

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE 1849 CONDOMINIUMS
ASSOCIATION, INC., a California
nonprofit mutual benefit
corporation,

No. 2:09-cv-03339-JAM-EFB

ORDER GRANTING
COUNTERDEFENDANT'S MOTION TO
DISMISS

Plaintiff,

v.

GEOFFREY BRUNER and DOES 1
through 20, inclusive,

Defendant.

GEOFFREY BRUNER and DOES 1
through 20, inclusive,

Counterclaimant,

V.

THE 1849 CONDOMINIUMS
ASSOCIATION, INC., a California
nonprofit mutual benefit
corporation,

Counterdefendant.

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This matter comes before the Court on Counterdefendant The 1849 Condominiums Association, Inc.'s ("Association's") Motion to Dismiss Counterclaimant Geoffrey Bruner's ("Bruner's")

1 Counterclaim ("Counterclaim") pursuant to Federal Rule of Civil
2 Procedure 12(b) (6). Bruner opposes the motion.¹
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5 For the reasons stated below, the Association's Motion to
6 Dismiss is GRANTED.
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9 I. FACTUAL AND PROCEDURAL BACKGROUND
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12 For all times relevant hereto, the Association, a
13 California non-profit mutual benefit corporation, was an owners
14 association managing the 1849 Condominium project ("Condo
15 Project") in Mammoth Lakes, California. Counterclaim ¶ 1. The
16 Condo Project is governed by a Declaration of Covenants,
17 Conditions and Restrictions for the Condo Project ("CC&R's").
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19 Id. Bruner, a resident of Clark County, Nevada, owns Unit No.
20 306 in the Condo Project. Id. ¶ 2.
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23 In December 2007, the Association presented a proposed
24 renovation project ("Renovation Project") to the unit owners for
25 their approval. Id. ¶ 4. The Renovation Project was to include
26 the remodel, repair, replacement, and/or renovation of the Phase
27 1 and 2 buildings in the Condo Project. Id. ¶ 6. The cost of the
28 proposed Renovation Project and the special assessment to the
unit owners was \$9,500,000 ("Assessment"). Id. ¶ 7. The unit

1 Because oral argument will not be of material assistance, the
Court orders this matter submitted on the briefs. E.D. Cal.
L.R. 230(g).

1 owners approved the Renovation Project and the associated
2 special assessment. Id. ¶ 8.

3 Since the approval of the Renovation Project, the
4 Association charged the entire Assessment, but has not completed
5 the Renovation Project as promised. Id. ¶ 9. The Association has
6 allegedly failed to construct several components of the
7 Renovation Project, unlawfully tabled, changed or removed
8 several aspects of the project, and mismanaged the project. Id.
9
10 Bruner asserts the Association did not seek competing
11 construction bids to reduce the overall cost of the Renovation
12 Project. Id. ¶¶ 12-13.

14 Furthermore, Bruner alleges the Renovation Project does not
15 comply with the CC&R's. Id. ¶ 10. Portions of the Renovation
16 Project are not within the scope of the Association's authority
17 under the CC&R's. Id. Additionally, the Association purportedly
18 failed to properly allocate the Assessment among the unit owners
19 in accordance with the CC&R's and the Association's own
20 governing documents. Id. ¶ 11.

22 The Association filed a Complaint ("Complaint") in Mono
23 County Superior Court on October 22, 2009 (Case No. 16857),
24 alleging Bruner failed to pay common area assessments. On
25 November 30, 2009, the action was removed to this Court based on
26 diversity of citizenship pursuant to 28 U.S.C. § 1332. On
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December 15, 2009, Bruner filed the Counterclaim against the Association, alleging sixteen state law claims.

II. OPINION

A. Legal Standard

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a).

1 "Absent prejudice, or a strong showing of any [other relevant]
2 factor[], there exists a presumption under Rule 15(a) in favor
3 of granting leave to amend." Eminence Capital, L.L.C. v.
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5 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal
6 with prejudice and without leave to amend is not appropriate
7 unless it is clear . . . that the complaint could not be saved
8 by amendment." Id.

9 B. First, Second, Third and Fourth Claims

10 Bruner alleges four claims based on contract principles:
11 Violation of Governing Documents, Selective Enforcement and/or
12 Abandonment of Governing Documents, Breach of Contract and
13 Breach of Implied Covenant of Good Faith and Fair Dealing. The
14 Association argues that these claims should be dismissed because
15 there is no contract, and even if there is a contract, the
16 Counterclaim fails to explain which provisions were violated.

17 Condominium law allows a homeowner to sue the association
18 for damages and an injunction to compel the association to
19 enforce the provisions of the declaration. Posey v. Leavitt, 229
20 Cal. App. 3d 1236, 1246 (1991) (citations omitted). "The
21 covenants and restrictions in the declaration shall be
22 enforceable equitable servitudes...[that] may be enforced by any
23 owner of a separate interest, or by the association, or by
24 both." Cal. Civ. Code § 1354(a). These agreements are enforced
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1 based on contract principles. Nahrstedt v. Lakeside Vill. Condo.
2 Ass'n, 8 Cal. 4th 361, 380 (1994).

3 To establish a breach of contract claim, a plaintiff must
4 establish the following elements: "(1) existence of the
5 contract; (2) plaintiff's performance or excuse for
6 nonperformance; (3) defendant's breach; and (4) damages to
7 plaintiff as a result of the breach." CDF Firefighters v.
8 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).

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10 A contractual obligation is a prerequisite to a breach of
11 an implied covenant of good faith and fair dealing. Fortaleza v.
12 PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at
13 **15-16 (N.D. Cal. July 27, 2009).

14
15 Here, Bruner alleges sufficient facts to establish a
16 contract between Bruner and the Association. Bruner alleges that
17 the Association is managed by the CC&R's and its own governing
18 documents. Bruner is the owner of Unit No. 306 in the Project.
19 Thus, Bruner sufficiently alleges that these documents
20 constitute an agreement between the Association and the unit
21 owners, and that either party can sue to enforce these
22 provisions.

23
24 However, Bruner fails to allege what provisions in the
25 CC&R's, or any other contract, were violated by the Association
26 in performing the Renovation Project. A breach of contract claim
27 rests upon the actual terms of the contract, but Bruner fails to

1 attach the CC&R's or other governing documents, which would
2 provide the Association's obligations. As such, Bruner has
3 failed to give the Association "fair notice of what the claim is
4 and the grounds upon which it rests." Twombly, 550 U.S. at 555.
5 Accordingly, Bruner's first four claims are dismissed, with
6 leave to amend.

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8 C. Declaratory Relief

9 Bruner's fifth claim requests declaratory relief to
10 determine whether the CC&R's and other governing documents of
11 the Association are enforceable, and if so, to determine the
12 rights of the parties. However, Bruner's fifth claim is based on
13 the same conclusory allegations as the preceding claims and
14 thus, fails to allege what provisions in the CC&R's, or any
15 other contract, were violated by the Association. Bruner has not
16 plead "enough facts to state a claim to relief that is plausible
17 on its face." Twombly, 550 U.S. at 570. Accordingly, Bruner's
18 fifth claim for declaratory relief is dismissed, with leave to
19 amend.

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21 D. Negligence Per Se/Violation of Statutes and Administrative
22 Regulations

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24 Bruner alleges that through oversight, management and
25 administration of the Project and Renovation Project, the
26 Association violated, "without limitation, the Davis-Stirling
27 Common Interest Development Act, California Civil Code § 1350,
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1 *et seq.*, and any corresponding regulations promulgated
2 thereunder.” Counterclaim ¶ 44.

3 Without citing any specific provision of the Davis-Stirling
4 Common Interest Development Act or California Civil Code, Bruner
5 has failed to sufficiently allege a claim. Bruner has the
6 burden to put the Association on notice of the provisions
7 allegedly violated. Merely citing to an entire Act and section
8 of the California Civil Code and stating in the Opposition that
9 this is “more than sufficient for the Association to figure out
10 for itself which of the many provisions it violated” fails to
11 plead enough facts to state a claim to relief that is plausible
12 on its face. Bruner’s Opposition 12:11-12. Accordingly,
13 Bruner’s sixth claim for negligence *per se*/violation of
14 unidentified statutes and regulations is dismissed, with leave
15 to amend.

16 E. Constructive Fraud and Breach of Fiduciary Duty

17 Bruner alleges that the Association breached their duty to
18 affirmatively disclose material facts to Bruner and the other
19 unit owners regarding the Renovation Project. Some of the
20 alleged material facts not disclosed include the purposes,
21 goals, plans and specifications of the Renovation project, the
22 components included in the Renovation Project and the actual and
23 projected costs of the Renovation Project. Counterclaim ¶ 53.

1 "In all averments of fraud or mistake, the circumstances
2 constituting fraud or mistake shall be stated with
3 particularity." Fed. R. Civ. Proc. 9(b). However, courts do not
4 apply this heightened pleading standard to constructive fraud
5 claims. Cendant Corp. v. Shelton, 474 F. Supp. 2d 377, 380 (D.
6 Conn. 2007).

7 "Constructive fraud comprises any act, omission or
8 concealment involving a breach of legal or equitable duty, trust
9 or confidence which results in damage to another even though the
10 conduct is not otherwise fraudulent." Harmon v. Kobrin (In re
11 Harmon, 250 F.3d 1240, 1249 n.10 (9th Cir. 2001) (citing
12 Assilzadeh v. Cal. Fed. Bank, 98 Cal. Rptr. 2d 176, 186 (Cal.
13 Ct. App. 2000) (internal quotation marks and citations
14 omitted)). The failure to disclose material facts may constitute
15 constructive fraud. Assilzadeh, 98 Cal. Rptr. 2d at 186.

16 "The elements of a cause of action for breach of fiduciary
17 duty are: 1) the existence of a fiduciary duty; 2) a breach of
18 the fiduciary duty; and 3) resulting damage." Pellegrini v.
19 Weiss, 165 Cal. App. 4th 515, 524 (2008). A homeowners
20 association owes a fiduciary duty to its members. See Cohen v.
21 Kite Hill Cmty. Ass'n, 142 Cal. App. 3d 642 (1983).

22 Here, Bruner sufficiently alleges that the Association had
23 a fiduciary duty to him. However, Bruner fails to sufficiently
24 allege that the Association breached their fiduciary duty by

1 failing to disclose material facts about the Renovation Project.
2 Although the Counterclaim commits a long paragraph to explaining
3 what the Association did not disclose to the unit owners, these
4 allegations are too vague and broad. Accordingly, Bruner's
5 seventh and eighth claims for constructive fraud and breach of
6 fiduciary duty are dismissed, with leave to amend.
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8 **F. Injunctive Relief**

9 Bruner's ninth claim for relief seeks an injunction
10 prohibiting the Association from proceeding with the Renovation
11 Project, or attempting to collect the balance of the
12 Assessments; and a mandatory injunction compelling the
13 Association to turn over all relevant documents, to give a full
14 accounting, to reallocate the Assessments, and to disgorge any
15 funds wrongfully assessed.
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17 The traditional bases for injunctive relief are irreparable
18 injury and inadequacy of legal remedies. Amoco Prod. Co. v.
19 Village of Gambell, 480 U.S. 531, 542 (1987). Here, Bruner does
20 not sufficiently plead facts to support a finding that he is
21 suffering irreparable injury. Moreover, the preceding eight
22 claims for relief demonstrate that Bruner has failed to plead
23 any actionable tort or breach of contract by the Association.
24 The Court finds there is no factual basis, as currently plead in
25 the Counterclaim, for any legal remedy. Accordingly, Bruner's
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1 ninth claim for injunctive relief is dismissed, with leave to
2 amend.

3 G. Intentional Misrepresentation/Fraudulent Concealment

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5 "In alleging fraud or mistake, a party must state with
6 particularity the circumstances constituting fraud or mistake.
7 Malice, intent, knowledge and other conditions of a person's
8 mind may be alleged generally." Fed. R. Civ. Proc. 9(b). A
9 claim of fraud must have the following elements: "(a) a
10 misrepresentation (false representation, concealment, or
11 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
12 intent to defraud, i.e., to induce reliance; (d) justifiable
13 reliance; and (e) resulting damage." In re Estate of Young, 160
14 Cal. App. 4th 62, 79 (2008) (quoting Lazar v. Superior Court, 12
15 Cal. 4th 631, 638 (1996)) (internal quotation marks omitted).
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18 Here, Bruner has not alleged fraud with the required
19 particularity to state a plausible claim for relief. Bruner's
20 conclusory statements that the Association made "false
21 representations and omissions of material fact" and
22 "intentionally covered over, suppressed, minimized the
23 importance of, or otherwise concealed such information" do not
24 sufficiently allege any real misrepresentation or intent to
25 defraud. Counterclaim ¶¶ 71, 72. Nowhere in the Counterclaim
26 does Bruner describe specific facts of the alleged fraud except
27 to describe a laundry list of vague and broad allegations
28

1 against the Association. These conclusory allegations are
2 insufficient to state a claim for relief. Accordingly, Bruner's
3 tenth claim for intentional misrepresentation/fraudulent
4 concealment is dismissed, with leave to amend.
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6 H. Negligent Misrepresentation/Concealment

7 "In alleging fraud or mistake, a party must state with
8 particularity the circumstances constituting fraud or mistake."
9 Fed. R. Civ. P. 9(b). In cases where fraud is not a necessary
10 element of a claim, but a plaintiff chooses nonetheless to
11 allege the defendant engaged in fraudulent conduct, the claim is
12 said to be "grounded in fraud." Vess v. Ciba-Geigy Corp. USA,
13 317 F.3d 1097, 1103-04 (9th Cir. 2003). Those allegations that
14 aver fraud must satisfy the particularity requirement of Rule
15 9(b). Id. "Fraud can be averred by specifically alleging fraud,
16 or by alleging facts that necessarily constitute fraud (even if
17 the word 'fraud' is not used)." Id. at 1105.

18 Here, Bruner's "negligent misrepresentation/concealment"
19 claim is "grounded in fraud" because Bruner essentially uses the
20 same allegations from the intentional misrepresentation claim to
21 allege this claim. Bruner's two main paragraphs for this claim
22 were copied from the intentional misrepresentation claim,
23 stating that the Association "made false representations and
24 omissions of material fact" and "intentionally covered over,
25 suppressed, minimized the importance of, or otherwise concealed
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1 such information." Counterclaim ¶¶ 82, 83. Thus, these
2 allegations are grounded in fraud, and must satisfy the
3 heightened pleading standard. These conclusory statements and
4 legal conclusions fail to meet the particularity requirement of
5 Rule 9(b). Accordingly, Bruner's eleventh claim for negligent
6 misrepresentation/concealment is dismissed, with leave to amend.
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8 **I. Negligence**

9 In order to state a claim for negligence, a plaintiff must
10 allege: (1) the defendant has a legal duty to use due care; (2)
11 the defendant breached such legal duty; (3) the defendant's
12 breach was the proximate or legal cause of the resulting injury;
13 and (4) damage to the plaintiff. Ladd v. County of San Mateo,
14 12 Cal. 4th 913, 917 (1996).

15 Bruner fails to sufficiently state a claim for negligence
16 because he does not allege facts stating how the Association
17 breached its legal duty to Bruner. Other than the vague and
18 conclusory allegations that the Association failed to disclose
19 information to the unit owners, Bruner fails to allege any facts
20 to support this claim. Accordingly, Bruner's twelfth claim for
21 negligence is dismissed, with leave to amend.

22 **J. Unjust Enrichment**

23 An unjust enrichment claim requires (1) the receipt of a
24 benefit and (2) the unjust retention of the benefit at the
25 expense of another. Peterson v. Cellco Partnership, 164 Cal.

1 App. 4th 1583, 1593 (2008). Bruner's Counterclaim alleges that
2 the Association "misappropriated, converted, accepted, retained,
3 used, enjoyed, and appreciated all of the Special Assessment."
4 Counterclaim ¶ 94. These conclusory allegations fail to state
5 sufficient facts to support this claim. Accordingly, Bruner's
6 thirteenth claim for unjust enrichment is dismissed, with leave
7 to amend.

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9 **K. An Accounting**

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11 "A cause of action for an accounting requires a showing
12 that a relationship exists between the plaintiff and defendant
13 that requires an accounting, and that some balance is due the
14 plaintiff that can only be ascertained by an accounting."

15 Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009)

16 (citations omitted). "An action for accounting is not available
17 where the plaintiff alleges the right to recover a sum certain
18 or a sum that can be made certain by calculation." Id.
19 (citations omitted).

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21 Here, Bruner fails to allege sufficient facts to support an
22 accounting claim. Although Bruner establishes in the
23 Counterclaim that Bruner and the Association have a special
24 relationship, Bruner fails to state how the amount in damages
25 from the Association retaining the Special Assessment and
26 mismanaging the Renovation Project would be uncertain after a
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1 calculation. Accordingly, Bruner's fourteenth claim for an
2 accounting is dismissed, with leave to amend.
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4 L. Constructive Trust

5 A constructive trust may be imposed if three conditions are
6 met: (1) existence of a res; (2) the plaintiff's right to that
7 res; and (3) the defendant's gain of the res by fraud, accident,
8 mistake, undue influence or other wrongful act. United States v.
9 Pegg, 782 F.2d 1498, 1500 (9th Cir. 1986). Here, a constructive
10 trust is not an appropriate remedy as plead in this case. Bruner
11 has failed to sufficiently allege that the Association received
12 the money through fraud or other wrongful act. Accordingly,
13 Bruner's fifteenth claim for a constructive trust is dismissed,
14 with leave to amend.

15 M. Attorney's Fees

16 "Attorney fees are allowable as an item of costs when
17 authorized by contract, statute or law." Arias v. Katella
18 Townhouse Homeowners Ass'n., Inc., 127 Cal. App. 4th 847, 852
19 (2005). Here, Bruner's sixteenth claim does not plead any legal
20 basis for recovery of attorney's fees, neither a statutory
21 ground nor any contractual provision for attorney's fees.
22 Accordingly, Bruner's sixteenth claim for attorney's fees is
23 dismissed, with leave to amend.

III. ORDER

For the reasons set forth above, the Association's Motion to Dismiss Bruner's Counterclaim is GRANTED, with leave to amend. Bruner has twenty (20) days from the date of this Order to file an Amended Counterclaim consistent with this Order.

IT IS SO ORDERED.

DATED: June 18, 2010


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE