrules the demurrer as to the sixth cause of action. The Court grants Cross-Defendants' motion to strike. Cross-Defendants must answer the FACC within 10 days of this Order.

Cross-Defendants are ordered to provide notice of this ruling.

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