

NOV 30 2015

Sherri R. Carter, Executive Officer/Clerk
By Shaunya Bolden Deputy

1 ERIC J. WAYNE, State Bar No. 134844
2 WAYNE & ASSOCIATES
21600 Oxnard St., Suite 2060
3 Woodland Hills, California 91367
(818) 716-2727
4 Fax No. (818) 716-2728

5 Attorneys for Defendants, DOUGLAS EMMETT MANAGEMENT, INC. and DOUGLAS
EMMETT 1997, LLC

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10 ROBERT L. GLUSHON,
11 Plaintiff,

12 vs.

13 DOUGLAS EMMETT 1997, LLC, a Delaware
14 limited liability company; DOUGLAS
15 EMMETT MANAGEMENT, INC., a Delaware
16 corporation; and DOES 1-50, inclusive,
17 Defendants

CASE NO. BC598918
[Complaint filed 10/23/15; Dept. 28]

**NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFF'S
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

**Date: 8/1/2016
Time: 8:45 a.m.
Dept.: 28**

RESERVATION ID: 151130083758

18 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

19 PLEASE TAKE NOTICE that on August 1, 2016 at 8:30 a.m., or as soon
20 thereafter as counsel may be heard in Department 28 of the above-entitled court
21 located at 111 North Hill Street, Los Angeles, CA 90012, Defendants, DOUGLAS
22 EMMETT MANAGEMENT, INC. and DOUGLAS EMMETT 1997, LLC, hereby does demur to Plaintiff's Complaint For Damages ("Complaint") on the
23 following grounds:
24

25 **AS TO THE FIRST CAUSE OF BREACH OF CONTRACT**

- 26 1. The First Cause of Action fails to state facts sufficient to constitute a cause
27 of action. [California Code of Civil Procedure Section 430.10 (e)]
28 2. The First Cause of Action is uncertain. [California Code of Civil Procedure

CIT/CASE: BC598918
RECEIVED: 04:25 PM
DATE PAID: 11/30/15
PAYMENT: \$435.00
CHECK: \$435.00
CASH: \$0.00
CHANGE: \$0.00
CARD: \$0.00

12/09/2015

1 Section 430.10 (f)]

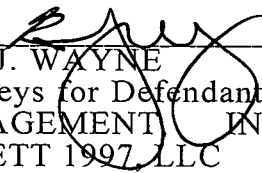
2 AS TO THE THIRD CAUSE OF FRAUD-

3 CANCEALMENT/SUPRESSION OF FACTS

- 4 1. The Third Cause of Action fails to state facts sufficient to constitute a cause
5 of action. [California Code of Civil Procedure Section 430.10 (e)]
6 2. The Third Cause of Action is uncertain. [California Code of Civil Procedure
7 Section 430.10 (f)]

8 DATED: November 30, 2015

WAYNE & ASSOCIATES

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11 
12 ERIC J. WAYNE
13 Attorneys for Defendants, DOUGLAS EMMETT
14 MANAGEMENT INC. and DOUGLAS
15 EMMETT 1997, LLC
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12/03/2015

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 ALLEGATIONS - FACTS

4 This matter arises out of a written Office Lease agreement entered into by
5 Plaintiff with Douglas Emmett 1997, LLC (Owner) on October 20, 2011 with Plaintiff
6 at the premises known as "Suite 1016" at 16255 Ventura Blvd., Encino, California
7 ("Subject Premises"). (Complaint, paragraphs 9).

8 Simply put, Plaintiff is attempting to get out of his office lease. The Complaint
9 fails to mention all of the efforts that have been made by the Landlord (DOUGLAS
10 EMMETT 1997, LLC) to appease Plaintiff.

11 Plaintiff's Complaint is comprised of thinly pled allegations that the Defendants
12 were aware that his office suite was allegedly too noisy before he signed his Lease and
13 therefore guilty of fraud. Plaintiff suggests that a prior tenant, Brain Schall, was
14 aware of these noise issues, however, Plaintiff fails to allege when Ms. Schall was a
15 tenant, the nature of his complaints, to whom or when Mr. Schall spoke to someone
16 employed by Defendants, what was stated, what the alleged issue was, how the
17 Defendants allegedly concealed or suppressed the alleged material facts, who had this
18 knowledge when were they made, where were they made, or how were they made.

19 In regards to the Breach of Contract cause of action, Plaintiff names both
20 Defendants despite the fact that he attached the Office Lease agreement which clearly
21 states that his Office Lease was solely with Defendant DOUGLAS EMMETT 1997,
22 LLC. Defendant DOUGLAS EMMETT MANAGEMENT, INC. was not a party to the
23 Office Lease, there is no privity of contract, and as a result, the Demurrer should be
24 sustained to the First Cause of Action as to DOUGLAS EMMETT MANAGEMENT,
25 INC. without leave to amend.

26 As such, it is respectfully submitted that this Court should sustain this demurrer
27 as to the first and third causes of action of plaintiff's complaint, without leave to
28 amend.

1 II.

2 A DEMURRER IS PROPER WHEN THE COMPLAINT DOES NOT
3 STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION
4 OR WHEN IT IS UNCERTAIN

5 A party against whom a complaint has been filed may object by demurrer to the
6 pleading on the grounds that “[t]he pleading does not state facts sufficient to
7 constitute a cause of action and/or the pleading is uncertain. As used in this
8 subdivision, “uncertain includes ambiguous and unintelligible.” *California Code of*
9 *Civil Procedure* Sections 430.10 (e) and (f).

10 California *Code of Civil Procedure* Section 430.30 (a) provides:

11 “When any ground for an objection to a complaint...appears on the face thereof,
12 or through any matter of which the court is required to or may take judicial notice, the
13 objection on that ground may be taken by demurrer to the pleading.”

14 To withstand a demurrer, a complaint must allege ultimate facts and not
15 evidentiary facts or conclusions of law. *Logan v. Southern California Rapid Transit*
16 *District* (1982) 136 Cal.App.3d 116, 126. Every element of a cause of action asserted
17 must be alleged with particularity, and not by vague references to facts that may or
18 may not be shown “according to proof” at a later date. *Goldrich v. Natural Surgical*
19 *Specialists* (1994) 25 Cal.App.4th 772, 782. Thus, if a defendant establishes the
20 absence of any essential element of a cause of action, the court should sustain the
21 demurrer to that cause of action. *Sher v. Leiderman* (1986) 181 Cal.App.3d 867, 885-
22 886.

23 As established below, each and every cause of action of plaintiffs’ complaint is
24 inadequately pled and does not state facts sufficient to constitute a legally cognizable
25 cause of action against defendants.

26 Moreover, a complaint which contains ambiguities and/or is unintelligible is
27 subject to special demurrer for uncertainty. *Code of Civ.Proc.* Section 430.10(f) The
28 court in *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537

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1 emphasized the importance of clarity in pleading when it held:

2 “Plaintiff’s complaint is also uncertain...It is settled law that a pleading must
3 allege facts and not conclusions, and that material facts must be alleged directly and
4 not by way of recital. Also, in pleading, the essential fact upon which a determination
5 of the controversy depends should be stated with clearness and precision so that
6 nothing is left to surmise. Those recitals, references to, or allegations of material facts
7 which are left to surmise are subject to special demurrer for uncertainty.” (Citations
8 omitted.)

9 The nature and extent of the plaintiff’s claims as to Douglas Emmett 1997, LLC
10 and Douglas Emmett Management, Inc. cannot be ascertained from the allegations of
11 the complaint. to Douglas Emmett 1997, LLC and Douglas Emmett Management, Inc.
12 are left to surmise what it purportedly did or failed to do as well as the manner or
13 method by which the purported actions or failures occurred. Simply put, the complaint
14 fails to provide any specific factual allegations to support any of the causes of action
15 as against defendants. For these reasons, the demurrer to the complaint should be
16 sustained in its entirety without leave to amend.

17 **III.**

18 **PLAINTIFF’S FIRST CAUSE OF ACTION FOR BREACH OF**
19 **CONTRACT FAILS TO STATE FACTS SUFFICIENT TO STATE A**
20 **CAUSE OF ACTION AND IS UNCERTAIN**

21 The elements of a cause of action Breach of Contract include the allegation that
22 a contract existed between the parties.

23 Plaintiff’s First Cause of Action for Breach of Contract is against all
24 Defendants. Plaintiff’s First Cause of Action is subject to demurrer because there is a
25 lack of any factual description of the purported actions giving rise to this cause of
26 action in regards to Defendant DOUGLAS EMMETT MANAGEMENT, INC.
27 Plaintiff alleges that on or about October 20, 2011, DOUGLAS EMMETT 1997, LLC
28 entered into a written Office Lease agreement with Plaintiff for the lease of the
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1 premises known as Suite 1016 at 16255 Ventura Blvd., Encino, California.
2 (Complaint 3:7 – 10) Plaintiff attaches the Office Lease as Exhibit 1.

3 The most cursory review of the Office Lease reveals that the Office Lease was
4 an agreement between the Landlord DOUGLAS EMMETT 1997, LLC and Plaintiff
5 ROBERT L. GLUSON. DOUGLAS EMMETT MANAGEMENT, INC. was not a
6 party to this Office Lease agreement. There is no privity of contract between Plaintiff
7 and DOUGLAS EMMETT MANAGEMENT, INC.

8 As such, the Complaint lacks the necessary facts to state a cause of action for
9 breach of contract against DOUGLAS EMMETT MANAGEMENT, INC.

10 For these reasons, the demurrer to the First Cause of Action of the Complaint
11 for Breach of Contract should be sustained as to defendant DOUGLAS EMMETT
12 MANAGEMENT, INC. without leave to amend.

13 **IV.**

14 **PLAINTIFF'S THIRD CAUSE OF ACTION FOR FRAUD-**
15 **CANCEALMENT/SUPPRESSION OF FACTS FAILS TO STATE FACTS**
16 **SUFFICIENT TO STATE A CAUSE OF ACTION AND IS UNCERTAIN**

17 **A. Fraud Claims Are Disfavored And Must Be Specifically Pleaded**

18 Fraud claims are disfavored and subject to strict requirements of particularity in pleading.
19 The policy of liberal construction of the pleadings thus is ordinarily not invoked on a fraud claim. 5
20 *Witkin, Cal. Proc., Pleading*, § 711 (5th Ed. 2008) (hereinafter “*Witkin*”) (citations omitted).

21 Thus, every element of a fraud claim must be alleged specifically and the policy of liberal
22 construction of pleadings cannot save a defectively pleaded fraud claim. *Wilhelm v. Pray, Price,*
23 *Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331-32. Fraud claims must allege facts to show
24 “how, when, where, to whom, and by what means the representations were tendered.” *Stansfield v.*
25 *Starky* (1990) 220 Cal.App.3d 59, 73 (citation omitted). Moreover, where fraud is alleged as against
26 an entity, the plaintiff must allege the names of the persons making the representations, their
27 authority to speak for the entity, to whom they spoke, what they said or wrote, and when. *State Farm*
28 *Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.

1 The essential allegations of an action for fraud are a misrepresentation, knowledge of
2 its falsity, intent to defraud, justifiable reliance, and resulting damage. *Roberts v. Ball, Hunt,*
3 *Hart, Brown & Baerwitz, 57 Cal.App.3d 104,109 (1976).* "Every element of the cause of
4 action for fraud must be alleged in the proper manner and the facts constituting the fraud
5 must be alleged with sufficient specificity to allow defendant to understand fully the nature of
6 the charge made." *Id.* General pleading of the legal conclusion of fraud is insufficient; every
7 element of the cause of action for fraud must be alleged in full, factually and specifically, and
8 the policy of liberal construction of pleading will not usually be invoked to sustain a pleading
9 that is defective in any material respect. *Wilhelm v. Pray, Price, Williams & Russell, 186*
10 *Cal.App.3d 1331,1324 (1986).* "This particularity requirement necessitates pleading facts
11 which "show how, when, where, to whom, and by what means the representations were
12 tendered." *Stansfield v. Starker, 220 Cal.App.3d 59, 73 (1990).*

13 Additionally, where a corporate or business defendant is involved, the pleading
14 standards for fraud are even greater. *Tarmann v. State Farm Mutual Auto Ins. Co., 2*
15 *Cal.App.4th 153, 157 (1991).* "The requirement of specificity in a fraud action against a
16 corporation requires the plaintiff to allege the names of the persons who made the allegedly
17 fraudulent representations, their authority to speak, to whom they spoke, what they said or
18 wrote, and when it was said or written." *Id.*

19 It is evident from the face of the Complaint, Plaintiff's cause of action fails to allege
20 fraud with the required degree of specificity. The complaint does not specifically identify any
21 particular defendant who made any alleged representation, his or her authority to speak, when
22 the alleged representation was made. As indicated above, where a corporate or business
23 defendant is involved, the pleading for fraud are even greater.

24 Plaintiff alleges generally that a single person, Katherine DeFevere, made inspections
25 with Plaintiff. However, Plaintiff does not allege that any misrepresentations were made by
26 Ms. DeFevere. In fact, Plaintiff does not allege any statements being made by Mr. DeFevere
27 at that time. None whatsoever. Plaintiff fails to allege that Ms. DeFevere herself had any
28 knowledge of any prior issues with noise. Plaintiff is assuming that Ms. DeFevere was aware

1 and possessed knowledge of this alleged noise issue.

2 **B. The Fraud Claim Is Uncertain as to DOUGLAS EMMETT 1997, LLC**

3 At a bare minimum, the fraud claim is uncertain. Plaintiff does not specify who Ms. DeFevere was
4 employed by at the time of the alleged concealment. Specifically, Plaintiff has failed to allege, and cannot
5 alleged, that Ms. DeFevere was an employee of DOUGLAS EMMETT 1997, LLC. The reason for this is
6 simple - DOUGLAS EMMETT 1997, LLC is a limited liability corporation without any employees. Absent
7 any allegation that any individual acting as a representative of DOUGLAS EMMETT 1997, LLC made any
8 false representation to Plaintiff prior to entering into the subject Lease, Plaintiff's cause of action for Fraud
9 against DOUGLAS EMMETT 1997, LLC must fail.

10 Plaintiff has failed to allege even how or in what manner the alleged representations
11 were made, e.g., orally or in writing.

12 In essence, however it appears, although it is not clear, plaintiff is alleging that
13 "defendants" made a promise to plaintiff to provide a sound-proof suite without intention of
14 performing it. A promise made without any intention of performance constitutes actual fraud
15 and deceit. *Bedell Engineering Co. v. Rouse*, 57 Cal.App.2d 734,737 (1943). Yet, failure to
16 perform a promise is not sufficient to prove fraud; if plaintiff adduces no further evidence of
17 fraudulent intent other than proof of nonperformance of oral promise, plaintiff should never
18 reach jury. *Conrad v. Bank of America*, 45 Cal.App.4th 133,157(1996) rehearing denied,
19 review denied. A promise to be fraudulent must be made in bad faith, without any intention
20 of performing it. *O Melia v. Adkins*, 73 Cal.App.2d 14,149 (1946). Furthermore, the mere
21 violation of a contract is not a fraud. *Bradley v. Duty*, 73 Cal.App.2d 522,525 (1946).

22 Towards the end of the Complaint, Plaintiff alleges that there was a prior tenant that
23 had complained about noise related issues. However, Plaintiff makes no reference to when
24 these complaints were made, to whom these complaints were made, whether Ms. DeFevere
25 was aware of these complaints; whether any other employee of Defendant DOUGLAS
26 EMMETT MANAGEMENT, INC. had any knowledge of these alleged complaints, the
27 nature and duration of these complaints, etc.

28 "The elements of an action for fraud and deceit based on concealment are: (1) the
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1 defendant must have concealed or suppressed a material fact, (2) the defendant must have
2 been under a duty to disclose the fact to the plaintiff, (3) the defendant must have
3 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the
4 plaintiff must have been unaware of the fact and would not have acted as he or she did if the
5 plaintiff had known of the concealed or suppressed fact, and (5) as a result of the concealment
6 or suppression of the fact, the plaintiff must have sustained damage." *Lovejoy v. AT&T*
7 *Corp.*, 92 Cal.App.4th 85, 95 (2001). Even so, plaintiff has failed to allege that Ms.
8 DeFevere herself, who made the alleged concealment or suppression of material facts, had
9 this knowledge when were they made, where were they made, or how were they made.

10 Plaintiff's allegations on his cause of action for fraud and deceit fail to state facts
11 sufficient to constitute a cause of action against any defendant as it fails to allege facts with
12 the required degree of specificity. Moreover, plaintiff's cause of action is ambiguous,
13 uncertain and unintelligible as it combines several different forms of fraud and deceit
14 including a promise made without any intention of performing it and
15 suppression/concealment of material fact which each have their own individual elements and
16 requirements in pleading.

17 For these reasons, the demurrer to the Third Cause of Action must be sustained
18 without leave to amend.

19 V.

20 CONCLUSION

21 For the reasons set forth above, the court should sustain the Demurrer without
22 leave to amend.

23 DATED: November 30, 2015

WAYNE & ASSOCIATES

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ERIC J. WAYNE
Attorneys for Defendants, DOUGLAS EMMETT
MANAGEMENT, INC. and DOUGLAS EMMETT
1997, LLC

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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 21600 Oxnard Street, Suite 2060, Woodland Hills, California 91367.

On November 30, 2015, I served the foregoing documents described as
NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES

on all interested parties in this action:

(X) by placing the true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland Hills, California addressed as follows:

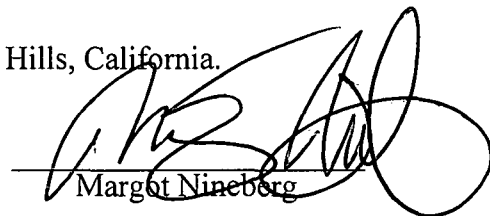
() by personal service I delivered such envelope by hand, as follows:

Robert L. Glushon, Esq.
Kristina Kropp, Esq.
LUNA & GLUSHON
16255 Ventura Blvd., Suite 1016
Encino, California 91436
Attorney for Plaintiff, ROBERT L. GLUSHON

(X) (State) I declare under penalty of perjury under the law of the State of California that the above is true and correct.

() (Federal) I declare that I am employed in the office of member of the bar of this court at whose direction the service was made.

Executed on November 30, 2015, at Woodland Hills, California.


Margot Nineberg

**** (For personal service signature must be that of messenger)**

12/03/2015

CRS RECEIPT

INSTRUCTIONS

Please print this receipt and attach it to the corresponding motion/document as the last page. Indicate the Reservation ID on the motion/document face page (see example). The document will not be accepted without this receipt page and the Reservation ID.

CALIFORNIA, COUNTY OF LOS ANGELES

) CASE NO.: HCE0000

) NOTICE OF MOTION AND MOTION

) TO COMPEL ANSWERS TO FORM

) INTERROGATORIES

) DATE: August 11, 2016

) TIME: 2:30 PM

) DEPT: 28

) RES ID: 13112001085

RESERVATION INFORMATION

Reservation ID: 151130083758
Transaction Date: November 30, 2015
Case Number: BC598918
Case Title: ROBERT L GLUSHON VS DOUGLAS EMMETT 1997 LLC ET AL
Party: DOUGLAS EMMETT 1997 LLC (Defendant/Respondent)
Courthouse: Stanley Mosk Courthouse
Department: 28
Reservation Type: Demurrer - without Motion to Strike
Date: 8/1/2016
Time: 08:45 am

FEE INFORMATION (Fees are non-refundable)

First Paper Fee: (See below)

Description	Fee
First Paper (Unlimited Civil)	\$435.00
Total Fees:	Receipt Number: 1151130K0521 \$435.00

PAYMENT INFORMATION

Name on Credit Card: Eric Wayne
Credit Card Number: XXXX-XXXX-XXXX-0497

11/30/2015 9:21 AM

A COPY OF THIS RECEIPT MUST BE ATTACHED TO THE CORRESPONDING MOTION/DOCUMENT AS THE LAST PAGE AND THE RESERVATION ID INDICATED ON THE MOTION/DOCUMENT FACE PAGE.