

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

Department 3

Honorable William J. Monahan, Presiding

Courtroom Clerk

191 North First Street, San Jose, CA 95113

Telephone: (408) 882-2130

DATE: 6/4/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (6/3/2024) you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.

https://www.sccourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:

<https://reservations.sccourt.org/>

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV417362	RYDER TRUCK RENTAL INC. vs FAIRPRICE MOVERS INC. a California corporation	Hearing: Order of Examination to FAIRPRICE MOVERS INC., a California corporation; Leonid Schwab, authorized person by Plaintiff Ryder Truck Rental Inc. APPEAR in person (not by Teams). [POS personal service on Leonid Schwab, authorized person on 4/30/2024 was filed on 6/6/2024.]

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LINE 2	23CV414707	Alexander Zbrozek et al vs Patricia Melnikoff et al	Hearing: Demurrer to Complaint by Defendant Patricia Melnikoff Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.
LINE 3	23CV428405	Academy of Fencing Masters, Inc. vs Xin "Cindy" Zhang et al	Hearing: Demurrer to Plaintiff's Complaint by Defendants Bayside Fencing Club, LLC; Xin Zhang; Dmytro Chumak; Viacheslav Zingerman; and Valeriy Naulo ("Defendants") Unopposed and SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Moving parties (Defendants) to prepare order.
LINE 4	22CV396046	City of San Jose vs Kimberly Connor	Motion: Order to Appoint Receiver against Defendant Kimberly Connor by Plaintiff City of San Jose Unopposed and GRANTED. Moving party (Plaintiff City of San Jose) to prepare order.
LINE 5	24CV428768	Maria Trovo Plancarte vs Moreno & Associates, Inc.	Hearing: Motion to compel arbitration and for stay by Defendant Moreno & Associates, Inc. (Defendant) The hearing on this motion is continued to 7/18/2024 at 9:00 a.m. in Dept. 3. The court may exercise its discretion to consider the Defendant's evidence/arguments submitted with its reply papers. Plaintiff's formal response to the evidence/arguments submitted with the Defendant's reply papers filed 5/14/2024 (including any additional opposition papers/declarations/evidence) must be filed and served by 7/3/2024. Defendant's reply papers (with no additional evidence) must be filed and served by 7/11/2024. The court will prepare the order.
LINE 6	24CV429013	DIANE BOOKER vs SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public entity et al	Motion: Withdraw as attorney by Alivia Abreu for Plaintiff Diane Golden Unopposed and GRANTED. Moving attorney (Alvia Abreu) to submit the [proposed] order.

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LINE 7	2015-1-CV-288581	M. Juarez vs D. Oropeza, et al	<p>Motion: Order to Amend Clerk's Judgment by Non-Party California Labor Commissioner to Remove Defendant, Doroteo Oropeza</p> <p>Unopposed and GRANTED. Moving party to prepare order and amended judgment.</p>
LINE 8	21CV385812	Mark Knop vs Christian Schank & Associates et al	<p>Motion: Quash the deposition subpoena on Next Legal for production of business records by Plaintiff Mark Knop</p> <p>APPEAR.</p> <p>What declaration(s) establishes that the subpoena seeks attorney-client or attorney work product privileged materials?</p> <p>What does plaintiff mean by the statement: "I did not intend to reveal <i>any</i> privileged documents. In particular, I thought I did not disclose any documents with my attorneys <i>which discussed the malpractice case. I was trying to limit my disclosures to the underlying family law case.</i>" (See Mark Knop Decl. filed 5/28/2024 ¶5 [emphasis added].)</p> <p>Should the court consider surreply evidence by Kristin T. Busch? Please cite any authority.</p> <p>If so, please clarify the conversation Kristin T. Bush refers to in her surreply declaration: "During a telephone conference I had with Plaintiff's counsel James Knopf, <i>on March 22, 2024</i>, he advised that he assisted Plaintiff in reviewing and producing Plaintiff's production of documents to my office." (See Busch Surreply Decl. filed 5/30/2024, ¶3.)</p> <p>Is there anything submitted by defendants showing any purported waiver of privilege relating to defendant's bankruptcy litigation.</p>
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Line 2

Case Name: *Alexander D. Zbrozek, et al. v. Patricia Melnikoff, et al.*

Case No.: 23-CV-414707

Demurrer to the Complaint by Defendants Patricia Melnikoff and Paula Quinn

Factual and Procedural Background

This is an action for breach of contract and fraud brought by plaintiffs Alexander D. Zbrozek and Quian Wei Wa (collectively, “Plaintiffs”) against defendants Patricia Melnikoff (“Melnikoff”), Paula Quinn (“Quinn”), Jimmy Nappo, and Compass II, a Delaware Corporation (collectively, “Defendants”).

According to the complaint, on October 5, 2019, Plaintiffs, as buyers, entered into a San Francisco Purchase Agreement (“Purchase Agreement”) with defendants Melnikoff and Quinn (collectively, “Seller Defendants”) for real property located at 11511 Summit Wood Road in Los Altos Hills, California (“Property”). (Complaint at ¶¶ 1-2, 11.) Under the Purchase Agreement, the Seller Defendants agreed to sell the Property to Plaintiffs for the sum of \$3,000,000. (Id. at ¶ 11.) Paragraph 10 of the Purchase Agreement specifically required that Seller Defendants provide disclosures of any known material facts prior to close of escrow, to make all other mandatory disclosures required by law, and any other contractual disclosures. (Ibid.)

Plaintiffs thereafter closed escrow of their purchase of the Property from the Seller Defendants and paid them the sum of \$3,000,000. (Complaint at ¶ 12.) Plaintiffs relied on the representations and disclosures made by Defendants in entering into the Purchase Agreement and closing escrow for their purchase of the Property. (Ibid.)

Following purchase of the Property, and within the past three years, Plaintiffs discovered for the first time that the improvements, repairs, and services performed by Defendants were not performed, designed, constructed and/or repaired properly or in good condition. (Complaint at ¶ 13.) Such defects included substantial water intrusion and water damage inside the west and east side walls of the Property and extensive rotting of the studs and other structural elements of the walls. (Ibid.) The Seller Defendants were aware of but failed to disclose numerous historical water leaks. (Id. at ¶ 14.) Plaintiffs did not discover, and a reasonable and diligent investigation would not have disclosed, the hidden condition of the Property. (Id. at ¶ 13.)

On April 17, 2023, Plaintiffs filed a complaint against Defendants alleging causes of action for: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligence; (4) negligence of design professionals; (5) fraud; (6) negligent misrepresentation; (7) rescission; (8) violation of Civil Code section 1102, et seq.; (9) violation of Civil Code section 2079, et seq.¹; and (10) negligence.

On April 26, 2024, the Seller Defendants filed the motion presently before the court, a demurrer to the complaint. Plaintiffs filed written opposition and a request for judicial notice. The Seller Defendants filed reply papers.

¹ The ninth cause of action is mislabeled as the “eighth” cause of action in the complaint.

A further case management conference is set for August 13, 2024.

Demurrer to the Complaint

The Seller Defendants argue the first, second, fifth and sixth causes of action are subject to demurrer based on the statute of limitations. (See *Cavey v. Tualla* (2021) 69 Cal.App.5th 310, 326 [statute of limitations defense may be asserted by general demurrer].) They also challenge the fifth and sixth causes for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

Meet and Confer Requirement

Before filing a demurrer, a demurring party must “meet and confer in person or by telephone” with the opposing party to determine “whether an agreement can be reached that would resolve the objections to be raised in the demurrer.” (Code of Civ. Proc., § 430.41, subd. (a).) This conference should occur at least five days before the deadline to file. (Code Civ. Proc., § 430.41, subd. (a)(2).)

When filing the demurrer, the demurring party must include a declaration stating either “the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer” or “[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith.” (Code Civ. Proc., § 430.41, subd. (a)(3).) A court’s determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (Code Civ. Proc., § 430.41, subd. (a)(4).)

Here, counsel for the Seller Defendants sent multiple letters to Plaintiffs’ attorney attempting to meet and confer prior to filing the instant demurrer. (See St. Phalle Decl. at ¶¶ 6-8.) Those efforts were ultimately unsuccessful as Plaintiffs’ counsel did not provide any response to the letters and attempt to informally resolve issues relevant to the motion. Nor has Plaintiffs’ attorney addressed the parties’ meet and confer (or lack thereof) in the opposition papers. And, while meet and confer in this instance could have been more productive, the court does not sustain or overrule a demurrer based on any perceived failure to do so adequately. That said, the court reminds counsel to undertake the obligations set forth in Code of Civil Procedure section 430.41 with sincerity and good faith moving forward.²

Request for Judicial Notice

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

² Santa Clara County Bar Association’s Code of Professionalism, § 9 [“A lawyer should at all times be civil, courteous, and accurate in communicating with adversaries, whether in writing or orally”].

In opposition, Plaintiffs request judicial notice of the complaint filed in this action. (See Request for Judicial Notice [“RJN”] at Ex. A.) The court may take judicial notice of the complaint as a court record filed in the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) The court however declines to take judicial notice of the complaint as it is the pleading under review which must necessarily be considered by the court in ruling on the demurrer. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [Sixth Appellate District denies request for judicial notice as unnecessary as the court must consider allegations in the complaint and attached exhibits in ruling on demurrer].)

Plaintiffs also request judicial notice of the Register of Actions dated April 25, 2024. (See RJN at Ex. B.) But, Exhibit B appears to be a grant deed for the Property in this action that was recorded on November 6, 2019 in Santa Clara County. As Plaintiffs do not seek judicial notice of the recorded grant deed, the request is not warranted.

Accordingly, the request for judicial notice is DENIED.

Legal Standard

“In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

First Cause of Action: Breach of Contract

The Seller Defendants argue the breach of contract claim is barred by the three-year statute of limitations under Code of Civil Procedure section 338, subdivisions (b) or (d).

Statute of Limitations Generally

A statute of limitations prescribes the period “beyond which a plaintiff may not bring a cause of action. [Citations.]” (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806.) It “strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false

allegations concerning long-forgotten events, when important evidence may no longer be available.” (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

“A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements.” (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff’s burden “even at the pleading stage” to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.)

“ [I]t is difficult for demurrers based on the statute of limitations to succeed because (1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed.’ [Citation.]” (*Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549, 554.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Code of Civil Procedure Section 338, subdivision (b)

The Seller Defendants first argue the breach of contract claim is barred by the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (b). This limitation concerns injuries to real property. The Seller Defendants contend this limitation period applies as the damage attributed to the Property constitutes latent construction defects. (See Demurrer at pp. 11:18-12:28.)

“A ‘latent’ construction defect is one that is ‘not apparent by reasonable inspection.’ [Citation.]” (*Creekridge Townhome Owners Assn., Inc. v. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257-258 (*Creekridge*)). California courts have recognized three statutes of limitation in connection with latent construction defects: Code of Civil Procedure sections 338, 337, and 337.15. (*Ibid.*) “ ‘The interplay between these statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.’ [Citations.]” (*Id.* at pp. 257-258.)

“As noted, the limitations periods of sections 337 and 338 start to run upon ‘discovery.’ Discovery occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing the injury (here, ‘wrong’ is not used in a

technical sense, but in a lay one). [Citations.] ‘A plaintiff has reason to suspect when he has *notice or information of circumstances to put a reasonable person on inquiry.*’ [Citations.] In other words, ‘sections 337 and 338 begin to run only after the *damage is sufficiently appreciable to give a reasonable man notice* that he has a duty to pursue his remedies.’ [Citations.]” (*Creekridge, supra*, 177 Cal.App.4th at p. 258.)

As an initial matter, it appears the four-year limitations period under section 337 would be applicable here as this is a claim for breach of contract. Nevertheless, the Seller Defendants urge the court to apply the three-year limitations period under section 338. In doing so, they contend the accrual date for the breach of contract claim is October 5, 2019, the date the Property was sold. (See Demurrer at p. 12:25-28.) But, there is no legal authority cited for the proposition that a breach of contract cause of action accrues upon the date of sale of the Property. (See *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 [“The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.”]; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt].) Instead, as stated above, the statute begins to run upon discovery and when damage is sufficiently appreciable to give a person notice to pursue their remedies. Here, Plaintiffs allege they made discovery of the defects within the past three years, and thus, even under section 338, subdivision (b), the breach of contract claim would still be timely for pleading purposes. (See Complaint at ¶¶ 13, 17.)

Code of Civil Procedure Section 338, subdivision (d)

In the alternative, the Seller Defendants assert the breach of contract cause of action is barred by the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (d). This limitation applies to actions for fraud or mistake.

“Code of Civil Procedure section 338, subdivision (d) specifically provides that a cause of action for relief based on mistake does not accrue until the aggrieved party discovers the facts constituting the mistake. Case law has interpreted this accrual provision to mean that ‘a cause of action for ... mistake accrues, and the limitations period commences to run, when the aggrieved party could have discovered the ... mistake through the exercise of reasonable diligence.’ [Citation.]” (*Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044.)

Again, it appears that a four-year limitations period under section 337 would apply to this claim for breach of written contract. (See *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1341 [“For breach of a written contract, that period is four years from the time the claim accrues.”].) The Seller Defendants however contend the gravamen of the breach of contract cause of action sounds in fraud and thus a three-year limitations period applies. (See Demurrer at pp. 10:6-11:10.) But, this contention ignores the fact that plaintiffs may plead claims in the alternative. (See *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 [“When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations.”].) And, even if the court applied the three-year limitations period, the Seller Defendants once more improperly rely on an accrual date of October 5, 2019, the date the Property was sold. (See Demurrer at p. 9:17-20.) As stated above, the statute of

limitations for fraud or mistake is not triggered until the aggrieved party makes discovery. Here, Plaintiffs allege they made discovery of the defects within the past three years, and thus, even under section 338, subdivision (d), the breach of contract claim would be timely for pleading purposes. (See Complaint at ¶¶ 13, 17.)

Consequently, the demurrer to the first cause of action based on the statute of limitations is OVERRULED.

Second Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing

The demurrer to the second cause of action based on the statute of limitations is OVERRULED for reasons stated above in connection with the first cause of action.

Fifth Cause of Action: Fraud

The Seller Defendants argue the fraud cause of action is barred by the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (d) and fails to state a valid claim.

Statute of Limitations

The demurrer to the fifth cause of action based on the statute of limitations is OVERRULED for reasons stated above in connection with the first cause of action.

Failure to State a Valid Claim Generally

“ ‘The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.’ [Citation.] ‘Conversely, a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer.’ [Citation.]” (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).

“A complaint, with certain exceptions, need only contain a ‘statement of the facts constituting the cause of action, in ordinary and concise language’ [citation] and will be upheld ‘ “so long as [it] gives notice of the issues sufficient to enable preparation of a defense.” ’ [Citation.] ‘[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.’ [Citation.]” (*Morris, supra*, 78 Cal.App.5th at p. 292.)

Fraud Specificity

“The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage.” (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

“Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.” (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*), citation and quotation marks omitted.)

Courts enforce the specificity requirement in consideration of its two purposes. (*West, supra*, 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid.*) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Ibid.*)

Here, the Seller Defendants argue that fraud has not been pled with specificity as there are no specific misrepresentations pled as to these defendants. (See Demurrer at pp. 7:19-8:13.) In opposition, Plaintiffs appear to concede this point but contend the fifth cause of action is actually a claim for fraudulent concealment, not intentional misrepresentation. (See OPP at pp. 4:13-5:12.)

“[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.” (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

The court has reviewed the fifth cause of action which includes allegations that the Seller Defendants concealed conditions and past attempts to repair the Property. (See Complaint at ¶¶ 13-14, 41-44.) But the court finds, as a matter of law, that Plaintiffs have not pled sufficient facts in support of the elements to state a valid claim for concealment. The demurrer is therefore sustainable on this ground but the court will give Plaintiffs an opportunity to amend their fraud claim. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the complaint in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment].)

Accordingly, the demurrer to the fifth cause of action is SUSTAINED WITH 15 DAYS’ LEAVE TO AMEND for failure to state a claim.

Sixth Cause of Action: Negligent Misrepresentation

The Seller Defendants assert the negligent misrepresentation cause of action is barred by the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (d) and fails to state a valid claim.

Statute of Limitations

The demurrer to the sixth cause of action based on the statute of limitations is OVERRULED for reasons stated above in connection with the first cause of action.

Failure to State a Valid Claim

“The elements of negligent misrepresentation are ‘(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ [Citation.]” (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50.)

“Causes of action for intentional and negligent misrepresentation sound in fraud and, therefore, each element must be pleaded with specificity.” (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 116, overruled on a different ground in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905.)

Like the fraud claim, the Seller Defendants argue the negligent misrepresentation cause of action has not been pled with specificity as to these defendants. (See Demurrer at pp. 8:17-9:9.) In opposition, Plaintiffs reiterate their position that the alleged fraud or negligent misrepresentation is based on concealment. (See OPP at pp. 4:13-5:12.) But, by definition, a misrepresentation, not a concealment of facts, is required to state a valid cause of action for negligent misrepresentation. Since Plaintiffs concede no such representation is at issue, the demurrer is sustainable on this ground.

Therefore, the demurrer to the sixth cause of action is SUSTAINED WITH 15 DAYS’ LEAVE TO AMEND for failure to state a claim.

Disposition

Plaintiffs’ request for judicial notice is DENIED.

The demurrer to the first, second, fifth, and sixth causes of action based on the statute of limitations is OVERRULED.

The demurrer to the fifth and sixth causes of action is SUSTAINED WITH 15 DAYS’ LEAVE TO AMEND for failure to state a claim.

The court will prepare the Order.

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