

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: Dubasso	v. Tradition Golf Club	DATE & DEPT. 11/30/16 – PS2	CASE NUMBER PSC1602890
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PROCEEDINGS: Demurrer to 1<sup>st</sup> Amended Complaint of Dubasso by Bennion, Deville Fine Homes Inc., Genevieve Ann Robinson

TENTATIVE RULING BECOMES THE RULING OF THE COURT

Demurrer sustained without leave to amend as to the seventh cause of action and sustained with 30 days leave to amend as to the first and second causes of action.

Plaintiffs Michael Dubasso and Jenny Dubasso (“the Dubassos”) filed their First Amended Complaint (“FAC”) asserting claims against multiple defendants, including Defendant Benion & Deville Fine Homes, Inc. (“Bennion”) and Bennion real estate agent Defendant Genevieve Robinson (“Robinson”) (collectively “Defendants”). Defendants were the listing agent and brokerage firm for the sellers. The gravamen of the FAC is that the Dubassos purchased a home in the Tradition development in La Quinta. Tradition Golf Club (“TGC”) is a social and golf club which has no legal relationship with the Tradition development, but is located within the development. Prior to purchasing a home in the Tradition development, the Dubassos toured TGC with the club’s general manager Heidi Risk (“Risk”). The Dubasso’s real estate agent Kathleen O’Keefe (“O’Keefe”) explained to Risk that the Dubassos were considering purchasing a property in the development and intended to become members of the social club and eventually the golf club. The Dubassos returned to the clubhouse two more times, with friends as well as with the real estate agent to again tour the club grounds, each time meeting with Risk. Jenny Dubasso told Risk she was excited and could not wait to become a member of the club. At no time did Risk advise that she would have to apply for membership and undergo a vetting process, rather than automatically entitled to membership upon purchase of a home within the development. After purchasing a Tradition property, the Dubassos applied for membership in the social club and were denied. The Dubassos assert that all of the defendants conspired together to induce the Dubassos to purchase a home with the belief that they were entitled to automatic right to membership in TGC and intentionally concealed that fact.

Notably absent from the FAC is any allegation that moving parties were present for any of the conversations concerning membership in the club or any specific allegations concerning Defendants other than the fact that they were the listing agent and agency.

The first and second causes of action for fraudulent concealment and negligence respectively both include duty as an element of the cause of action. As set forth above, Bennion and Robinson did not owe the Dubassos a duty and the only basis to assert causes of action against TGC and Risk for fraudulent concealment and/or negligence is under a conspiracy theory. Conspiracy itself is not a separate cause of action. Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial, § 6:154. Rather, it is a theory of vicarious liability under which certain defendants may be held liable for torts committed by others, i.e., all parties to a conspiracy are jointly liable for tortious acts committed by any of them pursuant to the conspiracy. Berg v. Berg Enterprises, LLC, supra, 131 Cal.App.4th at 823. However, as pled the facts do not provide sufficient facts to support a finding that either TGC and/or Risk conspired with the other defendants to commit fraudulent concealment or negligence.

The first cause of action is for fraudulent concealment against all defendants. The second cause of action is for negligence against defendants O'Keefe and the real estate company she worked for LQR, along with the moving parties. The seventh cause of action is for willful failure to comply with Civil Code sections 2079.2, 2079.16 and 2079.24 against LQR and O'Keefe and moving parties.

Seventh Cause of Action for Willful Failure to Comply with Civil Code sections 2079.2, 2079.16 and 2079.24:

The standard of conduct of real estate brokers is set forth in Civil Code section 2079 et seq., sets forth the duties that a real estate broker owes to a prospective purchaser of real property. Section 2079.2 provides that "[t]he standard of care owed by a broker under this article is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license..." Section 2079.16 relates to the disclosure form regarding the real estate agency relationship. The disclosure form must provide information concerning a seller's agent's obligations. The form is to inform the buyer that the seller's agent owes them the following: "(a) Diligent exercise of reasonable skill and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties." Section 2079.24 states that nothing within the article is to be construed to relieve agents from liability for their conduct in connection with acts governed by the article or for breach of a fiduciary duty or a duty of disclosure.

The Dubassos assert that Defendants had a duty under these Civil Code provisions to disclose to them that membership in TGC was subject to a vetting process and not automatic with the purchase of a home within Tradition. However, nothing in Civil Code section 2079 et seq. provides that Defendants had a duty to disclose to the Dubassos that membership in TGC, a separate legal entity from the Tradition development, was not automatic upon ownership in Tradition. Further, a seller's agent has no duty to disclose information that within the diligent attention and observation of the buyers was easily known to them. Information pertaining to the membership requirements of TGC were easily known to the Dubassos and as such Defendants did not owe any duty, under Civil Code section 2079 to disclose any information pertaining to TGC's membership requirements. Accordingly, the court sustains the demurrer to the seventh cause of action without leave to amend.

First Cause of Action for Fraudulent Concealment and Second Cause of Action for Negligence:

The FAC fails to allege sufficient facts to state a cause of action for fraudulent concealment or negligence. As stated above Defendants did not owe a duty to disclose. Therefore, the only basis to assert this cause of action against Defendants is via a conspiracy theory of liability. Conspiracy itself is not a separate cause of action. Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial, second 6:154. Rather, it is a theory of vicarious liability under which certain defendants may be held liable for torts committed by others, i.e., all parties to a conspiracy are jointly liable for tortious acts committed by any of them pursuant to the conspiracy. Berg v. Berg Enterprises, LLC, supra, 131 Cal.App.4th at 823. However, as pled the facts do

not provide sufficient facts to support a finding that either Bennion and/or Robinson conspired with the other defendants to commit fraudulent concealment or negligence. The FAC fails to assert any facts, never-the-less the specificity required for a fraud cause of action, related to Bennion and/or Robinson. The FAC simply makes a conclusory statement that the defendants all conspired together. Accordingly, the court sustains the demurrer with leave to amend as to the first and second cause of action.

David M. Chapman, Judge  
V. Franco, Clerk