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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

REEMA D. ARAKELIAN et al., Plaintiffs and Appellants, v. RON CONQUEST et al., Defendants and Respondents.	B161037 (Los Angeles County Super. Ct. No. PC026575)

APPEAL from orders of the Superior Court of Los Angeles County, Howard Schwab, Judge. Reversed in part and affirmed in part.

Hacker, Kanowsky & Braly and Carl J. Kanowsky for Plaintiffs and Appellants.

Gust T. May and Cassandra Stubbs for Bet Tzedek Legal Services as Amicus Curiae on behalf of Plaintiffs and Appellants.

William G. Hoerger for California Rural Legal Assistance, Inc. as Amicus Curiae on behalf for Plaintiffs and Appellants.

White O'Connor Curry & Avanzado, Andrew M. White, James E. Curry and Mary Catherine Woods for Defendant and Respondent John Gehron.

Fonda & Fraser, Todd E. Croutch and Daniel K. Dik for Defendants and Respondents Ron Conquest, Frank Wood, Andy Schuon and Robert Buziak.

INTRODUCTION

Plaintiff employees appeal orders of dismissal after the sustaining of demurrers to their complaint against the president of their corporate employer and against members of the corporate employer's board of directors. The complaint alleged seven causes of action seeking payment of unpaid wages owed to plaintiff employees for work they performed in their final weeks of employment. We conclude that plaintiffs have not satisfactorily alleged that these individual defendants were their employers, and that the trial court correctly sustained demurrers as to causes of action for breach of contract, negligence per se, and their action for unpaid wages based on Labor Code statutes. Plaintiffs have not shown that these individual defendants owed them a fiduciary duty, and therefore they cannot state a cause of action for breach of fiduciary duty. Plaintiffs' failure to make argument on appeal waives their claim of error as to a statutory cause of action for failure to pay wages and as to their negligence cause of action. Plaintiffs fail to show their complaint stated a cause of action for tortious breach of contract.

The complaint alleged two fraud causes of action. The complaint alleges no representations made by four defendants who were members of the board of directors, and therefore fails to allege causes of action for misrepresentation, concealment, and deceit or for negligent misrepresentation. As to the defendant who was president of the corporate employer, however, the complaint alleges specific representations made to employees which satisfy the requirements of these causes of action, and we reverse the order of dismissal as to both fraud causes of action.

We hold that as the president of the corporate employer, the order of dismissal sustaining demurrers to the fifth cause of action for fraud and the sixth cause of action for negligent misrepresentation must be reversed. As to all the other causes of action, the orders of dismissal are affirmed.

APPEALABILITY OF ORDERS

The notice of appeal identifies four orders from which plaintiffs appeal. The notice of appeal, construed liberally, is proper as to three of these orders. The appeal from a post-judgment order denying a motion for reconsideration is dismissed.

1. *Liberally Construed, the Appeal Is Properly Taken from Orders of Dismissal*

The notice of appeal identifies three orders sustaining demurrers without leave to amend: (1) a February 27, 2002, minute order sustaining defendant Gehron's demurrer to the second cause of action in the first amended complaint; (2) a May 24, 2002, order sustaining Gehron's demurrer to the second amended complaint; and (3) a May 24, 2002, order sustaining the demurrer of defendants Ron Conquest, Frank Wood, Andy Schuon, and Robert Buziak to the second amended complaint. Orders sustaining demurrers are not appealable orders. (*Dubins v. Regents of University of California* (1994) 25 Cal.App.4th 77, 80, fn. 1.) Nonetheless this court construes the notice of appeal liberally in favor of its sufficiency. (Cal. Rules of Court, rule 1(a); *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 333, fn. 1; *Setliff v. E. I. Du Pont de Nemours & Co*. (1995) 32 Cal.App.4th 1525, 1533.) Therefore a notice of appeal erroneously purporting to appeal from orders sustaining a demurrer will be deemed sufficient if a judgment of dismissal was entered, there is no doubt as to the ruling appellants seek to have reviewed, and the respondents could not have been misled to their prejudice. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780.) We therefore deem the notice of appeal to have been taken from the orders of dismissal filed on June 13, 2002, as to Conquest, Wood, Schuon, and Buziak and on June 25, 2002, as to Gehron.

2. *A Post-Judgment Order Denying a Motion for Reconsideration Is Not Appealable, and That Part of the Appeal Must Dismissed*

The notice of appeal purported to appeal from a July 12, 2002, order denying plaintiffs' motion for reconsideration of its May 24, 2002, order sustaining demurrers of Conquest, Wood, Schuon, Buziak, and Gehron without leave to amend. Signed orders of dismissal entered as to these defendants on June 13 and June 25, 2002, were final

judgments. (Code. Civ. Proc., § 581d.) "[A]fter entry of judgment, a trial court has no further power to rule on a motion for reconsideration." (*Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236.) "The fact that a motion for reconsideration may have been pending when judgment was entered does not restore this power to the trial court." (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182.) We therefore dismiss that part of the appeal taken from the non-appealable order denying the motion for reconsideration, and do not review issues arising from that order.

STANDARD OF REVIEW

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank -- California* (1994) 27 Cal.App.4th 800, 807.) In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. When a demurrer is sustained, this court determines whether the complaint states facts sufficient to constitute a cause of action. When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

FACTS AND PROCEDURAL HISTORY

The operative complaint is the second amended complaint filed on March 18, 2002. The complaint sought recovery of more than $500,000 in wages and benefits due plaintiffs, and sought recovery of contractual, statutory, compensatory, and punitive damages resulting from defendants' allegedly wrongful conduct. Only individual defendants Conquest, Wood, Buziak, Schuon, and Gehron are parties to this appeal. Pursuant to the standard of review, the complaint contains the following allegations.

The 60 individual plaintiffs were employees of individual defendants and of defendant Feed The Monster Media ("FTMM"). At the time of the complaint FTMM was a debtor in bankruptcy in United States Bankruptcy Court of the District of Arizona. FTMM had provided internet services for radio stations, particularly defendants CBS

Broadcasting, Inc. ("CBS"), and its majority owned subsidiary, defendant Infinity Broadcasting. The complaint identified individual defendants Ron Conquest (President of FTMM and a member of its board of directors), and Frank Wood, John Gehron, Andy Schuon, and Robert Buziak as members of FTMM's board of directors.

FTMM and the individual defendants employed plaintiffs until October 13, 2000. As of March 31, 1999, an agreement with FTMM gave CBS shared voting power with respect to 84 percent of FTMM's common shares, giving CBS and Infinity control over FTMM's board of directors. During the FTMM bankruptcy proceeding, Glen Kramer, the current FTMM President, testified at a creditors' meeting that FTMM was formed to perform services for CBS, the sole source of FTMM's income.

FTMM's June 29, 2000, Form 10K filed with the SEC admitted to a history of operating losses, a $23.8 million deficit as of March 31, 2000, and stated that FTMM had working capital for only 30 to 45 days beyond the SEC report. FTMM stated that its common stock was not widely traded, that principal stockholders had the ability to exercise significant control over FTMM, and that executive officers, directors, and principal stockholders, who owned 49.1 percent of FTMM common stock, could exercise substantial influence over matters requiring approval by stockholders, including the election of directors and approval of significant corporate transactions.

The SEC Form 10K stated that Gehron, an FTMM Director, was Chief Operating Officer of CBS Radio. Gehron and CBS were the largest shareholders of FTMM, owning 17.5 percent of its common stock. The next largest shareholder had 7.1 percent of FTMM common stock.

In the bankruptcy proceeding, FTMM admitted that CBS and Infinity were FTMM's only customers. Gehron and Conquest were the only directors remaining on FTMM's Board after the bankruptcy filing, and Gehron represented FTMM in its negotiations with CBS even though he was a CBS employee. CBS did not pay FTMM's invoices in a timely manner, and had withdrawn financial support from FTMM. FTMM did not pay wages due on September 29 or October 13, 2000. FTMM's answer to the

first amended complaint in bankruptcy admitted that its employees were entitled to payment of wages and salaries.

FTMM's November 15, 2000, 10-Q Form filed with the SEC for the period ending September 30, 2000, revealed that FTMM assets totaled $267,346, down from $5,725,787 for the period ending March 31, 2000. The 10-Q Form disclosed that management was negotiating with third parties for sale or merger of FTMM and that FTMM had negative cash flow from operations since it began on February 22, 1994. FTMM's severe undercapitalization and history of operating losses caused its collapse relatively shortly after its formation.

The complaint alleged that FTMM's directors and CBS failed to disclose to plaintiffs that FTMM lacked the ability to compensate them. Before a July 18, 2000, FTMM Board of Directors meeting, Conquest met with two board members, Wilson and Mastroieni, to discuss FTMM's dire financial position. Conquest agreed he would tender his resignation at an upcoming board meeting. Wilson and Mastroieni presented FTMM's poor financial condition to the Board and informed directors that Conquest had not obtained required financial reports regarding FTMM's condition and had fired several chief financial officers in the previous year in an attempt to control dissemination of financial information. Wilson and Mastroieni warned that FTMM would fail unless the Board took immediate, drastic steps.

Conquest, however, did not resign. Instead he orchestrated the Board's rejection of Wilson and Mastroieni's warnings and recommendations. The Board ordered Wilson and Mastroieni to stay away from FTMM headquarters in Burbank and the Arizona office for six months, and directed them not to talk to FTMM employees. FTMM and the defendants did not notify employees of FTMM's dire financial straits, and continued to induce new employees to come to work for FTMM based on representations that FTMM was a strong company with a solid future. Conquest and other defendants allowed a stock "loan" arrangement to be used to induce prospective employees to leave other jobs, knowing that the stock was worthless given FTMM's financial condition.

The complaint alleged that FTMM, its officers and directors knew since August 2000 that CBS had no intention of continuing to support FTMM with additional funding, new contracts, or timely payment of invoices to FTMM.

The complaint alleged that on September 29, 2000, FTMM was due to pay its 100 employees regular wages, but Conquest e-mailed employees that payment of wages was delayed a few days. Conquest's e-mail gave each employee a stock option for 500 shares of FTMM stock with a strike price of $1.50. At the time, FTMM stock traded at less than $1.50. Conquest's e-mail stated that FTMM continued to progress in obtaining long-term funding, referred to $18.8 million in cash infusions expected in October and December 2000, and stated that Conquest was negotiating with four other potential investors. Conquest's e-mail also advised employees that FTMM's low stock price created an opportunity for them to own FTMM stock.

Over the next 11 days, a series of e-mails from Conquest advised employees of significant progress in obtaining funding, expressed confidence in FTMM's future success, and stated that CBS executives were involved in resolving the financial problems facing FTMM. No funds for payroll materialized. Despite their superior knowledge, no defendants warned employees that FTMM was on the brink of collapse. FTMM suspended operations on October 13, 2000. The complaint alleged that given disclosures made in SEC filings and press releases, FTMM board members knew or should have known that FTMM employees would continue to work without compensation, but board members did nothing to prevent the harm to employees. The complaint alleged that Conquest created and participated in a sham presented to the employees and accepted full personal responsibility for the situation.

The complaint alleged that defendants were alter egos of FTMM. Regarding undercapitalization, FTMM's 10K SEC filing admitted a history of operating losses and a $23.8 million deficit. Gehron was a current FTMM director and Chief Operating Officer of CBS and negotiated for FTMM with CBS. During its last months, FTMM's directors took steps to prevent employees from knowing FTMM's financial condition, withheld

vital information, misled employees about FTMM's future prospects, and encouraged employees to buy FTMM stock mere days from collapse. Directors failed to disclose material information and used the corporate form to maintain an insolvent shell for the owners' benefit by receiving free stock options, having loans repaid, and receiving compensation for entities they controlled. FTMM's directors knew FTMM lacked adequate capital to survive.

Citing California Code of Regulations, title 8, section 11010, subdivision 2(F) and 29 United States Code section 203(d), the complaint alleged that California law defined defendants as employers of plaintiffs, and thus liable to plaintiffs for unpaid wages and benefits, and for statutory penalties imposed for their failure to pay.

The complaint alleged seven causes of action. The breach of contract cause of action alleged that beginning on September 29, 2000, defendants breached a written contract by failing to pay plaintiffs $552,143.43 for the period beginning September 25, 2000 and continuing up to and including October 13, 2000.

A cause of action for unpaid wages alleged that when plaintiffs' employment was terminated on October 13, 2000, defendants owed $552,143.33 for unpaid wages, commissions, overtime and vacation wages in violation of Industrial Welfare Commission Wage Orders and Labor Code sections 201, 203, 204, 210, 227.3, 1194, and 1197.

A cause of action for violation of Labor Code section 203 alleged that defendant's failure to pay wages as required by Labor Code section 201 made defendants subject to a civil penalty for wage penalties for 30 days after October 13, 2000.

A cause of action for breach of fiduciary duty alleged that defendants, as employers, owed a fiduciary duty to plaintiffs, and breached that duty by failing to pay them for work performed and services rendered.

A cause of action for fraud, deceit, and concealment alleged that on and after September 29, 2000, defendants falsely represented to plaintiffs that defendants would pay wages, incidental and consequential damages, and stock options, in order to deceive

plaintiffs and induce them to work for FTMM. Plaintiffs, ignorant of the falsity of defendants' representations, reasonably relied on those representations and continued to work for FTMM. The complaint alleged that defendants had a duty to disclose material information because of their employer-employee relationship with plaintiffs, because plaintiffs placed trust and confidence in defendants as their employer or as officers, directors, managers, and controlling shareholders, because defendants had superior knowledge of FTMM's true condition, because defendants knew that employees relied on them to provide responsible, honest, straightforward guidance as to matters peculiarly within their knowledge that would jeopardize employees' rights, and because defendants knew or should have known that plaintiffs did not know or have access to material facts. If plaintiffs had known of facts not disclosed by defendants, they would not have continued working. The complaint alleged that pursuant to Civil Code section 1710(3), defendants, with superior knowledge, should have disclosed FTMM's inability to pay plaintiffs before requiring them to report for work.

A cause of action for negligent misrepresentation further alleged that defendants made these representations with no reasonable grounds for believing them to be true and concealed the facts from plaintiffs, who were ignorant of the falsity of defendants' representations and were induced to continue working for FTMM.

A cause of action for negligence and negligence per se alleged that defendants breached their duty not to hide FTMM's financial condition from employees and not to induce plaintiffs to keep working by false information and promises.

On May 24, 2002, the trial court sustained without leave to amend the demurrer of Conquest, Wood, Schuon, and Buziak, and filed an order of dismissal as to these defendants on June 13, 2002. On May 24, 2002, the trial court sustained without leave to amend the demurrer of Gehron, and filed an order of dismissal as to Gehron on June 25, 2002. As stated, *ante*, plaintiffs filed a timely notice of appeal from the orders of dismissal.

ISSUES

This appeal concerns the liability of Gehron, Conquest, Wood, Schuon, and Buziak, as members of FTMM's board of directors, to plaintiffs, who were FTMM employees. Plaintiffs claim on appeal that four theories support defendants' liability:

1. State labor laws make individual defendants liable as plaintiffs' "employers;"

2. Individual defendants are directly liable for their individual tortious conduct;

3. Because FTMM was insolvent, as FTMM officers and directors the defendants are liable for breach of fiduciary duty to FTMM's creditors, including its employees; and

4. Individual defendants are liable as alter egos of FTMM.

Plaintiffs also claim that:

5. The trial court should not have dismissed the tortious breach of contract cause of action from the first amended complaint;

6. The negligence per se cause of action applies to cases of solely economic injury;

7. Fraud and negligent misrepresentation causes of action are well-pleaded; and

8. The complaint sufficiently pleads remaining causes of action.

DISCUSSION

1. *Demurrers as to the Breach of Contract Action Were Correctly Sustained*

The complaint alleges that defendants breached a written employment contract in the FTMM employee policy manual, which required FTMM to pay employees on the 15th and last business day of each month, with paychecks including earnings for all work performed through the end of the current payroll period. The complaint alleged that from September 25, 2000 to October 13, 2000, plaintiffs' unpaid wages, vacation time, personal time, commissions, and expenses totaled $552,143.43.

a. *Defendants Have No Contractual Liability Because They Did Not Sign the Employment Contract and Did Not Purport to Bind Themselves Individually*

To prevail on a breach of contract cause of action, plaintiff must prove: (1) the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

The employer-employee relationship is fundamentally contractual in nature. (*Hunter v. Up-Right, Inc*. (1993) 6 Cal.4th 1174, 1178.) The terms of the employment contract determine the rights and responsibilities of parties to that contract. (*Frances T. v. Village Green Owners Assn*. (1986) 42 Cal.3d 490, 507-508.) "The legal fiction of the corporation as an independent entity—and the special benefit of limited liability permitted thereby—is intended to insulate . . . officers from liability for corporate contracts[.]" (*Ibid.*) "Directors and officers are not personally liable on contracts signed by them for and on behalf of the corporation unless they purport to bind themselves individually." (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc*. (1970) 1 Cal.3d 586, 595.) Here the complaint does not allege that defendants purported to bind themselves individually. It does not allege that any of defendants, as directors and officers of FTMM, signed the FTMM employee policy manual. Only a signatory to a contract maybe liable for breach. (*Clemens v. American Warranty Corp*. (1987) 193 Cal.App.3d 444, 452.) The complaint does not allege that the defendants signed a contract with plaintiffs or purported to bind themselves individually to such a contract. Therefore the trial court correctly sustained defendants' demurrers to this cause of action.

b. *The Complaint Does Not Contain Sufficient Allegations to Satisfy the Application of the Alter Ego Doctrine Regarding the Individual Defendants*

Plaintiffs claim that defendants are personally liable as alter egos of FTMM, arguing that the complaint alleges that defendants ran FTMM for the benefit of

themselves and of majority stockholders and to the detriment of creditors, including employees.

"A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359.)

"There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.' [Citation.]" (*Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 300.) "[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (*Id*. at p. 301.)

Plaintiffs do not seek to apply alter ego doctrine against a corporation which wholly owns a subsidiary, against stockholders as owners of the corporation, or against an individual who is the sole owner of a corporation. Instead, plaintiffs seek to apply the alter ego doctrine against Conquest, Wood, Schuon, Buziak, and Gehron as members of the board of directors of FTMM. Plaintiffs cite no case authority in which the alter ego doctrine is applied to make directors personally liable for the acts of the corporation. Numerous allegations of the alter ego doctrine in the complaint are merely general legal conclusions and do not specify whether allegations of conduct by "defendants" refer to corporate defendants Ingenious Enterprises, LLC, CBS Broadcasting, Inc., and Infinity Broadcasting Corp., or to the parties to this appeal, defendants Conquest, Wood, Schuon, Buziak, and Gehron.

With regard to Gehron, the complaint alleged that Gehron was a current FTMM director and Chief Operating Officer of CBS. Without naming him, the complaint alleges that Gehron, as CBS's chief operating officer, "operated both CBS and negotiated for FTMM with CBS." Elsewhere the complaint alleged that Gehron and CBS were the largest shareholders of FTMM and owned 17.5 percent of common stock, that Gehron remained on FTMM's board of directors after the bankruptcy filing, and that Gehron had veto power over whether a particular radio station became an FTMM customer. The complaint also alleges that Gehron and Schuon were granted stock options for 93,750 shares of common stock and given 25,000 shares of stock. The allegation that CBS and Gehron together owned 17.5 percent of FTMM common stock does not specify how much stock Gehron personally owned. Elsewhere the complaint alleges that as of May 31, 1999, CBS and Infinity agreed with FTMM that regarding the election of certain FTMM directors, CBS and Infinity had shared voting power with respect to 84 percent of FTMM's common shares. With regard to Gehron's ownership interest in FTMM, these allegations do not satisfy the requirement of the alter ego doctrine that " 'there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist[.]' " (*Mesler v. Bragg Management Co*., *supra*, 39 Cal.3d at p. 300.)

With regard to Schuon, the complaint alleges that Schuon was a member of FTMM's board of directors. It also alleges that "Gehron and Schuon were granted stock options for 93,750 shares of common stock and given (apparently free of charge) 25,000 shares of common stock." From this allegation it is not possible either to determine Schuon's individual ownership of stock or whether he ever exercised the stock option and actually purchased optioned shares. The complaint makes no allegation of the percentage of FTMM stock Schuon owned and whether this ownership interest gave him control over the FTMM corporate entity. Moreover, given the allegation that CBS, Inc. and Infinity shared voting power with respect to 84 percent of FTMM's common shares, Schuon's stock ownership did not achieve " 'such unity of interest and ownership that the

separate personalities of the corporation and the individual no longer exist[.]' " (*Mesler v. Bragg Management Co*., *supra*, 39 Cal.3d at p. 300.)

With regard to Conquest, the complaint alleges that FTMM employed Conquest and that Conquest was CEO and a member of FTMM's board of directors. The complaint alleges that Conquest "was paid $135,000 by way of payments to a company he owns and controls . . . [d]efendant Ingenious Enterprises, LLC." The complaint alleges that Conquest was one of only two directors who remained members of the FTMM's board of directors after the bankruptcy filing. The complaint alleged that Conquest used the FTMM corporate credit card for personal items and had not paid the credit card's final bill, which contained purchases for personal use.

With regard to Buziak and Wood, the complaint alleges that Buziak and Wood were members of FTMM's board of directors, and that Buziak and Wood were repaid for $100,000 loans which each made to FTMM.

The complaint contains no allegations concerning the FTMM ownership interest of Conquest, Buziak, or Wood. Elsewhere the complaint alleges: "CBS owns and controls itself, Infinity and FTMM." The complaint also alleges that CBS and Gehron together owned 17.5 percent of FTMM common stock. Elsewhere the complaint alleges that as of May 31, 1999, CBS and Infinity had shared voting power of 84 percent of FTMM's common shares with respect to electing FTMM directors. The complaint quotes FTMM's "initial promotional material" stating that CBS/Infinity Radio owned an 18 percent equity interest in FTMM. As to Conquest, Buziak, Schuon, and Wood, these allegations do not satisfy the requirement of the alter ego doctrine that " 'there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist[.]' " (*Mesler v. Bragg Management Co*., *supra*, 39 Cal.3d at p. 300.)

We conclude that the complaint does not contain allegations which support application of the alter ego doctrine with respect to the individual defendants.

2. *The Complaint Does Not State a Cause of Action for Unpaid Wages Based on Labor Code Statutes Against Members of FTMM's Board of Directors, Who Were Not Plaintiffs' "Employers"*

Based on administrative wage orders issued by the Industrial Welfare Commission, plaintiffs argue that the individual defendants are employers who are liable for plaintiffs' unpaid wages, because defendants exercised control over plaintiffs' wages, hours, and working conditions.

a. *Allegations of the Complaint*

The cause of action for unpaid wages alleges that when plaintiffs' employment was terminated on October 13, 2000, defendants owed plaintiffs at least $552,143.43 for unpaid wages, commissions, overtime wages, and vacation wages, and their failure to pay this amount violated Labor Code sections 201, 203, 204, 210, 227.3, 1194, and 1197.

Labor Code section 201 makes wages earned and unpaid when an employer discharges an employee due and payable immediately. Labor Code section 203 imposes penalties on an employer who willfully fails to pay a discharged employees' wages. Labor Code section 204 requires payment of wages twice during a calendar month. Labor Code section 210 imposes penalties on persons who violate Labor Code section 204. When an employee is terminated, Labor Code section 227.3 requires payment of vested vacation at the employee's final rate. Labor Code section 1194 authorizes an employee's civil action to recover unpaid minimum wage or overtime compensation. Labor Code section 1197 makes it unlawful to pay less than the minimum wage.

Plaintiffs argue that in addition to their corporate employer, FTMM, the individual defendants Conquest, Wood, Gehron, Schuon, and Buziak are liable as plaintiffs' "employers" under these labor statutes. Their complaint quotes California Code of Regulations, title 8, sections 11010, subdivision 2(F) and 11040, subidivision 2(H): " 'Employer' means any person as defined in Section 18 of the Labor Code,[**1**] who

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1 Labor Code section 18 states: " 'Person' means any person, association, organization, partnership, business trust, limited liability company, or corporation."

directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." The complaint alleged that the individual defendants exercised control over plaintiffs' wages, hours, or working conditions or acted in the employer's interest in relation to plaintiffs. Plaintiffs cite the Department of Labor Standards Enforcement ("DLSE") as adopting the federal law definition of employer as including "any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" (29 U.S.C. § 203(d).) Plaintiffs interpret the DLSE as holding that an "employer" can include members of a corporate board of directors who exert control over the workplace environment. Plaintiffs argue that individual FTMM board members should be liable for employees' wages because they controlled the employment relationship.

Plaintiffs cite allegations in their complaint that defendants controlled plaintiffs' wages and working conditions by determining who could talk to the plaintiffs (a reference to the Board of Directors' order to board members Wilson and Mastroieni to stay away from FTMM Burbank and Arizona offices for six months and not to talk to FTMM employees), by threatening to fire FTMM employees who did not do the bidding of CBS employees, by controlling FTMM's budget (thereby controlling wages and benefits), and by taking full personal responsibility for FTMM's failure to pay wages. As an example of defendants' control over wages, the complaint cited Conquest's April 11, 2000, e-mail to employees that at the direction of the Board of Directors, he and two other FTMM employees addressed the issue of an annual bonuses.

b. *Work Orders 11010(2)(F) and 11040(2)(H) Do Not Define "Employer" to Include Members of the Board of Directors of a Corporation, and Do Not Give Employees a Private Right of Action Against Board Members for Unpaid Wages*

The Industrial Welfare Commission formulates wage orders governing California employment. (*Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575, 581.) Sections 11010, subdivision 2(F) and 11040, subdivision 2(H) are industry and occupation orders

promulgated by the Industrial Welfare Commission pursuant to California Constitution, article XIV, section 1 and Labor Code section 1173. (Cal. Code Regs., tit. 8, § 11010, subd. 2(F) and § 11040, subd. 2(H).)

Wage order 11010 applies to "all persons employed in the manufacturing industry" with some exceptions.[2] (Cal. Code Regs., tit. 8, § 11010, subd. 1.) "Manufacturing industry" means "any industry, business, or establishment operated for the purpose of preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling, or packaging goods, articles, or commodities, in whole or in part" except for manufacturing activities covered by other wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 2(H).)

Wage order 11040 applies to "all persons employed in professional technical, clerical, mechanical, and similar occupations" with some exceptions.[3] (Cal. Code Regs., tit. 8, § 11040, subd. 1.) Section 11040, subdivision 1(O) defines "professional, technical, clerical, mechanical, and similar occupations."

The operative complaint alleges that FTMM and defendants hired, employed, and/or retained plaintiffs to perform work, labor, and services until October 13, 2000 at FTMM's place of business in Burbank, California. The operative complaint does not allege what kind of work, labor, or services plaintiffs performed in their FTMM employment, and only generally alleges the business in which FTMM engaged, which was the sale of services to radio stations. The complaint briefly alleges that as part of its agreement with FTMM, CBS was to make available advertising time on its radio stations

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[2] Exceptions to which wage order 11010 does not apply include persons employed in administrative, executive, or professional capacities. (Cal. Code Regs., tit. 8, § 11010, subd. 1(A).)

[3] Exceptions to which wage order 11040 does not apply include persons employed in administrative, executive, or professional capacities. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A).)

which FTMM could sell to third parties, and that FTMM designed and implemented web sites for several CBS-owned radio stations.

The complaint's failure to allege specifically the business in which FTMM engaged and the type of work which plaintiff employees performed makes it impossible to determine whether wage orders 11010 and 11040 apply. We conclude that plaintiffs have not shown that wage orders 11010 and 11040 are authority for making individual defendants liable for unpaid wages as plaintiffs' employers.

Even if they apply to FTMM and to plaintiff employees, wage orders 11010 and 11040 regulate hours and days of work, minimum wages, reporting time pay, overtime pay, and many other details of work schedules and conditions of employment. (Cal. Code Regs., tit. 8, §§ 11010, 11040.) Both wage orders define "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, §§ 11010, subd. 2(F), 11040, subd. 2(H).) Both wage orders cite misdemeanor penalties pursuant to Labor Code section 1199 against an "employer or other person acting either individually or as an officer, agent, or employee of another person" for violations of who require employees to work longer hours than agreed upon, pay employees less than minimum wage, or violates or refuses or neglects to comply with a commission ruling or order. Both wage orders state:

"20. Penalties (See California Labor Code, Section 1199)

"(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

"(1) Initial Violation--$50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

"(2) Subsequent Violations--$100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

"(3) The affected employee shall receive payment of all wages recovered." (Cal. Code Regs., tit. 8, §§ 11010, subd. 20, 11040, subd. 20.)

We conclude that the penalties authorized by sections 11010, subdivision 20 and 11040, subdivision 20 for unpaid wages do not authorize a private action, based on these regulations, imposing civil liability for unpaid wages. (See *Vikco Ins. Services, Inc. v. Ohio Indemnity Co*. (1999) 70 Cal.App.4th 55, 62-63.) The Division of Labor Standards Enforcement has the power to administer and enforce Industrial Welfare Commission Wage Orders. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562; Lab. Code, §§ 61, 1193.5, and 1193.6, subd. (a).) Plaintiffs, by contrast, have brought a civil action based on Labor Code statutes as grounds for their second cause of action.[4] Labor Code section 201, subdivision (a) makes wages earned and unpaid due and payable immediately if "an employer" discharges an employee. Labor Code section 203 provides for a penalty against "an employer" who willfully fails to pay in accordance with section 201 wages of a discharged employee. Labor Code section 204 makes wages earned by any person in any employment due and payable twice during each calendar month on days designated in advance by "the employer" as paydays. Labor Code section 227.3 provides for payment of vested vacation time to an employee who is terminated "in

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[4] The second cause of action also refers to Labor Code section 210, which authorizes an additional "civil penalty" against "every person" who fails to pay wages of each employee as provided in, inter alia, section 204. This statute, however, specifies that the Labor Commissioner shall recover the penalty as part of a hearing held to recover unpaid wages and penalties pursuant to this chapter or in an independent civil action brought in the name of the people of the State of California and the Labor Commissioners. Labor Code section 210 concludes: "All money recovered therein shall be paid into the State Treasury to the credit of the General Fund." Thus Labor Code section 210 provides no authority for the second cause of action in the Arakelian complaint.

accordance with such contract of employment or employer policy respecting eligibility or time served[.]" Labor Code section 1194 authorizes a civil action by an employee to recover the unpaid balance of the full amount of unpaid minimum wage or unpaid overtime compensation. Labor Code section 1197 makes it unlawful to pay a wage less than the minimum fixed for employees by the Industrial Welfare Commission.

None of these Labor Code statutes give the term "employer" the expansive definition which the Industrial Welfare Commission Wage Orders give that term. We know of no California authority which defines "employer," for purposes of a civil action pursuant to Labor Code sections 201, 204, 227.3, 1194, and 1197, as broadly as the definition in Wage Orders 11010(2)(F) and 11040(2)(H). Specifically, we decline to hold that "employer" for purposes of these statutes, includes individual members of the board of directors of the corporation, FTMM.

3. *Plaintiffs Have Waived Their Labor Code Section 203 Cause of Action*

The cause of action for violation of Labor Code section 203 alleged that defendants' failure to pay wages as required by Labor Code section 201 made them subject to civil wage penalties for 30 days after October 13, 2000.

As a condition of receiving the penalty for nonpayment of wages, Labor Code section 203 requires the plaintiff to show that an employer has "willfully" failed to pay wages of a discharged employee.[5] The complaint contains no allegation that the individual defendants willfully failed to pay wages. Moreover, plaintiffs on appeal make no argument claiming that the trial court erroneously sustained defendants' demurrers to this cause of action. Plaintiffs therefore waive any claim of error as to the third cause of action. (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)

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[5] Labor Code section 203 states, in relevant part: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

4. *Plaintiffs Cannot Show That Defendants Owed Them a Fiduciary Duty*

The cause of action for breach of fiduciary duty alleged that as directors, officers, and controlling shareholders, defendants owed plaintiffs a fiduciary duty not to act in their own selfish behalf or for pecuniary gain to employees' detriment and to act with the utmost care and loyalty in conducting the business enterprise.

A cause of action for breach of fiduciary duty must allege the following necessary elements: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) The issue is whether defendants as members of the board of directors of FTMM owed a fiduciary duty to the company's employees.

Employment generally does not create a fiduciary relationship. (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811.) No presumption of a confidential relationship arises from the employment contract; something additional must be alleged to create a confidential, fiduciary relationship. (*Amid v. Hawthorne Community Medical Group, Inc*. (1989) 212 Cal.App.3d 1383, 1391; *Odorizzi v. Bloomfield School Dist*. (1966) 246 Cal.App.2d 123, 129.) "The mere fact that in the course of their business relationships the parties reposed trust and confidence in each other does not impose any corresponding fiduciary duty in the absence of an act creating or establishing a fiduciary relationship known to law." (*Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc*. (1983) 142 Cal.App.3d 589, 595.) The parties to a contract necessarily place an element of trust and confidence in the other to perform that contract, but contractual trust and confidence gives rise to the implied covenant of good faith and fair dealing, not a fiduciary relationship. The obligation to pay money is a debt, not a trust, and does not create a fiduciary relationship. (*Wolf v. Superior Court* (2003) 106 Cal.App.4th 625, 631.)

Plaintiffs argue that defendants owed a fiduciary duty to them as creditors of FTMM, a company that defendants owned and controlled as officers and directors. None of plaintiffs' cases, however, establish a fiduciary duty between corporate officers and

directors and employees to whom the corporation owes unpaid wages. (*Pepper v. Litton* (1939) 308 U.S. 295: controlling stockholder caused his "one-man" corporation to confess a judgment representing his salary claims of five years, sought to enforce his salary claims only when his debtor corporation was in financial difficulty, and then used them to impair the rights of another creditor seeking lease royalties, requiring disallowance of the claim in bankruptcy; *Commons v. Schine* (1973) 35 Cal.App.3d 141, 144-145: sole owner who dominated and controlled an insolvent corporation is treated as the director of an insolvent corporation, occupies a fiduciary relationship to its creditors, and is liable to creditors for any preference he has taken for his benefit and to their disadvantage; *In re Jacks* (Bankr. C.D.Cal. 1999) 243 B.R. 385: Creditor, an independent contractor, could not satisfy requirements of his claim that debt owed him was nondishargeable in bankruptcy because it arose through debtor's defalcation while acting in fiduciary capacity of director and officer of bankrupt corporation.)

Where no fiduciary duty exists, no cause of action for breach of fiduciary duty lies. (*O'Byrne v. Santa Monica-UCLA Medical Center, supra*, 94 Cal.App.4th at p. 812.) We conclude that the trial court correctly sustained demurrers to this cause of action.

5. *The Complaint Satisfactorily Alleges the Elements of Misrepresentation as to Conquest, But Not as to the Other Individual Defendants*

The cause of action for fraud, deceit, and concealment alleged that on September 29, 2000, defendants falsely and fraudulent represented to plaintiffs that they would pay plaintiffs their rightfully earned wages, incidental and consequential damages, and stock options. On October 16, 2000, defendants' representations were discovered to be false, and FTMM did not have the financial ability and defendant did not have the intention or ability to make these payments to plaintiffs. The complaint alleged that defendants knew or should have known these representations were false, made representations and concealed information with intent to defraud, deceive, and induce plaintiffs to continue to work for FTMM, and willfully suppressed the facts despite their obligation to disclose them. When defendants made these misrepresentations, plaintiffs

continued to work, believed them to be true, and were ignorant that defendants made false representations. Plaintiffs' reliance on defendants' representations were justified, because defendants had superior knowledge, skill, and experience regarding FTMM's financial condition. The complaint alleged that defendants' conduct and material omissions constituted intentional fraud and deceit within Civil Code section 1710(3), insofar as defendants, knowing FTMM lacked the ability to pay plaintiffs, should have disclosed that fact before requiring plaintiffs to report for work for which they would not be paid.

The elements of fraud giving rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Every element of a fraud cause of action must be properly alleged. (*Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, 157.) More importantly, fraud must be pleaded specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of pleadings will not ordinarily be invoked to sustain a materially defective pleading. The complaint must plead *facts* showing how, when, where, to whom, and by what means the representations were tendered. A plaintiff alleging fraud against a corporation must furthermore allege the names of persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.)

a. *The Complaint Alleges No Specific Misrepresentations By Gehron, Buziak, Wood, and Schuon*

Lazar requires the complaint to plead facts showing how, when, where, to whom, and by what means the representations were tendered. The operative complaint contains no specific allegations that Gehron, Buziak, Wood, or Schuon communicated with or made any representations to plaintiffs. Therefore the trial court correctly sustained

demurrers as to the fifth cause of action for fraud, deceit, and concealment as to Gehron, Buziak, Wood, and Schuon.

b. *The Complaint Specifically Alleges Necessary Elements of Misrepresentation as to Defendant Conquest*

The complaint contains specific allegations of misrepresentations made by Conquest. It alleges that FTMM and its officers and directors knew since the beginning of August 2000 that CBS had no intention of continuing to support FTMM by additional funding, new contracts for services to be rendered by FTMM, or by timely paying FTMM's invoices. The complaint alleges that after August 2000, Conquest made a series of e-mails to employees which misrepresented FTMM's financial situation. On September 29, 2000, FTMM was due to pay 100 employees their regular wages, but on that day the employees, including plaintiffs, received Conquest's e-mail stating that he had a "positive update regarding FTMM's financial status" and stated: "Your company continues to progress in obtaining funding that should meet our long term needs." Conquest's e-mail then discussed three phases of funding with new cash infusions in October and December 2000 totaling $18.8 million, and stated that Conquest was in negotiations with four other potential sources of funding for "substantial equity Investment in the Company." Conquest stated FTMM's stock was being "beat up," but advised employees "[n]ow is a great opportunity to participate in the ownership of FTM stock and we intend to make sure this story is told." Conquest's e-mail also informed employees that "legal technical delays" caused payroll to be delayed "a few days," but to induce employees to continue working, each employee was given a stock option for 500 shares of FTMM stock with a strike price of $1.50.

Conquest sent another e-mail message to employees three days later, stating: "I am glad to report that we are making significant progress in resolving the issues necessary to continue our funding. . . . I want to apologize to all of you for these circumstances and I take full personal responsibility for the situation. I am confident

everything will be resolved and FTM will continue on its course to a bright future. I pledge to you that I will do everything I am capable of to insure our success."

On October 6, 2000, Conquest again e-mailed employees, stating: "Late yesterday we moved into the final stage, that when complete, should allow funds to begin flowing." No funds materialized to provide for payroll.

On October 10, 2000, FTMM issued a press release stating that FTMM "continues to experience a cash shortfall that could affect its operations." The press release later admits that "[I]f the company does not successfully conclude these negotiations it will suspend its operations."

On October 11, 2000, Conquest again e-mailed FTMM employees, stating: "Very early this morning I received phone calls from Senior executives at CBS in NY indicating we finally had their attention and they were willing to work something out with us." Conquest's e-mail thanked employees for their "continued patience and loyalty."

Conquest again e-mailed employees, six hours later, on October 11, 2000. Conquest's e-mail stated that he had spoken with CBS and stated that CBS/Infinity understood FTMM's financial condition, that steps would be taken to clarify the relationship between FTMM and CBS/Infinity, and that additional phone calls were scheduled to discuss FTMM's "cash crunch."

The complaint alleges that FTMM suspended operations two days later.

As to defendant Conquest, the complaint satisfactorily alleges the elements of misrepresentation (false representation, concealment, or nondisclosure), knowledge of falsity, intent to defraud, i.e., to induce reliance, justifiable reliance by plaintiffs, and resulting damage. The trial court therefore erroneously sustained the demurer as to defendant Conquest, and we reverse that ruling as to this cause of action.

6. *Negligent Misrepresentation*

The complaint makes the same allegations as to its negligent misrepresentation cause of action as it made regarding the fraud, deceit, and concealment cause of action,

adding that defendants made the representations to plaintiffs with no reasonable grounds for believing them to be true and concealed the facts from plaintiffs.

Negligent misrepresentation requires: (1) the defendant must have made a representation as to a past or existing material fact; (2) the representation must have been untrue; (3) regardless of his actual belief, the defendant must have made the representation without any reasonable ground for believing it to be true; (4) the representation must have been made with the intent to induce plaintiff to rely on it; (5) the plaintiff must have been unaware of the falsity of the representation, must have acted in reliance on the truth of the representation, and must have been justified in relying on the representation; and (6) plaintiff must have sustained damage as a result of his reliance on the truth of the representation. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 402.)

"The tort of negligent misrepresentation does not require scienter or intent to defraud. [Citation.] It encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' (Civ. Code, § 1710, subd. 2), and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' (Civ. Code, § 1572, subd. 2 . . . .)" (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173-174.)

The failure of the complaint to allege any specific representations to plaintiffs made by Gehron, Wood, Buziak, or Schuon means that the trial court correctly sustained these defendants' demurrers as to the negligent misrepresentation cause of action.

As to Conquest, the complaint pleads the third element generally: "Defendants . . . made these representations with no reasonable grounds for believing them to be true." The rule requiring specific allegations in other fraud causes of action has not been definitively applied to negligent misrepresentation, except in a stockholder's complaint for negligent misrepresentation. (*Small v. Fritz Companies, Inc., supra,* 30 Cal.4th at p. 184.) Thus although the complaint contains no specific allegations why Conquest

lacked reasonable grounds for believing his representations concerning FTMM's financial ability to pay employees, the sustaining of the demurrer as to the negligent representation cause of action should be reversed. Even if allegations of intentional fraud and negligent misrepresentation are inconsistent, plaintiffs are not barred from pleading both causes of action. (*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.) We therefore reverse the sustaining of Conquest's demurrer as to this cause of action.

7. *Plaintiffs Have Waived Their Negligence Cause of Action, and Do Not Satisfactorily Allege a Negligence Per Se Cause of Action*

The negligence and negligence per se cause of action alleged that as plaintiffs' employer, or as officers, directors, and shareholders of FTMM who controlled FTMM, the defendants owed a duty of care to plaintiffs not to hide FTMM's true financial condition from its employees and not to induce plaintiffs to continue working based on false information and promises. The complaint alleged that on October 16, 2000, and thereafter plaintiffs discovered that defendants negligently, recklessly, and carelessly breached their duty of care by failing to notify plaintiffs of FTMM's true financial condition and the intention and/or ability of defendants to pay plaintiffs their wages.

Plaintiffs make no argument claiming error in the sustaining of the demurrer as to the negligence cause of action. Therefore plaintiffs waive any error as to that cause of action. (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.)

A negligence per se cause of action, codified in Evidence Code section 669, requires plaintiff to plead four elements: (1) that defendants violated a statute or regulation; (2) that the violation caused plaintiffs' injuries; (3) those injuries resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) plaintiffs were members of the class of persons the statute or regulation was intended to protect. (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1184-1185.) "[E]ither the courts or the Legislature must have created a duty of care. The presumption of negligence created by Evidence Code section 669 concerns the *standard* of care, rather

than the *duty* of care." (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430; italics in original.)

Labor Code section 201, subdivision (a) states, in relevant part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." This statute makes wages due and payable by the "employer." We have concluded, *ante*, that individual defendants Gehron, Conquest, Wood, Buziak, and Schuon were not plaintiffs' employers. As such the complaint has not alleged that these defendants violated the statute. Therefore the trial court correctly sustained demurrers as to this cause of action.

8. *The Trial Court Correctly Sustained a Demurrer to the Tortious Breach of Contract Action*

Plaintiffs claim that the trial court erroneously sustained demurrers to a tortious breach of contract action without leave to amend. That cause of action was alleged in an earlier first amended complaint. It alleged that defendants failed and refused to perform its written contract to pay wages to plaintiff employees on the 15th and last business day of each month. The complaint alleged that despite knowing FTMM's precarious position, defendants induced plaintiffs to continue working for FTMM with vague promises and offers of essentially worthless stock, when there was little likelihood that pay would ever be forthcoming given FTMM's financial weakness. The complaint alleged that defendants either intentionally knew or had reason to know their conduct would breach implied covenants of good faith and fair dealing arising from the written contract, and intentionally, recklessly, or negligently breached the implied covenants of honesty, good faith, and fair dealing implied in every agreement.

This cause of action is ambiguous. If it is a cause of action for breach of the covenant of good faith and fair dealing, "[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (Italics omitted.) The covenant thus has no existence independent of its

contractual underpinnings, and cannot impose substantive duties or limits on contracting parties beyond those in the specific terms of their agreement. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 349-350.) The breach of contract cause of action alleged the breach of an actual term of the contract, non-payment of wages to plaintiffs. A cause of action for breach of the implied covenant of good faith and fair dealing which alleges the same breach is therefore superfluous. (*Id*. at p. 327.) And cause of action for breach of the implied covenant of good faith and fair dealing which alleges a breach of obligations beyond the agreement's actual terms is invalid. (*Ibid*.) Therefore if this cause of action is one for breach of the implied covenant of good faith and fair dealing, the trial court correctly sustained demurrers.

If, on the other hand, this cause of action is, as it is captioned, one for "tortious breach of contract," or as plaintiffs' brief on appeal characterizes it, for bad faith breach of contract, except for breach of the covenant of good faith and fair dealing in cases involving insurance policies, compensation for breach of the covenant of good faith and fair dealing is limited to contract remedies. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43.)

On appeal, defendant relies on a sentence that appears to state that tort recovery for bad faith breach of contract is allowed where, in addition to the breach of the covenant of good faith and fair dealing, defendant's conduct violates a fundamental public policy of the State of California. (*Rattan v. United Services Automobile Assn*. (2000) 84 Cal.App.4th 715, 722.) *Rattan* cites *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 669-700, for this proposition, but *Foley* does not so state. *Foley* clearly held that breach of the implied covenant of good faith and fair dealing in an employment contract gave rise only to contract damages, and not to damages in tort. (*Id*. at pp. 663, 700.) A cause of action for the tort of wrongful termination in violation of fundamental public policy does exist. (*Id*. at pp. 665-671.) Nonetheless it does not apply to this case, because plaintiffs' cause of action for tortious breach of contract does not allege wrongful termination; it alleges failure to pay wages as required in an express written contract.

We conclude that the trial court correctly sustained demurrers as to this cause of action.

DISPOSITION

The order of dismissal is reversed as to defendant Conquest with respect to the sustaining of demurrers to the cause of action for fraud, deceit, and concealment and to the cause of action for negligent misrepresentation. As to all other causes of action, the orders of dismissal are affirmed. Costs on appeal are awarded to defendants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.