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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BOND SAFEGUARD INSURANCE
COMPANY,

 Plaintiff,

 v.

GEORGE KRAMER and DEBORAH
SWEANEY,

 Defendants.

No. 2:14-cv-01896-JAM-CKD

**ORDER DENYING DEFENDANT GEORGE
KRAMER'S PARTIAL MOTION TO
DISMISS**

Plaintiff Bond Safeguard Insurance Company ("Plaintiff") issued bonds for which Defendant George Kramer ("Defendant") owes money. Plaintiff brings this suit against Defendant and his sister alleging a fraudulent scheme to avoid payment. Because Plaintiff's allegations are sufficiently detailed, the Court DENIES Defendant's partial motion to dismiss.¹

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for February 25, 2015.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 In 2005, Defendant assisted the company Jimmy Camp
3 Development, Inc. in acquiring bonds from Plaintiff. Compl.
4 ¶ 12. When the company defaulted on the bonds, it entered into
5 an agreement with Plaintiff and Defendant, which made Defendant
6 liable for over \$64,000 in unpaid premiums. Compl. ¶¶ 13, 23.
7 Defendant failed to pay in full. Compl. ¶ 22. Plaintiff then
8 sought to collect on this debt by placing a lien on Defendant's
9 house. Compl. ¶ 73.

10 Meanwhile, Defendant and his sister, Deborah Sweaney
11 ("Sweaney"), allegedly concocted a scheme to let Defendant escape
12 liability. Compl. ¶ 54. The two created a deed of trust
13 purporting to make Sweaney the senior lienholder on the home.
14 See Compl. ¶¶ 55, 57, 73. Plaintiff alleges the deed was "a
15 nullity and should be voided" because the note purportedly
16 securing the deed never existed. Compl. ¶¶ 58, 61.

17 Plaintiff sued Defendant and Sweaney, alleging (1) breach of
18 an indemnity agreement, (2) "Premiums - Open Account," (3) unjust
19 enrichment, (4) "Implied Contract," (5) fraudulent transfers, and
20 (6)² "Conspiracy." Sweaney answered (Doc. #8), and her brother
21 filed this partial motion to dismiss the sixth and seventh claims
22 only (Doc. #14). Plaintiff opposes the motion (Doc. #15).

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27 ² The complaint incorrectly labels the fifth and sixth causes of
28 action as the "Sixth" and "Seventh" claims respectively. This
order refers to them as the "sixth" and "seventh" claims for
purposes of consistency with the pleadings and briefs.

1 II. OPINION

2 A. Discussion

3 1. Federal Rule of Civil Procedure 9(b)

4 Defendant argues that the Court must dismiss the sixth and
5 seventh causes of action because the allegations do not meet the
6 particularity requirements of Federal Rule of Civil Procedure
7 9(b). Mot. at 3-4. Defendant asserts that the complaint is
8 deficient because it does not describe the "specific
9 circumstances" in which Sweaney stated that the promissory note
10 "never existed." Mot. at 4:4-9; see Compl. ¶ 59. In response,
11 Plaintiff first argues that Rule 9(b) does not govern claims for
12 "constructive" fraudulent conveyance. Opp. at 3.

13 Federal Rule of Civil Procedure 9(b) requires a plaintiff
14 to plead allegations of fraud with particularity, including the
15 "circumstances constituting fraud or mistake." This pleading
16 standard applies to causes of action that "sound in fraud."
17 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir.
18 2003).

19 Plaintiff here brings the sixth claim under California's
20 Uniform Fraudulent Transfers Act. See Compl. ¶ 76. But the
21 complaint does not identify which part of that Act Defendant
22 allegedly violated. The allegations under the sixth claim
23 invoke language from two parts of the Act: California Civil Code
24 section 3439.04 and section 3439.05. See, e.g., Compl. ¶ 62
25 (using language from section 3439.04(a)(1)); id. ¶ 71 (using
26 language from section 3439.05). Rule 9(b) applies to section
27 3439.04 but not to section 3439.05. See Kelleher v. Kelleher,
28 2014 WL 94197, at *5-*6 (N.D. Cal. Jan. 9, 2014); Sunnyside Dev.

1 Co. LLC v. Cambridge Display Tech. Ltd., 2008 WL 4450328, at *6,
2 *8, *9 (N.D. Cal. Sept. 29, 2008). Thus, to the extent the
3 allegations support a claim under section 3439.04, the Court
4 applies Rule 9(b).

5 Plaintiff next argues that even if Rule 9(b) applies, the
6 allegation about Sweaney's statement is "evidentiary material
7 that did not need to be plead [sic]." Opp. at 4:26-27.

8 The Court agrees that Plaintiff's sixth cause of action is
9 pled with adequate specificity under Rule 9(b) even absent the
10 challenged allegation. Defendant asks the Court to throw out
11 the entire claim because Plaintiff did not specify the
12 circumstances of Sweaney's alleged statement. But Sweaney's
13 statement was not part of the purported fraud; under the
14 complaint's facts, the fraud occurred when Defendant and Sweaney
15 created a fraudulent deed of trust intending to make Sweaney the
16 senior lienholder. See Compl. ¶¶ 54-70. These allegations
17 adequately describe the circumstances of the alleged fraud. So
18 even if the Court were to ignore the allegation about Sweaney's
19 statement, the rest of the claim's allegations satisfy Rule
20 9(b).

21 Resolving the issue as to the sixth cause of action on this
22 basis, the Court does not reach the parties' further arguments,
23 including that the circumstances of Sweaney's statement
24 comprised "intent, knowledge, [or] other condition of a person's
25 mind [that] may be alleged generally[,]" and that Defendant's
26 9(b) argument was waived when Sweaney filed an answer. Opp. at
27 3:26-27, 5.

28 Defendant next seeks dismissal of the seventh cause of

1 action ("Conspiracy") on the basis that it also does not meet
2 the requirements of 9(b). Mot. at 3. But besides stating that
3 Rule 9(b) applies to the conspiracy claim, Defendant offers no
4 argument as to why the seventh claim's allegations are
5 insufficient. The seventh claim relies on allegations in the
6 sixth cause of action, which the Court finds adequate.
7 Defendant's argument therefore fails.

8 Because the sixth and seventh causes of action comply with
9 Rule 9(b), the Court denies Defendant's motion to dismiss on
10 that basis.

11 2. Damages

12 Defendant argues that "Plaintiff fails to articulate how it
13 has been damaged by the lien in favor of Sweeney [sic] [.]" Mot.
14 at 4:14-15. Defendant points to no case law and provides no
15 further justification for his position. Plaintiff in turn
16 responds that it has suffered damage because Defendant worked
17 with his sister to fraudulently make Sweeney a senior creditor
18 with respect to Plaintiff, thereby affecting Plaintiff's ability
19 to collect. Opp. at 5.

20 The Court agrees with Plaintiff that the complaint
21 adequately alleges damages. Specifically, paragraphs 71 through
22 73 state that "Plaintiff is entitled to attachment . . . against
23 the house and its proceeds" but cannot access the house or
24 proceeds, because Sweeney's fraudulent lien is senior to
25 Plaintiff's rights. The Court therefore denies Defendant's
26 motion to dismiss based on damages.

27 3. Plaintiff's Request for Fees and Costs

28 In its opposition, Plaintiff "requests that it be awarded

1 legal fees and costs arising from the need to respond to
2 [Defendant's] Motion." Opp. at 5:22-23. Plaintiff apparently
3 makes this request on the grounds that the motion to dismiss
4 "delayed the case without good cause" and was "an improper
5 tactic." Opp. at 4:20, 5:21. Plaintiff does not state any legal
6 basis by which the Court could make such an award, so the request
7 is denied.

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9 III. ORDER

10 For the reasons set forth above, the Court DENIES Defendant
11 George Kramer's motion to dismiss and Plaintiff's request for
12 fees and costs.

13 IT IS SO ORDERED.

14 Dated: March 6, 2015

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17 JOHN A. MENDEZ,
18 UNITED STATES DISTRICT JUDGE
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