

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable James P. Kleinberg Presiding

Paula Bastian, Courtroom Clerk

Joanne Rocha, Court Reporter

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To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS

DATE: 03/16/10 TIME: 9 A.M.

PREVAILING PARTY SHALL PREPARE THE ORDER

(SEE [RULE OF COURT 3.1312](#))

LINE #	CASE #	CASE TITLE	RULING
LINE 1	108CV115366	Ketera Technologies v SDE Business	Click on LINE 1 for ruling
LINE 2	109CV137226	Williams v Classic Residence By Hyatt	Defendant's Demurrer and Motion to strike first amended complaint unopposed and GRANTED with 10 days' leave to amend
LINE 3	109CV150228	Truong v Century 21 Alpha	Click on LINE 3 for ruling
LINE 4	109CV150537	Watkins v United Parcel	Click on LINE 4 for ruling
LINE 5	109CV156471	FIA Card Service v Smith	Click on LINE 5 for ruling
LINE 6	106CV061913	Ledman v Butt	Defendant's Motion for summary judgment unopposed and GRANTED
LINE 7	106CV069821	Amidy v Nederlander-Downtown Inc.	Motions for Charging membership interest and appointing receiver unopposed and GRANTED
LINE 8	108CV114762	De La Calzada v Estillore	Defendants' Motions to dismiss action for failure to prosecute DENIED as untimely pursuant to CRC 3.1342 (a)
LINE 9	109CV157252	Zehring v Pappas	Click on LINE 9 for ruling
LINE 10	109CV157999	Rashkin v KSL II Management Operations	Motion to compel arbitration GRANTED
LINE 11	110161999	Citifinancial Auto v Lazzarini	Application for writ of possession unopposed and GRANTED
LINE 12	110CV163167	Matheson v Russell	Petitioners' Petition to compel arbitration unopposed and GRANTED
LINE 13	108CV125713	Charter Adjustments v Long	Motion to set aside default judgment DENIED
LINE 14	109CV140590	Xerox Corporation v Prima Investment Group	Claim of Exemption
LINE 15	109CV143211	Alfa Tech Consulting Engineers v Foegelle	Plaintiff's Motion for summary judgment unopposed and GRANTED
LINE 16	109CV143922	Clark v Greves	Motion for terminating sanctions DENIED

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LINE 17	109CV143969	Santa Clara County Federal v Rivera	Claim of Exemption
LINE 18	109CV158728	FIA Card Services v Kuiper	Defendant's Motion to compel arbitration unopposed and GRANTED
LINE 19	108CV116127	Payless Car Rental v Seth	Off Calendar

Calendar line 1

Case Name: *Ketera Technologies, Inc. v. A.T. Kearney, et al.*

Case No.: 1-08-CV-115366

The demurrer of defendants Electronic Data Systems, EDS an HP Company, and Hewlett-Packard Company, Inc. (Defendants) to the first amended complaint (FAC) for breach of contract of plaintiff Ketera Technologies, Inc. (Plaintiff) is SUSTAINED with 10 days' leave to amend. Plaintiff has not alleged facts to establish the liability of the moving Defendants for this alleged breach of contract. Plaintiff has not alleged that these Defendants were parties to the contract or intended beneficiaries of the contract. Plaintiff has not alleged these Defendants are liable for the alleged breach of contract based on successor liability principles.

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Calendar line 2

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Calendar line 3

Case Name: *Nghi Truong, et al. vs. Century 21 Alpha, et al.*

Case No.: 1-09-CV-150228

Defendants Countrywide Home Loans, Inc. (“Countrywide”) and Real Time Resolutions, Inc. (“Real Time”) each demur to the Complaint filed by plaintiffs Nghi and Diana Truong (“Plaintiffs”) on the ground that it fails to state sufficient facts to constitute a cause of action. Real Time demurs to the Complaint on the additional ground of uncertainty.

Real Time’s demurrer for uncertainty is OVERRULED. Demurrers for uncertainty will only be sustained where the pleading is so inadequate that the defendant cannot reasonably respond, i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly’s of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Although the Complaint does not adequately allege Real Time’s role in the subject loan transactions, the Complaint is not so confusing that Real Time cannot admit or deny the allegations that are generally directed at all of the defendants. The dearth of factual allegations against Real Time is more appropriately addressed in Real Time’s general demurrer for failure to state sufficient facts.

The demurrers to the first cause of action for fraud/misrepresentation are SUSTAINED with 10 days’ leave to amend. Plaintiffs fail to state sufficient facts to constitute a cause of action for fraud against Countrywide and Real Time.¹ It is well-settled that every element of a fraud claim must be pled with specificity. (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216; *Wilhelm v. Pray, Price Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332). The particularity requirement necessitates pleading facts that show how, when, where, to whom and by what means the alleged misrepresentations were tendered. (*Lazar v. Sup. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal.4th 631, 645; *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993). Here, Countrywide is alleged to be the lender who provided financing for the purchase of the Rockport and Stonehenge properties, but there is no allegation that an agent of Countrywide made misrepresentations (or let alone spoke) to Plaintiffs. Since Countrywide is a corporate defendant, Plaintiffs must allege the names of the persons who made the misrepresentations and their authority to speak for the corporation. (*Lazar, supra*, 12 Cal.4th at p. 645.) As for Real Time, not only are there no allegations that Real Time made misrepresentations to Plaintiffs, there are no allegations whatsoever regarding Real Time’s involvement in the subject loans other than a conclusory paragraph at the beginning of the Complaint in which Plaintiffs allege that Real Time is the agent of Countrywide, and that Real Time’s actions are imputed to Countrywide. (See Compl. ¶ 6.) However, there are simply no allegations of actions by Real Time to impute to Countrywide. The rule of specificity is relaxed when the allegations indicate that the defendant necessarily possesses full information concerning the facts of the controversy or when the facts lie more in

¹ However, it does not clearly and affirmatively appear from the face of the Complaint that the first cause of action for fraud is time-barred. Under Code of Civil Procedure section 338 subdivision (d), the statute of limitations for fraud is three years, but the cause of action “is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud...” The Complaint was filed on August 19, 2009. Countrywide and Real Time argue the fraud claim is untimely because it was filed more than three years after the loans closed (June and November of 2005, respectively). However, there is no basis to infer that Plaintiffs discovered the facts constituting the fraud on the date the loans closed. Plaintiffs do not affirmatively allege when they discovered the facts constituting the alleged fraud.

the knowledge of the opposite party. (*Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.) Here, however, there is no reason to conclude that Countrywide or Real Time possess full or more knowledge of the facts of the controversy than Plaintiffs, since there is no allegation of any misrepresentations made by Countrywide or Real Time.

The demurrers to the second cause of action for negligence are also SUSTAINED with 10 days' leave to amend. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. Thus, for example, a lender has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment. The success of the [borrower's] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect. Liability to a borrower for negligence arises only when the lender actively participates in the financed enterprise beyond the domain of the usual money lender." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [internal citations and quotation marks omitted].) Here, Plaintiffs do not allege any facts to support the inference that Countrywide participated in the subject loan transactions as anything other than a mere lender of money. Although Plaintiffs allege that the defendants made material misrepresentations, this is more of an allegation of fraud, and as discussed above, Plaintiff fails to allege fraud with the requisite particularity. As for Real Time, there are no facts even linking Real Time with the subject loan transactions other than the general allegation that Real Time is Countrywide's agent, but there are no alleged acts committed by Real Time in connection with Plaintiffs' loans.

Furthermore, the second cause of action appears to be time-barred. The statute of limitations for negligence is two years. (See Code Civ. Proc., § 339 subd. (1) ["action upon a contract, obligation or liability not founded upon an instrument of writing"].) In general, the statute of limitations begins to run when the cause of action is complete with all of its elements.

(*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) "[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514.) Here, Plaintiffs suffered appreciable harm on the date the loans closed (June/November 2005) because this is when they were placed into risky loans without adequate knowledge of the risks. The Complaint was not filed until August of 2009. The discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the factual basis for the cause of action (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397), in order to benefit from the discovery rule, the plaintiff must plead and prove the facts showing: (1) lack of knowledge; (2) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); and (3) how and when he did actually discover the cause of action. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525.) Plaintiffs do not allege any facts justifying delayed discovery.

The demurrers to the third cause of action for intentional infliction of emotional distress ("IIED") are also SUSTAINED with 10 days' leave to amend.² To be actionable under a cause

² As for Countrywide's timeliness argument, the statute of limitations for IIED is two years. (See Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) Assuming, for the sake of argument, that the actions of Countrywide were outrageous and extreme for purposes of IIED, Plaintiffs would not have suffered emotional distress until the markets declined, when they were unable to make their mortgage payments, and Countrywide refused to help them refinance. Thus, the appreciable harm did not occur on the date

of action for IIED, “outrageous” conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized society. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.) While the outrageousness of a defendant’s conduct normally presents an issue of fact to be determined by the trier of fact, the court may determine in the first instance, whether the defendant’s conduct may reasonable be regarded as so extreme and outrageous as to permit recovery. (*Fowler, supra*, 196 Cal.App.3d at p. 44.) Conduct is more likely to be found outrageous if the defendant had a relationship with the plaintiff that would cause his or her conduct to have a particularly severe impact on the plaintiff such as an employer-employee relationship. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn. 2.) Here, although Plaintiff alleges they were in a “special” relationship with the defendants, this is a conclusory allegation, and the facts alleged in the Complaint do not support the inference that Countrywide acted in any capacity except as lender for the two loans. Although Plaintiff alleges that the defendants’ financial scheme was complicated and Plaintiffs were vulnerable, Plaintiffs cite no authority for the position that a mortgage lender has a duty to protect vulnerable borrowers from risky and complicated loans, or that a lender’s failure to prevent a borrower’s default constitutes extreme conduct that exceeds all bounds usually tolerated in civilized society. As for Real Time, the Complaint is void of any allegations of extreme or outrageous conduct, or any conduct for that matter, on the part of Real Time.

The demurrers to the fourth cause of action for breach of contract are also SUSTAINED with 10 days’ leave to amend. In this cause of action, Plaintiffs allege that Countrywide breached the loan agreements by turning a “blind eye” to them when they asked to refinance their loans. However, Plaintiffs fail to allege that Countrywide was contractually obligated to refinance the loans upon the borrowers’ request. Such an obligation is certainly not imposed in the law on creditors. (See *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 477 [finding no support for the position that a bank owes a duty of reasonable forbearance in enforcing its creditor’s remedies].) As for Real Time, the Complaint fails to allege any sort of contractual relationship between Plaintiff and Real Time, let alone the terms of said contract, and Real Time’s breach thereof. On the issue of rescission, since the Complaint fails to sufficiently allege fraud, Countrywide is correct that there is no ground for rescission of the subject loans under Civil Code section 1689 subdivision (b). Furthermore, Countrywide and Real Time correctly point out that in order to effect a rescission, the rescinding party must “[r]estore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise...” (Civ. Code, § 1691, subd. (b).) Here, in order to rescind the loan agreements, Plaintiffs must restore to Countrywide the loan amounts that were used to purchase the Rockport and Stonehenge Properties. Plaintiffs fail to allege that they have offered to restore the loan amounts to Countrywide.

The demurrers to the fifth cause of action for civil conspiracy are also SUSTAINED with 10 days’ leave to amend. Plaintiffs concede the demurrers are well-taken.

The demurrers to the sixth cause of action for rescission are also SUSTAINED with 10 days’ leave to amend. As discussed above, Plaintiffs fail to allege that they have offered to restore the loan amounts to Countrywide in order to rescind the loan agreements.

the loans were executed. Since it is not clear from the Complaint when the appreciable harm (i.e., emotional distress) would have been incurred, the statute of limitations argument is without merit.

The demurrers to the seventh cause of action for constructive trust are also SUSTAINED with 10 days' leave to amend. Plaintiffs concede the demurrers are well-taken.

The demurrers to the eighth cause of action for declaratory relief are also SUSTAINED with 10 days' leave to amend. The declaratory relief cause of action merely restates all of Plaintiffs' unsupported claims of fraud, breach of fiduciary duty, and breach of contract. A declaratory relief action will not lie to determine issues raised in other causes of action before the Court. (*California Ins. Guar. Ass'n v. Sup. Ct. (Jakes)* (1991) 231 Cal.App.3d 1617, 1623.)

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Calendar line 4

Case Name: *Watkins v. United Parcel Service General Services Co. aka/dba UPS, et al.*
Case No.: 1-09-CV-150537

Defendants United Parcel Service General Services Co. aka/dba UPS and Thomas Knab (“Knab”) (collectively, “Defendants”) demur to plaintiff Jennifer Watkins’s (“Plaintiff”) entire second amended complaint (“SAC”), based on (1) uncertainty, pursuant to Code of Civil Procedure (“CCP”) section 430.10, subdivision (f); and (2) failure to state facts sufficient to constitute a cause of action, pursuant to CCP section 430.10, subdivision (e).

Defendants also move to strike various paragraphs of the SAC, pursuant to CCP section 436.

Demurrer

Defendants’ demurrer is OVERRULED in its entirety.

Plaintiff’s entire SAC is not uncertain. (*Khoury v. Maly’s of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Plaintiff states sufficient facts to constitute the first cause of action for negligence. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Plaintiff does not need to plead that Defendants actually impacted her bicycle, as Plaintiff sufficiently alleges that her injuries were proximately caused by Knab’s negligence.

Plaintiff states sufficient facts to constitute the second cause of action for negligence per se. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.) Plaintiff sufficiently pleads that Defendants violated Vehicle Code section 22107 by alleging that Knab changed lanes in an unsafe manner. Plaintiff does not need to plead that Knab failed to appropriately signal prior to making any movements in the Vehicle, as Plaintiff adequately pleads one of the two ways a defendant can violate Vehicle Code section 22107. Plaintiff adequately alleges facts establishing the other three elements of negligence per se.

Plaintiff states sufficient facts to constitute the third cause of action for intentional infliction of emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 [intentional infliction of emotional distress].) Plaintiff has pled sufficient facts showing extreme and outrageous conduct by Defendants.

Motion to Strike

Defendant’s motion to strike is DENIED. Plaintiff’s allegations of malice are sufficient, as Knab’s tailgating and “unsafe” swerving around a bicyclist as well as honking and yelling obscenities is conduct that is carried out with a willful and conscious disregard of the rights or safety of Plaintiff. (SAC, ¶¶8-9; Civ. Code, § 3294, subd. (c)(1).)

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Case Name: *FIA Card Services, N.A. vs. Donald Smith.*

Case No.: 1-09-CV-156471

Defendant Donald Smith (“Defendant”) moves to strike the Complaint filed by plaintiff FIA Card Services, N.A. (“Plaintiff”) on the ground that it is defective because it has an attorney’s stamp signature instead of an original signature of Plaintiff’s attorney. Defendant argues that under Code of Civil Procedure section 128.7 subdivision (a), every pleading must be signed by at least one attorney of record in the attorney’s individual name, and under Bar Court rule 1112 (3), the State Bar Court will reject filing in any proceeding if the pleading presented for filing does not contain an original, handwritten signature. Defendant argues that in other jurisdictions, such as the Texas Criminal Court of Appeals, an original signature is required for filing a notice of appeal. (See *State of Texas v. Shelton* (Tex. Crim. App. 1992) 830 S.W.2d 605.)

“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.” (Code Civ. Proc., § 437, subd. (a).) Here, the Complaint does not technically violate Code of Civil Procedure section 128.7, since there is a signature on the signature line on page 2 of the Complaint. Section 128.7 only authorizes striking an “unsigned paper” (Code Civ. Proc., § 128.7, subd. (a)), but Defendant cites no binding California authority supporting its position that an attorney’s stamp signature is equivalent to an unsigned paper as a matter of law.

The *Shelton* case does not support this position. First, *Shelton* is distinguishable in that the notice of appeal therein reflected on its face that the facsimile signature of the city attorney was “via a ‘signature stamp.’” (*Id.* at p. 606.) The State did not dispute that the signature was stamped, but simply argued that the stamped signatures were, by themselves, “sufficient to raise the presumption that the signature stamp was properly used, i.e., that the County Attorney personally authorized the affixing of a facsimile of his signature to the State’s notice of appeal in this cause.” (*Ibid.*) Here, however, Plaintiff disputes that the signature was stamped, and asserts that the signature was actually signed. (See Decl. V. Subramanian in Opp. to Defendant’s MTS ¶¶ 5-6.) Furthermore the court in *Shelton* found that “the use of the signature stamp, *without more*, does not comply with the legislatively mandated ‘guarantee that the only person permitted by statute to make an appeal on behalf of the State actually participated in the process.’ [Citation.]” (*Ibid* [emphasis added].) Thus, in *Shelton*, the court did not hold that the use of stamped-signatures is, in all circumstances, improper. It merely held that in that situation, where appeals on behalf of the state had to be made by certain persons, a stamped signature did not prove by itself that the necessary person had made the appeal. Presumably, had the State submitted more than just the bare stamped signatures (i.e., proof that the signatories of the stamped signatures actually approved of the use of the stamps), the court may have found the stamped signatures sufficient.

In the context of the Statute of Frauds and the Uniform Commercial Code, a signature need not be handwritten; a typewritten, printed, or rubber-stamped signature may suffice provided it is executed or adopted by the party with present intention to authenticate the writing. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270.) Moreover, in *People v. Brussel* (1932) 122 Cal.App.Supp. 785, the Appellate Department of the Los Angeles County Superior Court

reversed the dismissal of a criminal complaint in which the trial court had found the complaint was not properly signed and not under oath based solely on an examination of the complaint.

If the persons whose names appeared upon the complaint as signers thereof adopted or used a rubber stamp as their signature, and such stamp was affixed by them personally, or by another in their presence and by their direction, the impression of such stamp became the lawful signature of such persons. Whether such rubber stamp impression was or was not used or adopted by the persons, whose names so appeared upon the complaint, was a question of fact which the trial court could not determine from an examination of the complaint alone.

(Brussel, supra, 122 Cal.App.Supp. at p. 789.)

Based on these authorities, the court finds there are questions of fact as to whether the Complaint was stamp-signed, and if so, whether such stamp was used or adopted by the person whose name appears on the Complaint, and this determination must be based on evidence beyond the court's examination of the Complaint alone. Since the asserted defect is not evident on the face of the pleading, the motion to strike is DENIED.

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Case Name: *Zehring v. Pappas*

Case No.: 1-09-CV-157252

Defendants' Motion to set aside default GRANTED. Plaintiff's request for monetary sanctions DENIED. The Court has reviewed and considered Plaintiff's untimely opposition to the motion. It is noteworthy that Plaintiff, who is advocating a strict construction of the rules re: service of process and relief pursuant to CCP § 473 is himself in violation of the basic timing requirements of motion practice.

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