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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 EDVARD ESHAGH,

9 Plaintiff,

10
11 v.

12 THE TERMINIX INTERNATIONAL
13 CO., L.P., et al.,

14 Defendants.

1:11-cv-00222-OWW-DLB

MEMORANDUM DECISION RE: MOTION
TO DISMISS (Doc. 10)

15 I. INTRODUCTION.

16 Edvard Eshagh ("Plaintiff") proceeds with an action against
17 Terminix International Company, L.P. and Terminix International,
18 Inc., ("Defendants") pursuant to 28 U.S.C. § 1332.¹

19 On April 7, 2010, Defendants filed a motion to dismiss
20 Plaintiff's complaint. (Doc. 10). Plaintiff filed opposition on
21 June 24, 2011. (Doc. 18). Defendants filed a reply on July 5,
22 2011. (Doc. 23).

23 II. FACTUAL BACKGROUND.

24 Defendants provide termite prevention services. From 1999 to
25 the present, Plaintiff has contracted with Defendants for termite

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27 ¹ Plaintiff seeks to proceed as a class representative pursuant to Fed. R. Civ.
28 P. 23. Because the complaint is subject to dismissal, the court does not reach
the propriety of Plaintiff's attempt to assert his claims in a class action suit
at this time.

1 prevention services at his residence under a Control Service
2 Agreement ("CSA").

3 Pursuant to Defendants' internal policy, certain "Minimum
4 Basic Requirements" must be satisfied in order for a property to
5 qualify for a "Terminix Guarantee." At all times relevant,
6 Plaintiff's property has been in violation of two of the Minimum
7 Basic Requirements. First, Plaintiff's property has an
8 "uncorrected stucco hazard" within the meaning of Defendants'
9 internal policies. Second, Plaintiff's property is incapable of
10 receiving an "entire structure treatment" due to various attributes
11 of the property. Despite these deficiencies, Defendants issued
12 Terminix Guarantees for Plaintiff's property and falsely
13 represented that they had performed "all necessary services" within
14 the meaning of the CSA.

15 Defendants did not disclose to Plaintiff that they were not
16 performing all "necessary services" required by Defendants internal
17 procedures. Defendants internal policies set forth the following
18 options for addressing a stucco condition such as Plaintiff's: (1)
19 lower the exterior grade to expose the bottom edge of the stucco
20 and create three inches clearance of exposed foundation; (2) seal
21 off or recommend sealing off the stucco; or (3) cut stucco back
22 from ground contact for proper inspection and treatment.
23 Defendants did not address the stucco condition on Plaintiff's
24 property as required by Defendants' policies, leaving Plaintiff's
25 property susceptible to termite damage.

26 In February 2008, Plaintiff discovered a termite infestation
27 at his property when a section of flooring gave way. In 2009,
28 another area of floor gave way in a different area of Plaintiff's

1 property. The State of California inspected Plaintiff's property
2 in 2010 and concluded that Terminix had not adequately treated
3 Plaintiff's property for termite prevention.

4 **III. DISCUSSION.**

5 **A. Statute of Limitations**

6 **1. Breach of Contract Cause of Action**

7 Plaintiff's fourth cause of action is for breach of contract.
8 Plaintiff alleges that Defendants breached the terms of the CSA by
9 failing to perform "all necessary services" within the meaning of
10 the CSA. Plaintiff complains that Defendants did not correct the
11 stucco hazard and did not provide an "Entire Structure Treatment."
12 (Comp. at 39).

13 Under California law, the ordinary statute of limitations for
14 breach of a written contract is four years. Cal. Civ. Pro. § 337;
15 e.g., *Vu v. Prudential Property & Casualty Ins. Co.*, 26 Cal. 4th
16 1142, 1148 (Cal. 2001). The limitations period commences when the
17 cause of action accrues. Cal. Civ. Pro. § 312; *Fox v. Ethicon*
18 *Endo-Surgery, Inc.*, 35 Cal.4th 797, 806 (2005). "Generally
19 speaking, a cause of action accrues at 'the time when the cause of
20 action is complete with all of its elements.'" *Id.*

21 The discovery rule "postpones accrual of a cause of action
22 until the plaintiff discovers, or has reason to discover, the cause
23 of action." *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal.
24 App. 4th 1308, 1318 (Cal. Ct. App. 2007) (citation omitted).
25 Delayed accrual of a cause of action may result where the
26 relationship between the parties is one of special trust. *Id.*
27 Where the discovery rule applies, the limitations period does not
28 accrue until the aggrieved party has notice of the facts

1 constituting the injury. *Id.* A person with actual notice of
2 circumstances sufficient to put a prudent person upon inquiry is
3 deemed to have constructive notice of all facts that a reasonable
4 inquiry would disclose. *Id.* at 1319. For purposes of accrual of
5 the limitations period, inquiry notice is triggered by suspicion.
6 *Id.*

7 "A plaintiff whose complaint shows on its face that his claim
8 would be barred without the benefit of the discovery rule must
9 specifically plead facts to show (1) the time and manner of
10 discovery and (2) the inability to have made earlier discovery
11 despite reasonable diligence." *McKelvey v. Boeing North American,*
12 *Inc.*, 74 Cal. App. 4th 151, 160 (Cal. Ct. App. 1999) *partially*
13 *superceded on other grounds as stated in Grisham v. Philip Morris*
14 *U.S.A., Inc.*, 40 Cal. 4th 623, 637 n.8 (Cal. Ct. App. 2007).
15 Application of the discovery rule ordinarily presents questions of
16 fact. *E-Fab*, 153 Cal. App. 4th at 1320 (*citing Fox*, 35 Cal. 4th at
17 810).

18 Defendants contend that the statute of limitations for
19 Plaintiff's breach of contract claims began to run when Plaintiff
20 first had reason to know that the stucco siding on his property
21 provided a possible point of entry for termites. Attached to the
22 complaint is an Inspection Report Defendant provided to Plaintiff
23 on November 30, 2006. The November 2006 report provides:

24 The stucco siding extends beneath the outside grade level
25 creating/providing possible points of entry for wood
26 destroying organisms behind the stucco into the
27 structure. No evidence of active infestation/infection
28 was noted at the time of this inspection as a result of
this condition. Periodic inspection is provided.

28 Defendants motion does not establish, as a matter of law, that the

1 November 2006 report was sufficient to put Plaintiff on notice of
2 his claim for breach of contract. The crux of Plaintiff's breach
3 of contract claim is that Defendants did not perform "necessary
4 services." The November 2006 report does not suggest that
5 Defendants were not performing necessary services related to the
6 stucco issue; to the contrary, the November 2006 report implicitly
7 represents that the only action necessary with respect to the
8 stucco siding was periodic inspection.

9 Defendants contend, in the alternative, that the statute of
10 limitations on Plaintiff's breach of contract claim began to run on
11 the date on which Plaintiff first learned there was termite damage
12 to his property. Attached to the complaint is a February 1, 2008
13 Inspection Report which provides:

14 Evidence of subterranean termites at/in subarea. No
15 active infestation was noted at this time. This company
16 has previously treated this structure for the control
17 and/or eradication of this wood destroying organism. No
18 additional treatment is recommended at this time.
19 Periodic inspection is advised.

20 Assuming *arguendo* that the statute of limitations began to run on
21 February 1, 2008, Plaintiff's breach of contract claim is timely.
22 Plaintiff filed his complaint on February 8, 2011, less than four
23 years from the date of the February 2008 Inspection Report.² See
24 Cal. Civ. Pro. § 337.

25 Defendants also contend that an inspection report from March
26 2002 indicated termite damage at Plaintiff's property. Defendants

27 ² Defendants' motion erroneously contends that the two-year statute of
28 limitations set forth in California Code of Civil Procedure section 339 applies
to Plaintiff's contract claims. Section 339 applies to "[a]n action upon a
contract...not founded upon an instrument of writing." Cal. Civ. Pro. § 339
(2011) (emphasis added). Plaintiff's counsel failed to identify this error.

1 attach what appears to be a March 2002 report concerning
2 Plaintiffs' property, however, the March 2002 report submitted by
3 Defendants is not properly authenticated and is not a document
4 incorporated into or referenced by Plaintiff's complaint.
5 Accordingly, Defendants motion to dismiss Plaintiff's contract
6 claims as time barred is DENIED, without prejudice.

7 **2. UCL and FAL Claims**

8 California's Unfair Competition Law ("UCL") sets forth a
9 four-year statute of limitations period. Cal. Bus. & Prof. Code §
10 17208; *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th
11 163, 179 (Cal. 2000). Whether the discovery rule applies to UCL
12 claims is an open question under California law. *Broberg v. The*
13 *Guardian Life Ins. Co. of America*, 171 Cal. App. 4th 912, 920 (Cal.
14 Ct. App. 2009); *but see Karl Storz Endoscopy-Am., Inc. v. Surgical*
15 *Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) ("claims under
16 California Business and Professions Code § 17200 et seq. are
17 subject to a four-year statute of limitations which began to run on
18 the date the cause of action accrued, not on the date of
19 discovery").

20 Claims under California's False Advertising Law ("FAL") are
21 subject to either the three-year statute of limitations provided by
22 California Code of Civil Procedure 338(a) or the four-year statute
23 of limitations applicable to UCL claims. *See McCready v. Am. Honda*
24 *Motor Co.*, 2006 U.S. Dist. LEXIS 44137 * 9 (N.D. Cal. 2006) (noting
25 open question); *but see Streamcast Networks, Inc. v. Skype Techs.,*
26 *S.A.*, 2006 U.S. Dist. LEXIS 97393 * 26 n.8 (C.D. Cal. 2006)
27 (applying section 338 without analysis).

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1 For reasons discussed below, Plaintiff's UCL and FAL claims
2 are not pled with the specificity required to satisfy federal
3 pleading standards; accordingly, it is unnecessary to reach the
4 statute of limitations issue governing these claims. Defendants'
5 motion to dismiss Plaintiff's UCL and FAL claims as time barred is
6 DENIED, without prejudice.

7 **3. Tort Claims**

8 Plaintiff advances two tort claims: (1) breach of professional
9 duty; and (2) assumpsit.³ The two-year statute of limitations set
10 forth in California Code of Civil Procedure section 339 applies to
11 claims of professional negligence that are not specifically covered
12 under discrete statutes. See *Roger E. Smith v. Shn Consulting*
13 *Eng'rs & Geologists*, 89 Cal. App. 4th 638, 642-43 (Cal. Ct. App.
14 2001). Assumpsit actions are also subject to the two-year statute
15 of limitations set forth in section 339. See *Unions Water Co. v.*
16 *Murphy's Flat Fluming*, 22 Cal. 621, 630 (Cal. 1863) (holding that
17 action in assumpsit is "an action upon a contract, obligation, or
18 liability, not founded on an instrument in writing"); Cal. Code.
19 Civ. Pro. 339.

20 The complaint alleges Plaintiff discovered a termite
21 infestation at his property in February 2008 when a portion of the
22 floor collapsed due to termite damage; the statute of limitations
23 began to run on Plaintiff's tort claims at that time. A reasonable
24 person is put on inquiry notice that termite prevention services
25 have not been adequately performed when they learn their property

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27 ³ Assumpsit, a Latin word meaning "he promised," is an ancient quasi-contractual
28 theory of recovery developed in the King's and Queen's courts of England. *Jogani*
v. Superior Court, 165 Cal. App. 4th 901, 905-906 (Cal. Ct. App. 2008). It
appears Plaintiff's assumpsit claim is in fact an unjust enrichment claim.

1 is collapsing due to termite damage. Plaintiff's allegation that
2 Defendants "lulled Plaintiff to believe it was simply an example of
3 a vaccine not working 100%" is unavailing; a reasonable person with
4 knowledge of the objective facts Plaintiff alleges would have, at
5 a minimum, conducted an investigation that would have revealed the
6 basis for Plaintiff's tort causes of action. Plaintiff's tort
7 claims were not filed within two years of February 2008 as required
8 by section 339. Defendants motion to dismiss Plaintiff's tort
9 causes of action is GRANTED. Plaintiff's tort claims are
10 DISMISSED, with prejudice.

11 **B. Pleading Deficiencies**

12 **1. Plaintiff's UCL and False Advertising Claims**

13 Plaintiff's UCL claims are predicated, at least in part, on
14 allegations sounding in fraud. *Inter alia*, Plaintiff alleges
15 Defendants engaged in "fraudulent...business practices;" "never
16 intended to...fulfill its promise...to provide termite prevention
17 services;" and employed "false" advertisements. (Comp. at 36-37).
18 Plaintiff's UCL and FAL claims are subject to Federal Rule of Civil
19 Procedure 9(b). *E.g.*, *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125
20 (9th Cir. 2009) (Rule 9(b) applies to all claims that "sound in
21 fraud" or are "grounded in fraud").

22 Rule 9(b) imposes an elevated pleading standard with respect
23 to fraud claims. To comply with Rule 9(b), allegations of fraud
24 must be specific enough to give defendants notice of the particular
25 misconduct which is alleged to constitute the fraud. *Swartz v.*
26 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation
27 marks omitted). Allegations of fraud must include the "time,
28 place, and specific content of the false representations as well as

1 the identities of the parties to the misrepresentations." *Id.*
2 (internal quotation marks omitted). The "[a]verments of fraud must
3 be accompanied by the who, what, when, where, and how of the
4 misconduct charged." *Kearns* 567 F.3d at 1124. (internal quotation
5 marks omitted). A plaintiff alleging fraud "must set forth more
6 than the neutral facts necessary to identify the transaction. The
7 plaintiff must set forth what is false or misleading about a
8 statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317
9 F.3d 1097, 1106 (9th Cir. 2003).

10 The complaint does not allege the relevant facts with
11 sufficient particularity to satisfy Rule 9. *Inter alia*, the
12 complaint does not allege what specific representations or
13 advertising materials Plaintiff relied on, does not identify any
14 individuals alleged to have made fraudulent statements, and does
15 not clearly establish when the misleading statements Plaintiff
16 allegedly relied on were made.

17 In his opposition, Plaintiff argues that the information
18 needed to satisfy Rule 9 - such as the identify of person making
19 representations and the dates on which such representations were
20 made- can be gleaned from the twenty exhibits Plaintiff attached to
21 his complaint. The complaint does not incorporate these documents
22 into the factual allegations underlying Plaintiff's UCL and FAL
23 claims. Plaintiff cannot satisfy Rule 9 by simply attaching
24 voluminous exhibits to a complaint and expecting Defendants, and
25 the court, to comb through approximately one-hundred pages of
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1 documents in order to piece together a cognizable claim.⁴
2 Plaintiff's UCL and FAL claims are DISMISSED, without prejudice.

3 **2. Tort Claims**

4 Defendants argument that the economic loss rule bars
5 Plaintiff's tort causes of action is moot in light of the statute
6 of limitations holding.

7 **3. Contract Claims**

8 Defendants contend that the contract underlying Plaintiff's
9 claim for breach of contract cannot be ascertained from the face of
10 the complaint. Although the complaint is fairly ambiguous, it is
11 sufficient to provide fair notice that Plaintiff's claim is for
12 breach of the document attached to the complaint as Exhibit I and
13 the annual extensions thereto. Exhibit I is entitled "California
14 Subterranean Termite Plan Agreement" and is signed by Defendants'
15 employee and Plaintiff. Exhibit I is incorporated by reference
16 into the complaint and is described as the operative agreement
17 throughout the complaint. (Comp. at 16, 29). In light of the
18 allegations of the complaint, the terms reflected in Exhibit I, and
19 the references to Exhibit I contained in the complaint, the
20 complaint is sufficient to provide the notice required by Rule 8.
21 However, to the extent Plaintiff's seeks to assert claims for
22 breach arising out of contracts other than Exhibit I, such claims
23 are not properly pled, and any such claims are DISMISSED, without
24 prejudice.

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27 ⁴ This is especially so where, as here, a significant amount of superfluous
28 evidentiary matter is attached, and where there are twenty exhibits appended to
the complaint that are docketed on the CM/ECF system without titles.

1 Defendants also contend that Plaintiff's "property damage
2 claim should be dismissed" pursuant to the terms of the parties'
3 agreement. Defendants note that the contract purports to exempt
4 Defendants from liability for property damage. Plaintiff rejoins
5 that the provision of the contract invoked by Defendants is
6 unconscionable. Even assuming *arguendo* that Plaintiff cannot
7 recover for damage to his property under his breach of contract
8 claim, the property damage exclusion Defendants invoke does not
9 provide a basis to dismiss the breach of contract cause of action
10 asserted in the complaint, which seeks to recover "damages in an a
11 amount to be determined at trial." (Comp. At 40). Defendants'
12 attempt to limit the amount of contract damages Plaintiff may
13 recover can be addressed in the context of a motion for summary
14 judgment or in a motion in limine.

15 **C. Motion to Strike Plaintiff's Request for Injunctive Relief**

16 Defendants' seek to strike Plaintiff's prayer for injunctive
17 relief because Plaintiff has not alleged he has an inadequate
18 remedy at law.⁵ As the complaint is subject to dismissal for the
19 reasons stated above, Defendants' motion to strike is moot.

20 **ORDER**

21 For the reasons stated, IT IS ORDERED:

- 22 1) Plaintiff's UCL and FAL claims are DISMISSED, without
23 prejudice;
- 24 2) Plaintiff's breach of professional duty and assumpsit
25 claims are DISMISSED as time barred, with prejudice;

27 ⁵ Defendants' argument is misplaced, as injunctive relief is available under the
28 UCL. *E.g.*, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144
(Cal. 2003).

1 3) Plaintiff shall file an amended complaint within 20 days
2 following electronic service of this memorandum decision;
3 Defendants shall filed responsive pleading within 15 days
4 following service of an amended complaint; and
5 4) Defendants shall file a form of order consistent with this
6 memorandum decision within five (5) days of electronic service
7 of this decision.

8 IT IS SO ORDERED.

9 Dated: July 25, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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