

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAR 21 2011

ALAN CARLSON, Clerk of the Court

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

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11 THIRD LAGUNA HILLS MUTUAL, a
12 California non-profit corporation,

13 Plaintiff,

14 v.

15 PROFESSIONAL COMMUNITY
16 MANAGEMENT, INC., a California
17 corporation, also known as PCM; MILT
18 JOHNS, an individual; JANET PRICE, an
19 individual and DOES 1 to 20, inclusive,

20 Defendants.

21 MILTON JOHNS, an individual,

22 Cross-Complainant,

23 v.

24 PROFESSIONAL COMMUNITY
25 MANAGEMENT OF CALIFORNIA, INC., a
26 California corporation, also known as PCM;
27 RUSS DISBRO, an individual; DONNY
28 DISBRO, an individual; PAUL VAN
Hoomissen, an individual; JACKSON
DEMARCO, TIDUS PECKENPAUGH, a
California Law Corporation; MUCH,
SHELIST, FREED DENENBERG, AMENT
& RUBENSTEIN, an Illinois Corporation
doing business in California; THIRD
LAGUNA HILLS MUTUAL, a California
non-profit corporation; GOLDEN RAIN

Case No. 30-2010 00380231

[Assigned for All Purposes to the Hon.
Kirk H. Nakamura, Dept. C8]

**NOTICE OF MOTION AND MOTION
TO STRIKE PORTIONS OF THE
CROSS-COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Filed concurrently with Demurrer to
Cross-Complaint and Motion to Sever]

Date: April 28, 2011
Time: 2:00 p.m.
Dept: C8

Complaint filed: June 10, 2010

Cross-Complaint filed: December 30, 2010

Trial Date: No Date Set

1 FOUNDATION OF LAGUNA WOODS, a)
California non-profit corporation; ROBERT)
2 HATCH, an individual; JIM MATSON, an)
individual; and ROES 1 to 150, inclusive,)
3
Cross-Defendants.)
4

5 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

6 PLEASE TAKE NOTICE that on April 28, 2011 at 2:00 p.m., or as soon thereafter as the
7 matter may be heard, in Department C8 of the above-entitled Court, located at 700 Civil Center Drive
8 West, Santa Ana, California, 92701, Cross-Defendants JACKSON DEMARCO, TIDUS,
9 PECKENPAUGH (“The Firm”) will, and hereby does, move to strike the following portions of the
10 cross-complaint filed by Cross-Complainant MILTON JOHNS (“Johns”):

- 11 1. Page 15, ¶ 88:23-25: “Johns has suffered and continues to suffer...emotional distress
12 and physical illness in an amount unknown, but according to proof at trial.”
- 13 2. Page 15, ¶ 89:26-Page 16, ¶ 89:3: “The conduct by..., JDTP,..., and each of them in
14 requesting and negotiating with regard to Johns’ termination because he told the
15 entities and individuals that they were violating California law was willful and
16 malicious and in conscious disregard of Johns’ rights with the intent to vex, injure and
17 annoy him, such as to constitute oppression, fraud and/or malice under California Civil
18 Code § 3294.”
- 19 3. Page 16 ¶ 89:6-7: “Accordingly, Johns is entitled to punitive damages in an amount
20 appropriate to punish and make an example of Cross-Defendants.”
- 21 4. Page 17 ¶ 97:6-9: “The conduct by..., JDTP,..., and each of them , in failing to properly
22 represent Johns and failing to inform him of the developments pertaining to his
23 livelihood was willful and malicious and in conscious disregard of Johns’ rights with
24 the intent to vex, injure, and annoy him, such as to constitute oppression, fraud and/or
25 malice under California Civil Code § 3294.”
- 26 5. Page 17 ¶ 97:12-13: “Accordingly, Johns is entitled to punitive damages in an amount
27 appropriate to punish and make an example of Cross-Defendants.”
- 28 6. Page 18 Prayer 3: “Damages for mental and emotional distress in a sum according to

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proof at time of trial.”

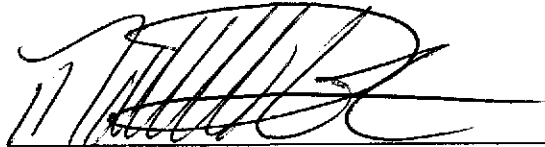
7. Page 18 Prayer 6: “Payment of Johns’ reasonable and actual attorney fees in a sum according to proof at time of trial.”

8. Page 18 Prayer 9: “Punitive and exemplary damages in a sum according to proof at time of trial.”

This motion is made pursuant to Code of Civil Procedure sections 435 *et seq.*, on the grounds that the allegations sought to be stricken are false, improper and contrary to law. The motion is based upon this notice of hearing, the attached memorandum of points and authorities, the Cross-Complaint, the concurrently-filed demurrer, all of the pleadings and records on file with the court, such documentary evidence that may be submitted before or at the hearing on this matter, and the argument of counsel at the hearing on this matter.

Dated: March 18, 2011

By:



MICHAEL McCARTHY
MARSHALL R. COLE
Attorneys for Cross-Defendant
JACKSON DeMARCO TIDUS PECKENPAUGH

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION AND STATEMENT OF FACTS

Contained within a Cross-Complaint largely focusing on wrongful termination allegations, lie two causes of action against Cross-Defendant JACKSON DEMARCO, TIDUS & PECKENPAUGH (“The Firm”). Cross-complainant MILTON JOHNS (“Johns”), alleges intentional interference with contractual relations and breach of fiduciary duties arising out of The Firm’s representation of Johns during an employment dispute that arose between Johns and his employer PROFESSIONAL COMMUNITY MANAGEMENT OF CALIFORNIA, INC., (“PCM”) as general manager. (Cross-Complaint ¶ 32.)

Johns had worked for PCM as general manager since 2000. (Cross-Complaint ¶ 17.) From the time Johns became general manager through 2009 Johns was allegedly promised that he would always maintain a senior executive position with PCM. Eventually Johns was approached by an employee of PCM, Donny Disbro, to purchase PCM and proposing Johns and Mr. Disbro be Co-CEO’s. These discussions were memorialized into an offer to purchase PCM on April 9, 2009. (Cross-Complaint ¶¶ 17-20.)

Subsequently, in May or June of 2009, Johns was approached by PCM regarding the April offer to purchase, and was informed that the offer would not be accepted. (Cross-Complaint ¶ 21.) The reasoning behind this decision [allegedly] was that Johns engaged in certain acts which could be considered insubordination within PCM, and as a result, Johns remained as general manager. (Cross-Complaint ¶¶ 27-30.) Eventually, and culminating in February 2010, Johns was approached again by PCM and informed that he would no longer have a position with PCM due to the fact that he was “burned out”. (Cross-Complaint ¶ 32.) Although Johns had indicated that various promises had been made to him, PCM indicated that said promises would not be honored and his employment was terminated. (Cross-Complaint ¶ 32.)

According to the allegations of the Cross-Complaint, Johns asserts liability against The Firm because they allegedly knew there was an employment contract between Johns and PCM and interfered with the employment contract by negotiating with THIRD LAGUNA HILLS MUTUAL (“Third”), Plaintiff in this action, for Johns’ termination. (Cross-Complaint ¶¶ 83, 86.) However,

1 Third is not a party to the alleged employment agreement. Nonetheless, Johns goes on to claim that
2 The Firm engaged in these negotiations without Johns' knowledge or informed consent. (Cross-
3 Complaint ¶ 94.) However, absent from the Cross-Complaint are any essential terms of said
4 employment contract, who in fact the parties are to the alleged employment contract and what The
5 Firm's specific roll was in bringing about a breach of the alleged employment contract.

6 Johns also asserts liability against The Firm for failing to inform Johns of a tolling agreement
7 extension proposed by Third. (Cross-Complaint ¶ 94.) Johns claims that had he been informed of the
8 proposed tolling agreement, he would have entered into it and avoided being sued by Third. (Cross-
9 Complaint ¶ 95.) Such is gross speculation at best.

10 In this action, Johns is now attempting to blame The Firm for losing his employment with
11 PCM and subsequently being sued by Third, despite the fact that there are no facts establishing any
12 liability against The Firm. As pled, it is entirely uncertain as to how The Firm engaged in any
13 wrongdoing, especially since no essential terms of the alleged employment agreement are identified.
14 Aside from bold conclusory allegations, there are no facts alleged establishing any liability as to The
15 Firm. As a result, Johns conclusory allegations shall be stricken from the Cross-Complaint..

16 2. **THE COURT IS EMPOWERED TO GRANT THE PRESENT MOTION WITHOUT**
17 **LEAVE TO AMEND**

18 *Code of Civil Procedure* Section 435, subdivision (b)(1), states in pertinent part:

19 **“Any party within the time allowed to respond to a pleading may serve and file a**
20 **notice of motion to strike the whole or any part thereof . . .”** (*Id.*) (Emphasis
21 added).

22 *Code of Civil Procedure* Section 436 provides:

23 **“The court may, upon a motion made pursuant to section 435**
24 **. . . (a) strike out any irrelevant, false, or improper matter inserted at any**
25 **pleading; (b) strike out or any part of any pleading not drawn or filed in**
26 **conformity with the laws of this state, court rule, or an order of the court.”** (*Id.*)
27 (Emphasis added).

28 ///

1 **3. JOHNS' ATTEMPT TO RECOVER PUNITIVE DAMAGES IS UNSUPPORTABLE**
2 **UNDER CALIFORNIA LAW**

3 It is well established that punitive damages are disfavored and should only be allowed in the
4 clearest cases. (*Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 750.) Under *Civil*
5 *Code* Section 3294, to plead a claim for punitive damages, a plaintiff must allege **actual facts**
6 demonstrating that the defendant is guilty of oppression, fraud or malice. Mere conclusory allegations
7 of such behavior do not give rise to a claim for punitive damages under Section 3294. (See, *Smith v.*
8 *Superior Court* (1992) 10 Cal.App.4th 1033, 1042.)

9 "Malice" is defined in *Civil Code* section 3294 as follows:

10 **"(1)... conduct which is intended by the defendant to cause injury**
11 **to the plaintiff or despicable conduct which is carried on by the**
12 **defendant with a wilful and conscious disregard of the rights or**
13 **safety of others."**

14 "Oppression" is defined in Section 3294 as:

15 **"(2)... despicable conduct that subjects a person to cruel and unjust**
16 **hardship in conscience disregard of that person's rights."**

17 In construing the terms "malice" and "oppression" for pleading purposes, the courts have held
18 that **a plaintiff must allege specific facts** showing that the defendant either acted intentionally to
19 harm the plaintiff or acted with such a high degree of conscious disregard for the plaintiff's health,
20 safety or welfare that the intent to injure can be inferred. (*J. R. Norton Co. v. General Teamsters,*
21 *Warehousemen & Helpers Union Local 890* (1989) 208 Cal.App.3d 430, cert. denied, 493 U.S. 894,
22 110 S.Ct. 242.) The courts have further held that to establish malice or oppression, an allegation that a
23 defendant's conduct was negligent, grossly negligent or even reckless is insufficient. (*Bell v. Sharp*
24 *Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1043-1048.)

25 It has been recognized that this standard of "despicable" conduct requires a level of conduct
26 that is nearly criminal before punitive damages may be awarded. (*Mock v. Michigan Millers Mutual*
27 *Ins. Co.* (1992) 4 Cal.App.4th 306, 328.) Indeed, an examination of California cases using the term
28 "despicable" in its common, ordinary sense, reveals that the term is routinely employed to describe

1 criminal behavior. (See, e.g., *People v. McElrath* (1985) 175 Cal.App.3d 178 [branding rape, oral
2 copulation and sodomy as outrageous, shocking and despicable]; *People v. Adams* (1982) 137
3 Cal.App.3d 346 [characterizing a racially motivated shooting as a "despicable deed"]; *People v.*
4 *Carter* (1983) 144 Cal.App.3d 534 [describing a sexual assault and stabbing of a child as a
5 "despicable series of crimes"].)

6 Here, Johns' attempt to maintain punitive damages is based solely upon a factual scenario
7 which can only be described at most as mere negligence, with no alleged facts whatsoever that meet
8 the statutory standard, plaintiff's prayer for punitive damages is patently insufficient under California
9 law.

10 In paragraphs 89 and 97 of Johns' Cross-Complaint, intended for the fifth and sixth causes of
11 action for intentional interference with contractual relations and breach of fiduciary duty, and in the
12 prayer therefor, Johns claims he is entitled to punitive damages based on The Firm's "willful and
13 malicious and conscious disregard of Johns' rights with the intent to vex, injure and annoy him."
14 However, other than conclusions, blanket statements, and empty rhetoric, not a single fact is pled that
15 would even remotely describe, let alone establish, any evidence of malice, oppression, or fraud.
16 These sorts of factually-devoid, conclusory allegations are as a matter of law insufficient and
17 inadequate to support a claim for punitive damages.

18 The only conduct that Johns alleges The Firm engaged in was negotiating with Third
19 regarding Johns' employment and failing to inform Johns' of a tolling agreement extension. Surely
20 this conduct does not amount to malice, oppression, or fraud. As a result all allegations setting forth a
21 claim for punitive damages and the prayer for punitive damages should be stricken.

22 4. **CALIFORNIA LAW PRECLUDES CROSS-COMPLAINANTS' RECOVERY OF**
23 **"EMOTIONAL DISTRESS" DAMAGES ABSENT PHYSICAL INJURY;**
24 **ACCORDINGLY, THE CLAIM FOR EMOTIONAL-DISTRESS DAMAGES**
25 **SHOULD BE STRICKEN FROM THE PLEADINGS**

26 The law is well-settled in California holding that a plaintiff cannot obtain emotional distress
27 for actions arising out of a contract (*Duell v. Sanstrom* (1932) 120 Cal.App. 414, 417; *Lillie v.*
28 *Warner Bros. Pictures* (1934) 139 Cal.App. 724, 728). Moreover, under California law, emotional

1 distress damages are not available in every case in which there is an independent cause of action
2 founded upon negligence.’ (*Erlich v. Menezes* (1999) 21 Cal 4th 543, 544). In fact, **“in the absence of**
3 **physical injury, the courts have never allowed recovery of damages for emotional distress**
4 **arising solely from property damage or economic injury to the plaintiff.”** (*Butler-Rupp v.*
5 *Lourdeaux* (2005) 4th 1220, 1228-1229.)

6 Cases permitting recovery for emotional distress typically involve mental anguish stemming
7 from more personal undertakings the traumatic results of which were unavoidable. (See, e.g., *Molien*
8 *v. Kaiser Foundation Hospitals* (1980) 27 Cal. 3d 916 [misdiagnosed venereal disease and
9 subsequent failure of marriage]; *Kately v. Wilkinson* (1983) 148 Cal. App. 3d 576 [fatal waterskiing
10 accident]; *Chelini v. Nieri* (1948) 32 Cal. 2d 480 [failure to adequately preserve a corpse].)
11 Recovery of emotional distress damages has been allowed, absent impact or physical injury, in certain
12 specialized classes of cases. Where the negligence is of a type which will cause highly unusual as well
13 as predictable emotional distress, recovery has been allowed. (*Allen v. Jones* (1980) 104 Cal.App.3d
14 207, 215 [163 Cal.Rptr. 445] [mishandling of the cremated remains of plaintiff’s brother]; *Molien v.*
15 *Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 930 [167 Cal.Rptr. 831, 616 P.2d 813, 16
16 A.L.R.4th 518] [negligent advice to patient that she suffered from syphilis, resulting in severe distress
17 to her husband].)

18 Here, Johns’ alleged emotional distress damages and physical illness damages arise from the
19 interference with contractual relations cause of action. Since the action arises from a contract, *Duell*
20 clearly establishes that no such recovery can be had. Here, Johns termination from his employment
21 caused, at best, financial harm. Johns pleads no facts establishing that he suffered any kind of
22 physical injury except for an allegation that suffered a “physical illness”. However, pled as yet
23 another conclusory allegation with no factual support, Johns claim for damages based upon emotional
24 distress falls well short of the standard adhered to under the law. Johns fails to plead that his
25 termination was so traumatic as to place the harm that he suffered within the above cited examples of
26 when courts allow recovery for emotional distress. Pointing to absolutely no trauma, Johns request
27 for emotional distress damages shall be stricken.

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1 **5. THE COURT SHOULD STRIKE PLAINTIFF'S PRAYER FOR ATTORNEY'S FEES**

2 *Code of Civil Procedure* Section 1021 provides as follows:

3 "Except as attorney's fees are specifically provided for by statute, the
4 measure and mode of compensation of attorneys and counselors at law
is left to the agreement, express or implied, of the parties."


5 Thus, attorney's fees are not recoverable as costs unless expressly authorized by statute or contract.
6 *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 379.

7 Here, the Cross-Complaint of Johns fails to allege any basis whatsoever for the recovery of
8 attorney's fees. Johns cites no statute nor points to any provision in a retainer agreement [nor does he
9 allege one ever existed] allowing for the recovery of attorney's fees. The reason no retainer
10 agreement is cited is that no retainer exists between Johns and The Firm. Thus, it is impossible for
11 Johns to satisfy the requirements of attaching the retainer agreement to the Cross-Complaint, or
12 pleading the relevant terms of the agreement *in haec verba*, there is no basis for the recovery of
13 attorney's fees and Johns' prayer for attorney's fees is properly stricken.

14 **6. CONCLUSION**

15 For all of the foregoing reasons, The Firm respectfully requests that the Court strike those
16 portions of Johns' Cross-Complaint delineated in the written notice of this motion, without leave to
17 amend.

18
19 Dated: March 18, 2011

By: 
MICHAEL MCCARTHY
MARSHALL R. COLE
Attorneys for Cross-Defendant
JACKSON DeMARCO TIDUS PECKENPAUGH

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 15260 Ventura Blvd., Suite 920, Sherman Oaks, CA 91403.

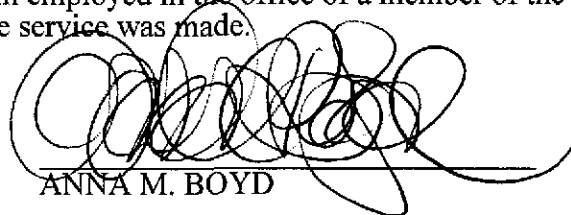
On March 21, 2011, I served the document described as **NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF THE CROSS-COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** upon the interested parties in this action in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

- (By Mail) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Sherman Oaks, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after day of deposit for mailing contained in affidavit.
- (By Overnight Delivery) I deposited this document in the box or other facility located at 15260 Ventura Blvd., Suite 920, Sherman Oaks, CA 91403 regularly maintained by Overnite Express, in an envelope designated by Overnite Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served, for guaranteed next business day delivery.
- (By Facsimile Transmission) I caused the foregoing document to be served by facsimile transmission to each of the interested parties at the facsimile machine telecopy number shown above.
- (By Personal Service) I caused the delivery of such envelope by hand to the offices of the addressee.

Executed on March 21, 2011, at Sherman Oaks, California.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



ANNA M. BOYD

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Orange County Superior Court Case No. 30-2010 00380231

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