

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-1739 CW

COMMONWEALTH ANNUITY AND LIFE
INSURANCE COMPANY, f/k/a ALLMERICA
FINANCIAL LIFE INSURANCE AND ANNUITY
CO.,

Plaintiff,

v.

JOHN DALESSIO; RITA DALESSIO; and the
DALESSIO FAMILY 2003 TRUST,

Defendants.

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT AND
GRANTING IN PART AND
DENYING IN PART
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

_____ /

This matter comes before the Court on the motion of pro se
Defendants John Dalessio and Rita Dalessio for summary judgment on
Plaintiff's claim for breach of contract and for summary judgment
of liability on their counter-claims. Plaintiff Commonwealth
Annuity and Life Insurance Co., f/k/a Allmerica Financial Life
Insurance and Annuity Co., opposes the motion and cross-moves for

1 summary judgment in its favor on its claim and Defendants' counter-
2 claims. The matter was heard on June 18, 2009. Having considered
3 all of the papers filed by the parties and oral argument on the
4 motion, the Court GRANTS IN PART Defendants' motion for summary
5 judgment and DENIES IT IN PART and GRANTS IN PART Plaintiff's
6 motion for summary judgment and DENIES IT IN PART.

7 BACKGROUND

8 On January 26, 1996, Plaintiff initiated a civil action
9 against Defendant John Dalessio in this District, Allmerica
10 Financial Life Insurance and Annuity Co. v. John Dalessio,
11 C 96-00385-VRW. A trial of that case was completed on June 1,
12 2006, the jury finding for Plaintiff and awarding compensatory and
13 punitive damages. Judgment was entered on June 21, 2006, ordering
14 that Plaintiff recover from John Dalessio \$245,288.09 with interest
15 from December 18, 1995 through entry of judgment; \$300,000 in
16 punitive damages; post-judgment interest on all sums; and costs of
17 action. (Complaint, Ex. B.)

18 On November 30, 2006, Plaintiff and John Dalessio executed a
19 document entitled, "Settlement Agreement and General Release".
20 (Complaint, Ex. A.) The Agreement expressed the intent of the
21 parties "to settle and dispose of, fully and completely, any and
22 all claims, demands or causes connected with or incidental to the
23 dealings between the parties hereto" (Id. at 2,
24 Section 2.3.) The Agreement provided that John Dalessio would pay
25 to Plaintiff \$165,000 on execution of the Agreement and, one year
26 after execution, \$100,000 with accrued interest at the rate of six
27 percent per annum. (Id. at 3, Section 4.) Further, "in the event
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1 of a breach, Dalessio [would] also be responsible for attorney fees
2 and costs incurred by Allmerica to enforce recovery"

3 (Id. at 5, Section 4.) The Agreement also provided that "the
4 parties agree to dismiss with prejudice the Action referenced in
5 Paragraph 2.2 [the 1996 lawsuit]" and "[t]he parties warrant that
6 they will dismiss with prejudice any claims or legal action filed
7 against any of the parties released herein concerning the issues
8 raised by the Action referenced in Paragraph 2.2"

9 (Id. at 3, Section 3; id. at 6-7, Section 5.9.)

10 John Dalessio made the first payment of \$165,000 as specified
11 in the Agreement. The second payment, \$100,000 plus accrued
12 interest, was due on November 30, 2007. John Dalessio has not made
13 that payment. The parties to the Agreement have not dismissed the
14 1996 lawsuit with prejudice.

15 Plaintiff filed the complaint in this case on April 1, 2008,
16 claiming breach of contract for John Dalessio's failure to make the
17 second payment. The complaint named John Dalessio, his wife, Rita
18 Dalessio, and the Dalessio Family 2003 Trust as Defendants. John
19 and Rita Dalessio filed their answer on May 14, 2008 and also filed
20 four counter-claims against Plaintiff and against third parties
21 David Shane, Ann Sparkman and the Hon. Vaughn R. Walker.¹ The
22 counter-claims allege fraud in the negotiations leading to the

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25 ¹ The answer and counter-claims purported to be filed on
26 behalf of the Dalessio Family 2003 Trust as well as on behalf of
27 John and Rita Dalessio. Because the Trust must appear through
28 counsel, the Trust was declared to be in default on April 29, 2009
and the answer is deemed to be on behalf of John and Rita Dalessio
alone. Unless otherwise indicated, the word "Defendants" in this
order refers to John and Rita Dalessio.

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1 Agreement, breach of the Agreement by Plaintiff and fraudulent
2 misconduct both in the events that were at issue in the 1996
3 lawsuit and in the conduct of the trial of the 1996 lawsuit.

4 LEGAL STANDARD

5 Summary judgment is properly granted when no genuine and
6 disputed issues of material fact remain, and when, viewing the
7 evidence most favorably to the non-moving party, the movant is
8 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
9 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
10 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
11 1987).

12 The moving party bears the burden of showing that there is no
13 material factual dispute. Therefore, the court must regard as true
14 the opposing party's evidence, if it is supported by affidavits or
15 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
16 815 F.2d at 1289. The court must draw all reasonable inferences in
17 favor of the party against whom summary judgment is sought.
18 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
19 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
20 1551, 1558 (9th Cir. 1991).

21 DISCUSSION

22 I. Purported Admissions By Plaintiff

23 Defendants allege that Plaintiff has admitted numerous
24 statements included in a Request for Admissions which Defendants
25 served on Plaintiff. Defendants allege that Plaintiff did not
26 timely respond to the request, and so the statements are deemed
27 admitted. Fact discovery in this case was closed on March 31,
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1 2009. (Minute Order and Case Management Order, September 26,
2 2008.) The Request for Admissions was served by mail on March 1,
3 2008. (J. Dalessio Dec., Ex. 5.) Federal Rule of Civil Procedure
4 36(a)(3) provides thirty days to respond to Requests for Admissions
5 and Rule 6(d) provides an additional three days when service is
6 made by mail. Thus, Plaintiff's response was not due until after
7 completion of discovery. Civil Local Rule 26-2 provides:
8 "Discovery requests that call for responses or depositions after
9 the applicable discovery cut-off are not enforceable, except by
10 order of the Court for good cause shown." Because the Request for
11 Admissions was not timely served and no good cause has been shown,
12 the statements therein are not admitted.

13 II. Plaintiff's Claim

14 Plaintiff asserts a single claim for breach of contract, and
15 prays for damages of \$100,000 for the second payment specified in
16 the Agreement, accrued interest at six percent per annum,
17 attorneys' fees as provided in the Agreement and costs of the
18 instant suit. Plaintiff asserts this claim against three
19 Defendants, John Dalessio, his wife, Rita Dalessio, and the
20 Dalessio Family 2003 Trust.

21 A. Plaintiff's Claim against Rita Dalessio and the Dalessio
22 Family 2003 Trust

23 Defendants move for summary judgment in favor of Rita Dalessio
24 and the Dalessio Family 2003 Trust, claiming that they are not
25 appropriate parties to this action because they were not parties to
26 the contract that Plaintiff alleges was breached. Plaintiff
27 contends that both are proper parties because the Agreement
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1 specifies that it applies to "[John] Dalessio and anyone connected
2 to him, including his heirs, estate, assigns, family,
3 representatives, successors, employees and agents"

4 (Complaint, Ex. A at 1, Section 1.) The Complaint makes a single
5 boilerplate allegation concerning Rita Dalessio and the Trust:

6 At all times herein mentioned, defendants, and each of them,
7 were the agents and/or representatives of each of the
8 remaining defendants, and in doing the things alleged herein,
9 were acting within the course and scope of said agency and
10 representation. Plaintiff alleges on information and belief
11 that each and every wrongful act complained of herein by
12 defendants, and each of them, was done with the approval,
13 express or implied, of each of the other defendants, and each
14 defendant ratified and approved the acts and/or omissions of
15 the other defendants.

16 (Complaint ¶ 10.)

17 Neither Plaintiff nor John Dalessio can bind non-parties, who
18 have not consented to the bargain, to a contract. Cal. Civ. Code
19 § 1550 (consent is an essential element of a contract). The
20 consent of parties to a contract must be free, mutual, and
21 communicated by each to the other. Id. § 1565. Despite its
22 language, the Agreement is a contract only between Plaintiff and
23 John Dalessio, the sole signatory parties. (Complaint, Ex. A
24 at 9.) Neither Rita Dalessio nor the Trust can be regarded as a
25 party to the contract, so its terms create no obligation on their
26 parts.

27 Because Rita Dalessio and the Trust were not parties to the
28 Agreement, they cannot be held liable for breach of the Agreement.
Defendants' motion for summary judgment on Plaintiff's claims

1 against Rita Dalessio and the Trust is granted.² Plaintiff's
2 motion for summary judgment on these claims is denied.

3 B. Plaintiff's Claim against John Dalessio

4 John Dalessio asserts that the Agreement required performance
5 of the promise to dismiss the 1996 lawsuit before his second
6 payment became due, that Plaintiff breached the contract by failing
7 to cooperate with affirmative steps he took to initiate the
8 dismissal, that this breach was material and that the breach
9 relieves him of the duty to make the second payment.

10 In exchange for Plaintiff giving up its legal right to pursue
11 the full judgment entered against John Dalessio in the 1996
12 lawsuit, John Dalessio agreed to make the payments described above,
13 to abandon his post-trial motions and to abandon his right to
14 appeal. No language in the Agreement specifies that the second
15 payment required of John Dalessio in Section 4 is contingent on the
16 prior performance of the promise to dismiss which is made in
17 Section 3 and repeated in Section 5. John Dalessio's declaration
18 asserts the importance of the dismissal to him and his reasons for
19 insisting that it be part of the Agreement, but there is no
20 evidence in the record that the second payment was intended by one
21 or both parties to be contingent on the prior performance of the
22 dismissal. (J. Dalessio Dec. at 4, ¶ 17.) If the dismissal were

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25 ² Plaintiff apparently included these Defendants as an aid to
26 the execution of judgment against John Dalessio. To the extent
27 that John Dalessio's assets are community property or held in
28 trust, it should not be necessary to name Rita Dalessio and the
Trust as Defendants in order to execute the judgment, and John
Dalessio has conceded as much. If it is necessary, Plaintiff may
later move to amend the judgment.

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1 to occur before John Dalessio had made the second of the required
2 payments and he subsequently failed to perform, Plaintiff would be
3 without recourse to assert its legal right to pursue the full
4 judgment entered on the 1996 case and would be deprived of the
5 benefit intended by the Agreement.

6 The Court finds that John Dalessio's contractual duty to make
7 the second payment to Plaintiff was not contingent upon prior
8 dismissal of the 1996 lawsuit and that dismissal of the 1996
9 lawsuit is not required until John Dalessio has satisfied his
10 payment obligations. Because dismissal is not yet due, Plaintiff
11 has not breached the contract by its alleged failure to cooperate
12 with John Dalessio to perform the dismissal.³

13 The Agreement required John Dalessio to make a payment of
14 \$100,000 plus interest to Plaintiff by November 30, 2007. John
15 Dalessio did not make this payment and his excuse for the non-
16 payment is not valid. Accordingly, the Court grants Plaintiff's
17 motion for summary judgment against John Dalessio and denies John
18 Dalessio's motion for summary judgment.

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20 ³ John Dalessio did not know that Plaintiff had not perfected
21 dismissal of the 1996 lawsuit before the date on which the second
22 payment was due. There is no evidence that John Dalessio made any
23 efforts to pursue the dismissal before the date the second payment
was due. Thus, his breach of the contract by failing to make the
second payment was not excused by any failure on Plaintiff's part
to procure the dismissal at that time.

24 John Dalessio also alleges that Plaintiff has breached the
25 contract by acting in bad faith. Because the promise to pay is not
26 contingent on the promise to dismiss, the argument that bad faith
27 is shown by failure to cooperate in the dismissal or intending not
28 to dismiss the case before the second payment was due fails. The
argument that bad faith is shown by Plaintiff's actions in this
case, such as naming Rita Dalessio as a Defendant or putting the
Agreement into evidence, fails because these actions were
subsequent to John Dalessio's non-payment and cannot excuse it.

1 III. John Dalessio's Counter-Claims

2 The answer alleges four counter-claims in the name of
3 "DALESSIO," which is defined collectively as John Dalessio, Rita
4 Dalessio and the Dalessio Family 2003 Trust. However, the language
5 of the allegations in the counter-claims makes it clear that it is
6 John Dalessio who asserts the counter-claims,⁴ so the Court will
7 treat the claims as made in his name alone.

8 A. Counter-claims Alleging Fraud

9 Three of the four counter-claims allege fraud on the part of
10 Plaintiff. The first and second counter-claims allege that
11 Plaintiff negotiated and executed the Agreement with an intent
12 later to breach the Agreement by failing to dismiss the 1996
13 lawsuit and to bring the present action against John Dalessio.
14 There is no evidence in the record, except the Agreement itself,
15 concerning Plaintiff's intent during the negotiation of the
16 Agreement or at the time the Agreement was executed. Specifically,
17 there is no evidence of fraud on Plaintiff's part and summary
18 judgment must be entered on these fraud claims.⁵

19 The fourth counter-claim alleges multiple instances of fraud,
20 all involving the facts at issue in the 1996 lawsuit and the
21 conduct of Plaintiff and third parties in that action. The

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23 ⁴ For example, "DALESSIO'S reputation and he himself has
24 mentally and physically suffered," makes sense only if read as an
allegation by John Dalessio alone. (Answer ¶ 47.)

25 ⁵ Although John Dalessio points to a September, 2008 exchange
26 of email between himself and counsel for Plaintiff as proof that
27 Plaintiff never intended to dismiss the 1996 lawsuit, the email
only speaks to Plaintiff's understanding of the dismissal question
28 in 2008, not to Plaintiff's understanding of the dismissal question
and Plaintiff's intentions during the negotiation of the Agreement.

1 principle of res judicata bars the allegations that were at issue
2 in the prior action from being adjudicated in another lawsuit. An
3 appeal of the prior action would have been the proper forum in
4 which to raise the allegations related to the conduct of parties in
5 that action. John Dalessio, having given up his right to appeal
6 the prior action in the Agreement, may not raise those issues in
7 this case.

8 Accordingly, the Court grants Plaintiff's motion for summary
9 judgment on the first, second and fourth counter-claims and denies
10 John Dalessio's motion for summary judgment on these counter-
11 claims.

12 B. Counter-claim for Breach of Contract

13 The third counter-claim repeats the allegation that Plaintiff
14 breached the Agreement by failing to dismiss the 1996 case and by
15 initiating the current action. As discussed above, dismissal of
16 the prior action is not yet due, so Plaintiff has not breached the
17 contract by failing to dismiss. Furthermore, no language in the
18 Agreement prevents Plaintiff from pursuing this action for John
19 Dalessio's non-payment, so initiating this action was not a breach
20 of the Agreement. Accordingly, the Court grants Plaintiff's motion
21 for summary judgment on the third counter-claim and denies John
22 Dalessio's motion for summary judgment on that counter-claim.

23 IV. Counter-Claim Against the Hon. Vaughn R. Walker

24 The Hon. Vaughn R. Walker is named as a Defendant in the
25 fourth counter-claim. The allegations against him are related to
26 his handling of the 1996 lawsuit. "Judges are immune from damage
27 actions for judicial acts taken within the jurisdiction of their
28 courts." Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986).

1 Accordingly, the counter-claim against the Hon. Vaughn R. Walker is
2 dismissed with prejudice.

3 CONCLUSION

4 For the foregoing reasons, the Court GRANTS IN PART
5 Defendants' motion for summary judgment and DENIES IT IN PART.
6 (Docket No. 43.) Defendants' motion for summary judgment on
7 Plaintiff's claim against Rita Dalessio and the Dalessio Family
8 2003 Trust is GRANTED. Defendants' motion for summary judgment on
9 Plaintiff's claim against John Dalessio is DENIED. Defendants'
10 motion for summary judgment on Defendants' counter-claims is
11 DENIED.

12 The Court also GRANTS IN PART Plaintiff's motion for summary
13 judgment and DENIES IT IN PART. (Docket No. 45.) Plaintiff's
14 motion for summary judgment on its claim against John Dalessio is
15 GRANTED. Plaintiff's motion for summary judgment on its claim
16 against Rita Dalessio and the Dalessio Family 2003 Trust is DENIED.
17 Plaintiff's motion for summary judgment on Defendants' counter-
18 claims is GRANTED.

19 Defendants object to the declarations of Mark Stepakoff, David
20 Shane and Thomas Kwasniak. (Docket No. 47 at 6-10.) Plaintiff
21 objects to portions of John Dalessio's declaration. (Docket No. 48
22 at 8.) Because the Court did not rely on the evidence to which the
23 objections are directed, the objections are OVERRULED as moot.

24 Some third party claims are variously asserted against David
25 Shane, Ann Sparkman, and the Hon. Vaughn R. Walker. As noted
26 above, the claim against the Hon. Vaughn R. Walker is DISMISSED
27 with prejudice on the basis of judicial immunity. Within ten days
28 of this order, Defendant John Dalessio shall submit proof that

1 David Shane and Ann Sparkman have been served with the summons and
2 complaint. If service was not accomplished, or if service was
3 accomplished but not within the 120-day period specified by Federal
4 Rule of Civil Procedure 4(m), the claims against David Shane and
5 Ann Sparkman will be dismissed unless, within ten days of this
6 order, John Dalessio shows good cause why they were not timely
7 served. If proof of service is shown, then also within ten days of
8 this order, Defendant John Dalessio may file a supplemental
9 opposition to Plaintiff's motion for summary judgment explaining
10 why summary judgment on the claims against David Shane and Ann
11 Sparkman should not be entered in their favor for the same reasons
12 that Plaintiff was granted summary judgment on the same claims
13 against it.

14 When the judgment in this case has been satisfied, the Court
15 will dismiss the 1996 case.

16 IT IS SO ORDERED.

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20 Dated: 7/20/09



CLAUDIA WILKEN
United States District Judge

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as noted on the following page

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

COMMONWEALTH ANNUITY AND LIFE Insurance Company et al, Case Number: CV08-01739 CW

CERTIFICATE OF SERVICE

Plaintiff,

v.

DALESSIO et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 20, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Dalessio
Attorney at Law
16 Via Las Encinas
Carmel Valley, CA 93924

Dated: July 20, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk