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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KENNEDY FUNDING, INC., a New Jersey Corporation,

Case No. C 09-01957 RS

Plaintiff,

ORDER GRANTING MOTION TO DISMISS

v.

NICOLAS CHAPMAN, an individual;
JIREH EDUCATIONAL MINISTRIES, a California non-profit corporation;
NEWPORT AVALON INVESTORS, LLC, a California limited liability company;
BRIAN D. EVANS, an individual;
MANCEBO CORPORATION, a California Corporation;
ARNE WAGNER, an individual;
LAWRENCE S. THAL, an individual;
REDGE MARTIN, an individual;
VANGUARD FINANCIAL LTD.; and
DOES 1 through 50, Inclusive,

Defendants.

NEWPORT AVALON INVESTORS, LLC, a California limited liability company

Counter-Claimant,

v.

KENNEDY FUNDING, INC., a New Jersey corporation,

Counterclaim-Defendant.

United States District Court
For the Northern District of California

I. INTRODUCTION

This case involves claims and counter-claims arising from the financing of a real estate development project. At issue here are the counter-claims of defendant Newport Avalon Investors, LLC (“Newport”) against plaintiff and counter-defendant Kennedy Funding, Inc. (“Kennedy”).¹ Newport asserts eight counter-claims against Kennedy for its conduct related to various lending agreements. Kennedy moves to dismiss counter-claims two through eight under Federal Rule of Civil Procedure 12(b)(6). The motion was heard in this Court on October 7, 2010. For the reasons stated below, the motion is granted with leave to amend all claims except false light, which is dismissed without leave to amend.

II. BACKGROUND

The events giving rise to this litigation began in October 2003, when Newport obtained a loan for \$5.4 million from Kennedy in order to acquire real property in Pleasanton, California.² According to the cross-complaint, the original loan offered by Kennedy in its letter of intent included a loan fee of 4%. Newport relied upon the terms until, on the “eve of closing,” Kennedy increased the loan fees, which decreased the loan principal. Newport utilized the proceeds to purchase approximately fifty-one acres for a planned subdivision. As part of the project, Newport claims that Kennedy “purported to help” it obtain a performance bond. Newport contends that the bond premium was \$15,747, but it was charged \$100,000. It further alleges that Kennedy and Keeton Construction Co. (“Keeton”) presented false documents to the County of Alameda and Federal Insurance Company in obtaining the bond. Keeton, a non-party to the suit, is described by Newport as “a shill contractor.”

¹ Kennedy initiated this suit against defendants Nicholas Chapman, Jireh Educational Ministries, Newport, and several other individuals to recover funds allegedly owed to it under a settlement agreement reached as part of Newport’s bankruptcy proceeding. Nicholas Chapman and Newport jointly filed a motion to dismiss and Jireh Educational Ministries also filed a separate motion to dismiss. On June 18, 2010, this Court issued its order granting in part and denying in part the motions. *See Kennedy Funding, Inc. v. Chapman*, No. C 09-01957 RS, 2010 U.S. Dist. LEXIS 60475 (N.D. Cal. June 18, 2010). Subsequently, Newport answered the complaint and raised the counter-claims at issue here.

² Additional factual background is contained in the Court’s prior order, 2010 U.S. Dist. LEXIS 60475, at *1-3.

1 According to Kennedy, by late 2004, Newport was in default on its loan obligations.
2 Newport subsequently filed for bankruptcy protection under Title XI of the United States Code. In
3 May 2006, while the bankruptcy proceeding was ongoing, Newport and Kennedy entered into a
4 settlement, which Newport refers to as “the agreements.” These agreements were incorporated into
5 the bankruptcy plan. On October 5, 2006, Newport emerged as a reorganized debtor under the plan
6 as confirmed by the bankruptcy court. As part of their agreements, Kennedy was to fund a second
7 loan to Newport for \$400,000. The purpose of the second loan was to enable Newport to make
8 improvements to the Pleasanton subdivision. Newport contends that Kennedy was late in funding
9 the loan by seven months, which has affected Newport’s ability to sell the subdivision lots.

10 In more recent events, Newport claims that in February 2009, Kennedy sent agents to the
11 subdivision who made false statements about Newport’s ownership of the property. The agents
12 allegedly told “local members of the real estate professional community” that the property had been
13 foreclosed and that Newport did not have title to convey. Based on these contentions, Newport
14 brought eight counter-claims for: (1) breach of contract; (2) declaratory relief under 28 U.S.C. §
15 2201; (3) RICO violation; (4) fraud; (5) defamation; (6) false light; (7) interference with prospective
16 economic advantage; and (8) unfair business practices. Kennedy moves to dismiss all but the
17 breach of contract counter-claim for failure to state a claim upon which relief can be granted.

18 III. LEGAL STANDARD

19 Under Federal Rule of Civil Procedure 8(a)(2), a complaint must present “a short and plain
20 statement of the claim” demonstrating that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2).
21 If the complaint does not meet this standard, the defendant may move to dismiss for failure to state a
22 claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), dismissal is
23 appropriate if either the claimant does not raise a cognizable legal theory or otherwise fails to allege
24 sufficient facts to support a cognizable claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
25 (9th Cir. 1988). Thus, while a legally sufficient complaint does not require “detailed factual
26 allegations,” it must contain more than “unadorned” assertions of harm or bare legal conclusions
27 without factual support. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp.*
28 *v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a Rule 12(b)(6) motion to dismiss, all

1 material allegations in the complaint are accepted as true and construed in the light most favorable
2 to the non-moving party. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

3 Furthermore, Federal Rule of Civil Procedure 9(b) requires that “[in] allegations of fraud or
4 mistake, a party must state with particularity the circumstances constituting fraud or mistake.” To
5 satisfy the rule, a plaintiff must plead the “who, what, where, when, and how” of the claimed
6 misconduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Defendants must be provided
7 notice of “particular misconduct,” so that they may “defend against the charge” instead of generally
8 deny wrongdoing. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal
9 quotation marks and citations omitted).

10 IV. DISCUSSION

11 Kennedy moves to dismiss counter-claims two through eight for failure to state a claim upon
12 which relief can be granted. In its motion to dismiss, Kennedy briefly states that the counter-claims
13 also should be dismissed for lack of subject matter jurisdiction and refers to Newport’s lack of
14 standing, but it does not develop these arguments. At oral argument on this motion, Kennedy
15 confirmed that it only moves to dismiss pursuant to Rule 12(b)(6).

16 A. Declaratory Relief

17 In counter-claim two, Newport seeks a declaratory judgment that Kennedy breached the
18 bankruptcy plan and “related agreements.” In the case of an actual controversy, the Court “may
19 declare the rights and other legal relations of any interested party seeking such declaration.” 28
20 U.S.C. § 2201. Counter-claim one, however, already seeks relief for Kennedy’s alleged breach of
21 “the agreements” incorporated into the bankruptcy plan. Specifically, Newport contends that
22 Kennedy’s delay in funding the post-bankruptcy loan by seven months constitutes breach of their
23 agreements. In counter-claim two, Newport states its belief that Kennedy denies the breach alleged
24 in counter-claim one and therefore seeks declaratory judgment of the breach. Counter-claim two
25 merely seeks adjudication of the same issues raised in counter-claim one and therefore does not
26 represent an independent claim. Therefore, the motion to dismiss is granted without leave to amend.
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1 B. RICO

2 In its third counter-claim, Newport alleges that Kennedy committed a RICO violation by
3 engaging in a “fraudulent criminal enterprise . . . to manipulate prospective borrowers out of funds
4 and property.” Newport fails to specify the subsection of 18 U.S.C. section 1964 under which it
5 brings its claim. The parties apparently direct their arguments, however, to whether Newport has
6 alleged the elements of a section 1964(c) claim. Under this subsection, the claimant must allege: (1)
7 conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity, (5) that caused injury
8 to its business or property. *Ove v. Guinn*, 264 F.3d 817, 825 (9th Cir. 2001). According to
9 Newport, Kennedy changed the terms of the first loan on the “eve of closing.” It increased the loan
10 fees, which decreased the loan principal. Kennedy “purported to assist” Newport in obtaining a
11 performance bond for its development project. Newport contends that the bond premium was
12 \$15,747, but it was charged \$100,000. It further alleges that Kennedy and Keeton falsely stated in a
13 document that Keeton was the general engineering contractor for Newport’s project. The document
14 was “transmitted by wire and mail” to the County of Alameda and Federal Insurance Company in
15 May 2004, June 2007, and August 2008 to obtain and renew the performance bond. Finally,
16 Newport claims that Kennedy entered into the bankruptcy settlement agreement “with no intent to
17 perform,” but instead to “fraudulently induce” Newport and “others” into supporting the plan.

18 While Newport contends that the above acts violate RICO, only enumerated predicate acts
19 constitute “racketeering activity” under the statute. § 1961(1). Newport does not explicitly state the
20 theory under which it brings its RICO claim. Based on its characterization of Kennedy as a
21 fraudulent enterprise, its allegations are at least grounded in fraud. As such, it must comport with
22 the heightened pleading standard imposed by Rule 9(b). *See Vess*, 317 F.3d at 1103. Newport’s
23 contentions, however, fail to “state with particularity the circumstances constituting fraud.” Fed. R.
24 Civ. P. 9(b). With respect to the interest rate of the original loan and the performance bond
25 premium, the complaint lacks factual allegations of who made specific false statements, to whom,
26 when, and other circumstances surrounding the fraud. As for falsely stating that Keeton was
27 Newport’s contractor, Newport does not explain how these statements made to third parties
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1 defrauded it. Finally, Newport’s claim that Kennedy misrepresented that it would perform the
2 settlement agreement when it had no intention to do so is wholly conclusory.

3 Newport’s assertions fail to establish other required elements of a RICO claim, as well. For
4 a section 1964(c) claim, an “enterprise” is a distinct entity from the RICO defendant whose conduct
5 gives rise to civil liability. *See Rae v. Union Bank*, 725 F.2d 478, 481(9th Cir. 1984). In other
6 words, Kennedy by itself does not constitute an enterprise for purposes of Newport’s RICO claim.
7 The only other entity mentioned is Keeton, which Newport describes as “a skill contractor used as
8 part of the unlawful enterprise.” That allegation, apparently the sole support for Newport’s assertion
9 that an enterprise exists, falls short of providing a plausible basis for its RICO claim.

10 Additionally, Newport’s allegations of a pattern of racketeering activity are insufficient. In
11 order to establish a pattern, a plaintiff must show “that the racketeering predicates are related, *and*
12 that they amount to or pose a threat of continued criminal activity.” *H.J. Inc. v. Northwestern Bell*
13 *Telephone Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). Newport complains of several acts
14 over a period of years, but all were allegedly undertaken to defraud it out of the Pleasanton property.
15 A pattern, however, requires more than one scheme with a “single purpose which happen[s] to
16 involve more than one act . . . to achieve that purpose.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529,
17 1535 (9th Cir. 1992) (distinguishing “a single episode” involving a number of acts from “a series of
18 separate, related acts”). Furthermore, Newport cannot establish “continued” criminal activity by
19 reference to multiple acts affecting only the Pleasanton project. *See id.* at 1936 (explaining
20 “predicate acts designed to bring about a single event . . . [do] not pose a threat of continuity”).
21 Newport states that it “is informed and believes” that the accused enterprise has “damaged
22 numerous parties” in the United States. This general accusation provides no support for Newport’s
23 contention that Kennedy engages in a pattern of racketeering activity. In sum, Newport fails to
24 plead sufficiently the elements of a RICO claim. Kennedy’s motion to dismiss counter-claim three
25 is granted with leave to amend.

26 C. Fraud

27 In counter-claim four, Newport asserts that Kennedy made fraudulent misrepresentations. In
28 California, a plaintiff averring fraud must plead five elements: (1) a false statement; (2) knowledge

1 of falsity (*i.e.*, scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting
2 damage. *See Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004). Newport
3 relies on the same facts alleged in its RICO claim above. In particular, Newport contends that
4 Kennedy fraudulently entered into the settlement agreements with the intent not to perform. For the
5 reasons previously discussed, Newport fails to satisfy the pleading requirements of Rule 9(b) for the
6 alleged acts of fraud. Therefore, counter-claim four is dismissed with leave to amend.

7 D. Defamation and False Light

8 For counter-claims five and six, Newport raises defamation and false light invasion of
9 privacy. According to Newport, Kennedy and Keeton made false statements in obtaining a
10 performance bond for Newport’s development project. Specifically, Kennedy and Keeton submitted
11 a document to the County of Alameda and Federal Insurance Company that Newport alleges falsely
12 stated Keeton was Newport’s general engineering contractor. Newport also contends that Kennedy
13 “twice sent an agent” to the subdivision who made false statements about Newport’s ownership of
14 the property. The agent allegedly claimed that the property was in foreclosure and Newport did not
15 possess title to transfer.

16 In California, libel and false light have “largely collapsed” into the same claim. *Cort v. St.*
17 *Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 987 (9th Cir. 2002). The two torts are distinct,
18 however, in that false light involves an invasion of privacy, not just harm to reputation. *Id.* (“The
19 right of privacy concerns one’s own peace of mind, while the right of freedom from defamation
20 concerns primarily one’s reputation.”). Furthermore, California recognizes the common law right to
21 privacy as an individual right. *See, e.g., Ion Equipment Corp. v. Nelson*, 110 Cal. App. 3d 868, 878-
22 79 (1980) (“[T]here are no California cases recognizing that a corporation enjoys the right of
23 privacy.”). In this case, counter-claimant Newport is a limited liability company. As commonly
24 understood, a corporation, and by analogy a LLC, is not susceptible to the injured “feelings”
25 associated with invasion of privacy torts. *See id.* at 878. With respect to defamation, however,
26 “there is no distinction between the protectible interest in reputation of corporations and
27 individuals.” *Vegod Corp. v. Am. Broad. Cos.*, 25 Cal. 3d 763, 770 (1979) (internal quotation marks
28

1 and citations omitted). Thus, as a LLC, Newport cannot state a claim for false light, although it may
2 allege defamation for harm to its reputation.

3 Defamation encompasses both libel and slander. Cal. Civ. Code § 44. Libel is defined, in
4 relevant part, as a false, unprivileged publication by writing, “which has a tendency to injure [any
5 person] in his occupation.” § 45. Libel that defames the plaintiff without the need for any
6 explanation constitutes “libel on its face.” § 45a. Defamation that is not libelous on its face
7 requires proof of special damage in order to state a claim. *Id.*; § 48a(4)(b) (defining special damage
8 as damage with respect to “property, business, trade, profession or occupation”). Similarly, slander
9 includes a false, unprivileged publication that is orally uttered which tends “directly to injure
10 [plaintiff] in respect to his office, profession, trade or business by imputing something with
11 reference to his office, profession, trade, or business that has a natural tendency to lessen its profits.”
12 § 46. Thus, Newport’s defamation counter-claim more precisely consists of a libel claim for the
13 document submitted in obtaining the performance bond and a slander claim for the alleged
14 statements made to real estate professionals.

15 While defamation is not subject to the heightened pleading standard of Rule 9(b), Newport
16 still must allege facts sufficient to state a “plausible claim for relief.” *See Iqbal*, 129 S. Ct. 1950.
17 With respect to the performance bond, Newport states that Kennedy and Keeton made false
18 statements. It is unclear what statements Kennedy allegedly made versus Keeton or, alternately,
19 why any statement made by Keeton provides the basis for Kennedy’s liability. Furthermore,
20 Newport asserts that it is entitled to “damages per se.” The allegedly libelous statement, however, is
21 that Keeton was “the general engineering contractor performing the work for Newport.” Newport
22 claims that the statement “caus[ed] the County of Alameda to investigate the issue regarding the
23 bond.” These allegations are insufficient to plead either libel on its face or special damage. With
24 respect to the alleged statements made to the real estate professionals, the cross-claim presents
25 conclusions rather than factual allegations of Kennedy’s involvement. The counter-claim fails to
26 allege, for example, who made the statements, to whom they were made, and the speaker’s
27 relationship to Kennedy. Accordingly, Kennedy’s motion to dismiss is granted without leave to
28 amend the false light claim, but with leave to amend the defamation claim.

1 E. Interference with Prospective Economic Advantage

2 In its seventh counter-claim, Newport alleges interference with prospective economic
3 advantage. The elements of this tort include: “(1) an economic relationship between the plaintiff
4 and some third party; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the
5 part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship;
6 and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.” *Korea*
7 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003) (internal quotation marks and
8 citations omitted). Newport relies on the same allegations raised for its defamation and false light
9 counter-claims above. It contends that the statements made to real estate professionals
10 “unreasonably interfered” with its ability to sell its real property through its “existing and
11 prospective economic relationships.” Furthermore, Newport claims that the statements made in
12 obtaining the performance bond caused the County of Alameda “to investigate the issue regarding
13 the bond,” thereby harming its “beneficial relationship” with the County.³

14 Newport’s vague statements, however, do not satisfy the notice pleading standard of Rule
15 8(a)(2). Regarding the statements made to real estate professionals, Newport has not alleged facts
16 demonstrating an economic relationship with a third party of which Kennedy had knowledge. In the
17 case of the performance bond, Newport vaguely avers that a “beneficial” relationship existed
18 between it and the County of Alameda. Because these statements fail to identify any specific, third-
19 party economic relationship, it is impossible to find that Newport sufficiently pled the remaining
20 elements of the tort either, *i.e.*, acts designed to disrupt the relationship, actual disruption, and
21 economic harm proximately caused by defendant’s acts. Thus, in both instances, Newport fails to
22 state a claim for interference with prospective economic advantage. Kennedy’s motion to dismiss
23 counter-claim seven is granted with leave to amend.

24 F. Unfair Business Practice

25 In counter-claim eight, Newport contends that Kennedy engaged in unfair business practices
26 in violation of California’s Unfair Competition Law (“UCL”). Cal. Bus. & Prof. Code § 17200.

27 _____
28 ³ Newport’s counter-claim states that “the beneficial relationship of Counter-defendant with
the County of Alameda” was harmed, but the Court assumes Newport intends to refer to its own
relationship with the County.

1 Under the UCL, “unfair competition” is broadly defined to include “any unlawful, unfair or
2 fraudulent business act or practice.” *Id.* Each of the three prongs provides a distinct basis of
3 liability. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). In this case, Newport’s
4 UCL counter-claim is grounded in fraud. It contends that Kennedy’s “fraudulent schemes,” which
5 were designed to deprive it of “funds and property,” constitute unfair business practices. Thus,
6 counter-claim eight is subject to the requirement of Rule 9(b) that fraud claims be plead with
7 particularity. *See, e.g., id.* at 1125. As explained above, Newport’s fraud allegations are insufficient
8 to state a claim for relief so the UCL claim, premised on the same underlying alleged fraud, is
9 similarly deficient. Thus, the motion to dismiss is granted with leave to amend.

10 IV. CONCLUSION

11 Kennedy’s motion to dismiss counter-claims two through eight is granted. With the
12 exception of the false light and declaratory relief claims, the counter-claims are dismissed with leave
13 to amend. The false light and declaratory relief claims are dismissed without leave to amend.
14 Newport must file any amended complaint within 20 days from the date of this order.

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16 IT IS SO ORDERED.

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18 Dated: 11/01/2010



19 RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE