

APR 19 2011

John A. Clarke, Executive Officer/Clerk
BY Shaunya Wesley, Deputy

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Attorneys for Defendants,
DOUGLAS EMMETT 2002, LLC, a Delaware limited liability company
(sued and served herein as Douglas Emmett 2002, LLC dba San Vicente Plaza) and
DOUGLAS EMMETT MANAGEMENT, LLC, a Delaware limited liability company

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES (CENTRAL DISTRICT)**

WANTON GROUP BTWD, LLC, d/b/a
CHIN CHIN BTWD,

Plaintiff,

vs.

DOUGLAS EMMETT 2002, LLC dba
SAN VICENTE PLAZA; DOUGLAS
EMMETT MANAGEMENT, LLC and
DOES 1 through 20, inclusive,

Defendants.

Case No. BC457620

[Case Assigned to The Honorable Zaven
V. Sinanian]

**NOTICE OF MOTION AND MOTION
TO STRIKE PORTIONS OF
PLAINTIFF'S COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Filed Concurrently With A Demurrer]

Date: 06/24/11 [Reserved]

Time: 8:30 a.m.

Dept: 23

Complaint Filed: 03/18/11

Trial Date: None

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

PLEASE TAKE NOTICE that on Friday, June 24, 2011, at 8:30 a.m. or as soon
thereafter as the matter may be heard in Department 23 of the above-entitled court
located at 111 N. Hill Street, Los Angeles, California 90012, defendants DOUGLAS
EMMETT 2002, LLC, a Delaware limited liability company (sued and served herein as
Douglas Emmett 2002, LLC dba San Vicente Plaza), and DOUGLAS EMMETT

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CASE: BC457620
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11/02/10

1 MANAGEMENT, LLC, a Delaware limited liability company (“**defendants**”), will and
2 hereby do move the court for an order striking portions of the complaint of plaintiff
3 WANTON GROUP BTWD, LLC, a California limited liability company dba Chin Chin
4 BTWD (“**plaintiff**”). This hearing date was reserved and was the first available date on
5 the Department’s calendar.

6 This motion to strike is made pursuant to California *Civ. Proc. Code* §§ 435 and
7 436, pursuant to *Civ. Code* § 3294 for failure to state facts sufficient to state a claim for
8 punitive damages, and pursuant to *Civ. Proc. Code* § 337(1) which is the applicable
9 statute of limitations for actions on a written contract.

10 This motion to strike is based upon this notice, upon the memorandum of points
11 and authorities submitted herewith, upon the pleadings and documents in the court’s file
12 of this matter, upon any matter subject to judicial notice, and upon such further oral
13 and/or documentary evidence as may be presented at the hearing of this motion.

14 Dated: April 19, 2011

SHERWOOD AND HARDGROVE

15
16 By:



Don C. Sherwood
William G. Lieb

17 Attorneys for defendants
18 DOUGLAS EMMETT 2002, LLC, and
19 DOUGLAS EMMETT MANAGEMENT, LLC
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1 MOTION TO STRIKE PORTIONS OF THE COMPLAINT

2 Defendants DOUGLAS EMMETT 2002, LLC, a Delaware limited liability
3 company and DOUGLAS EMMETT MANAGEMENT, LLC, a Delaware limited
4 liability company (“defendants”), move this Court to strike the following portions of the
5 complaint of plaintiff WANTON GROUP BTWD, LLC, a California limited liability
6 company dba Chin Chin BTWD (“plaintiff”) on the grounds that the relief sought is
7 improperly asserted:

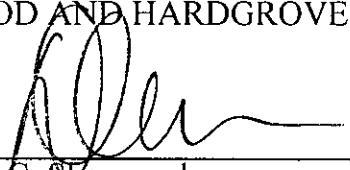
8 1. The portion of paragraph 17 that seeks damages for breaches that occurred
9 prior to March 19, 2007, which states that “Plaintiff is informed and believes that
10 Defendants have been improperly overcharging Plaintiff for common area expenses and
11 additional rent since 2006, for which Plaintiff seeks damages according to proof at the
12 time of trial[.]” because such damages are barred by the applicable statute of limitations
13 under *Civ. Proc. Code* § 337(1).

14 2. All of paragraph 41 that seeks recovery of exemplary or punitive damages
15 on the basis of the allegations contained in the negligent misrepresentation cause of
16 action, because there are no facts alleged showing oppression, fraud or malice as required
17 under *Civ. Proc. Code* § 3294 to support a claim for punitive damages.

18 3. That portion of paragraph 4 of the prayer that seeks recovery of exemplary
19 or punitive damages on the basis of the allegations in the negligent misrepresentation
20 cause of action, which states “For punitive and exemplary damages according to proof[.]”
21 because there are no facts alleged showing oppression, fraud or malice as required under
22 *Civ. Proc. Code* § 3294 to support a claim for punitive damages.

23 Dated: April 19, 2011

SHERWOOD AND HARDGROVE

24
25 By: 
26 Don C. Sherwood
William G. Lieb

27 Attorneys for defendants
DOUGLAS EMMETT 2002, LLC, and
DOUGLAS EMMETT MANAGEMENT, LLC
28

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiff WANTON GROUP BTWD, LLC, a California limited liability company
4 dba Chin Chin BTWD (“**plaintiff**”), has filed an action against defendants DOUGLAS
5 EMMETT 2002, LLC, a Delaware limited liability company and DOUGLAS EMMETT
6 MANAGEMENT LLC, a Delaware limited liability company (“**defendants**”),
7 for damages that resulted when defendants allegedly charged greater common area
8 maintenance charges than were due pursuant to a written lease agreement while plaintiff
9 was a tenant in those certain premises located at 11740 San Vicente Boulevard, Suite
10 201, Los Angeles, California 90049 (the “**Premises**”). Plaintiff’s Complaint for Breach
11 of Written Contract; Declaratory Relief; Injunctive Relief; Unfair Trade and Business
12 Practices; Negligent Misrepresentation filed on March 18, 2011 (hereinafter referred to as
13 the “**Complaint**”) purports to state four causes of action. The first cause of action seeks
14 damages for breach of lease “since 2006”, and therefore plaintiff is time barred from
15 recovering some of the damages sought pursuant to the four-year statute of limitations for
16 actions on a written contract under *Civ. Proc. Code* § 337(1). The fourth cause of action
17 seeks punitive damages under *Civ. Code* §3294, but fails to state facts showing
18 oppression, fraud or malice.

19 As set forth in more detail herein, plaintiff is barred from recovering damages
20 prior to March 19, 2007 and has failed to state facts sufficient to justify exemplary or
21 punitive damages. Defendants therefore move to strike those portions of the complaint
22 described herein above. Defendants respectfully submit that the motion has merit and
23 should be granted.

24 **II. THE FACTS ALLEGED BY PLAINTIFF ARE NOT SUFFICIENT TO**
25 **SUPPORT A CLAIM FOR DAMAGES THAT ACCRUED BEFORE THE**
26 **FOUR YEAR STATUTE OF LIMITATIONS UNDER CIV. PROC. CODE**
27 **§ 337(1), OR PUNITIVE DAMAGES UNDER CIV. CODE §3294**

28 The facts alleged by plaintiff in the complaint are that plaintiff leased the Premises

1 from defendants pursuant to a written lease agreement dated April 25, 2006 (hereinafter
2 referred to as the “Lease”) for the purpose of operating a restaurant. (Complaint, ¶¶ 1-7.)
3 A copy of the lease for the Premises was attached to the complaint as Exhibit 1.
4 (Complaint, ¶ 7). Pursuant to the Lease, plaintiff agreed to pay “Additional Rent” which
5 included, among other things, certain types of expenses known as common area
6 maintenance (hereinafter referred to as “CAM”). (Complaint, ¶ 8). The “Summary of
7 Lease Information” stated that plaintiff was to pay 10.7% of services to the Common
8 Area, and 9.40% for “other Common Area Expenses” including CAM. (Complaint, ¶¶ 9-
9 12). Defendants allegedly charged plaintiff at a rate of 10.7% for all defendants’
10 operating expenses, instead of charging plaintiff at the rate of 9.40% for CAM.
11 (Complaint, ¶ 12). Except for utilities, insurance, and real estate taxes, all other
12 “Additional Rent” (including CAM) should be charged at the rate of 9.40%. (Complaint,
13 ¶ 12). Plaintiff alleges that some of the charges billed by plaintiff were not within the
14 scope of Additional Rent or CAM as defined by the lease. (Complaint, ¶¶ 13-14).
15 Plaintiff also alleges that defendants refused to provide an explanation for the charges,
16 and threatened to bring an eviction action if the billed Additional Rent were not paid.
17 (Complaint, ¶¶ 13, 15). Defendants have improperly overcharged Plaintiff for CAM and
18 other Additional Rent “since 2006, for which Plaintiff seeks damages according to proof
19 at the time of trial.” (Complaint, ¶ 17).

20 Based upon these facts, plaintiff purports to state four causes of action:
21 (1) for breach of a written contract; (2) for declaratory relief; (3) for unfair trade and
22 business practices; and (4) for negligent misrepresentation. Plaintiff attempts to claim
23 damages for overcharges commencing in 2006, and seeks exemplary and punitive
24 damages as part of the fourth cause of action for negligent misrepresentation.
25 (Complaint, ¶¶ 17, 41).

26 Based upon the forgoing, this Court should grant the motion to strike those
27 portions of the complaint that contain irrelevant and/or improper matter as set forth in
28 detail herein.

1 **III. A COMPLAINT IS SUBJECT TO A MOTION TO STRIKE THE WHOLE**
2 **OR ANY PART THEREOF**

3 “Any party, within the time allowed to respond to a pleading may serve and file
4 a notice of motion to strike the whole or any part thereof . . .” *Civ. Proc. Code*
5 § 435(b)(1). “The court may, upon a motion made pursuant to Section 435, or at any time
6 in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false,
7 or improper matter inserted in any pleading (b) Strike out all or any part of any pleading
8 not drawn in conformity with the laws of this state, a court rule, or an order of the court.”
9 *Civ. Proc. Code* § 436. Where pleadings are defective, “the defect may be raised by a
10 demurrer or motion to strike or by motion for judgment on the pleadings.” *Coyne v.*
11 *Krempels* (1950) 36 Cal.2d 257.

12 As set forth herein, there are portions of plaintiff’s complaint that must be
13 stricken, because the damage claims requested are improper. The claims subject to this
14 motion to strike include requests for damages that are barred by the applicable statute of
15 limitations under *Civ. Proc. Code* § 337(1) and requests for punitive damages under
16 *Civ. Code* §3294.

17 **A. Portions of Plaintiff’s Claims For Damages Are Barred By**
18 **The Applicable Statute Of Limitations Under Civ. Proc. Code § 337(1)**

19 Except where a statute provides otherwise, an action on “any contract,
20 obligation or liability founded upon an instrument in writing” must be brought within
21 four years of the date on which the claim accrued. *Civ. Proc. Code* § 337(1). A cause of
22 action for overcharges accrues on the date of the injury, and therefore a cause of action
23 accrued each time defendants allegedly overcharged plaintiff. *See Utility Audit Company*
24 *v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 960–61 (holding each overpayment
25 during a continuous course of overcharging gave rise to a new claim that accrued on the
26 date of the overpayment).

27 ///

28 ///

1 The Complaint was filed on March 18, 2011, and is founded on a written
2 Lease agreement. The limitations period has therefore expired for any claim based on a
3 breach of the Lease that occurred before the date four years before the filing of the
4 complaint, March 19, 2007. Plaintiff claims damages according to proof at trial,
5 however, for alleged breaches of the lease agreement commencing in 2006. (Complaint,
6 ¶ 17). A portion of the damages sought by paragraph 17 of the Complaint, damages for
7 overcharges that occurred prior to March 19, 2007, are therefore time barred. As such,
8 plaintiff's motion to strike the portion of paragraph 17 seeking damages for breaches that
9 occurred prior to March 19, 2007 should be granted.

10 **B. Plaintiff Has Improperly Included Requests For Punitive Damages**
11 **In The Complaint And Has Failed To Plead With Particularity Facts**
12 **To Support Punitive Or Exemplary Damages Under Civil Code §3294**

13 *Civ. Code* §3294(a) provides that in an action that is not based upon breach
14 of a contract, exemplary damages are only warranted when the facts establish that the
15 defendant's actions constituted malice, oppression, or fraud.

16 The fourth cause of action of the Complaint fails to state a claim for
17 punitive damages on two grounds: (1) because the action arises from a breach of an
18 obligation in contract and (2) because the plaintiff has not alleged facts that justify an
19 award of punitive damages. Therefore, the motion to strike all of paragraph 41 of the
20 Complaint and that portion of paragraph 4 of the prayer seeking punitive and exemplary
21 damages should be granted.

22 **1. Plaintiff's Fourth Cause Of Action Is An Improperly Pled**
23 **Breach Of Contract Claim And Punitive Damages Are**
24 **Therefore Not Available**

25 Plaintiff requests punitive damages in paragraph 38 of the Complaint
26 and paragraph 4 of the prayer, based on the allegations complained in the fourth cause of
27 action. The fourth cause of action, which alleges negligent misrepresentation,
28 is supported by facts that solely show a breach of a contractual obligation. This is

1 insufficient to justify a request for punitive damages.

2 As discussed in greater detail in the attached demurrer, California
3 does not recognize negligent false promises, or promises made with an honest but
4 unreasonable intent to perform, as actionable. *Tarmann v. State Farm Mutual*
5 *Automobile Insurance Company* (1991) 2 Cal.App.4th 153, 159. Plaintiff's allegation
6 that plaintiff was negligent in entering into the Lease is properly brought either as a fraud
7 action or as a breach of contract action, and not as an action for negligent
8 misrepresentation. *See id.* The facts pleaded in the Complaint do not support a theory for
9 which punitive damages are available.

10 Although punitive damages are sometimes available in fraud actions,
11 the facts alleged in the complaint do not state a cause of action for fraud. Fraud is
12 defined as an intentional misrepresentation, deceit, or concealment of a material fact
13 known to the defendant. In addition, proof of fraud requires a showing that the defendant
14 intended to deprive a person of property or legal rights, or cause some other injury.
15 *Civ. Code* §3294(c)(3). Fraud actions are subject to strict requirements of particularity in
16 pleading, and each element of the cause of action must be factually and specifically
17 pleaded. *See Committee on Children's Television, Inc. v. General Foods Corporation*
18 (1983) 35 Cal.3d 197, 216.

19 To state a claim of fraud, plaintiff would be required to state facts
20 showing that plaintiff entered into the Lease with the intent not to perform.
21 *See Tarmann*, 2 Cal.App.4th at 159. The Complaint does not state any facts that would
22 show that defendants entered into the Lease without intending to perform, but instead
23 claims that defendants made alleged misrepresentations as to the amount of CAM that
24 would be charged "with no reasonable ground for believing them to be true...."
25 (Complaint, ¶ 37). Because there are no facts that would support a finding that
26 defendants entered into the Lease in bad faith, the Complaint fails to state specific facts
27 that could support a cause of action for fraud.

28 ///

1 The Complaint is facially adequate to state a claim for breach of
2 contract, but punitive damages are not available for breaches of obligations arising from
3 contract. *See Civ. Code* §3294(a); *Crogan v. Metz* (1957) 57 Cal.2d 398, 405 (holding
4 punitive damages could not be awarded even if a breach of contract was willful or
5 fraudulent). The facts stated by plaintiff in the Complaint, described in greater detail
6 above in Part II, support only the conclusion that defendants breached a contract with
7 plaintiff by overcharging CAM due under the Lease.

8 Because the facts stated in plaintiff's Complaint support only breach
9 of contract claims, and not a tort theory such as fraud, punitive damages are not available
10 in the action. As such, the motion to strike all of paragraph 41 of the Complaint and that
11 portion of paragraph 4 of the prayer seeking punitive and exemplary damages should be
12 granted.

13 **2. Plaintiff's Fourth Cause Of Action Fails To State Facts**
14 **Sufficient To Support a Request for Punitive Damages**

15 In order to recover punitive damages, the plaintiff must specifically
16 allege the ultimate facts of the defendant's oppression, fraud, or malice. *See Perkins v.*
17 *Superior Court of Los Angeles* (1981) 117 Cal. App.3d 1. Malice is defined as conduct
18 that is intended "to cause injury to the plaintiff or despicable conduct that is carried on by
19 the defendants with a willful and conscious disregard of the rights or safety of others."
20 *Civ. Code* §3294(c)(1).

21 A complaint without allegations that a defendant behaved willfully
22 and knowingly, and that the conduct was designed to be oppressive and malicious for the
23 purpose of damaging the plaintiff, does not support a claim for exemplary or punitive
24 damages. *See Monge v. Superior Court* (1986) 176 Cal. App. 3d 503. Merely acting in
25 carelessness or ignorance does not justify the imposition of punitive damages.
26 *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Insurance Company* (1986)
27 185 Cal.App.3d 1149, 1154. More importantly, courts uniformly have held that parties
28 seeking relief must plead with particularity specific facts that would justify an award of

1 punitive damages as a mandatory prerequisite to granting such extraordinary relief.
2 *See G.D. Searle and Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29.

3 The facts alleged by the plaintiff in the complaint and in the fourth
4 cause of action for negligent misrepresentation are insufficient to show that the
5 defendants "acted with knowledge of the probable dangerous consequences to plaintiff's
6 interests and deliberately failed to avoid [the] consequences." *Flyer's*, 185 Cal.App.3d
7 at 1155 (citing *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 158). There are no facts
8 stated in the Complaint that would support any inference as to defendants' state of mind
9 when they entered into the Lease. The plaintiff has therefore failed to state facts that
10 would show that any representations made by defendants with respect to the Lease were
11 made with other than mere negligence. Accordingly, the defendants' motion to strike all
12 of paragraph 41 of the Complaint and that portion of paragraph 4 seeking punitive and
13 exemplary damages should be granted.

14 **IV. CONCLUSION**

15 This motion to strike is made pursuant to *Civ. Code* § 3294 for failure to state facts
16 sufficient to state a claim for punitive damages and pursuant to *Civ. Proc. Code* § 337(1)
17 which is the applicable statute of limitations for actions on a written contract. As such,
18 the paragraphs, or portions thereof, requesting punitive damages or relief for breaches
19 that occurred more than four years before filing of the Complaint must be stricken.

20 Respectfully submitted.

21 Dated: April 19, 2011

SHERWOOD AND HARDGROVE

22
23 By: 

24 Don C. Sherwood
William G. Lieb

25 Attorneys for defendants
26 DOUGLAS EMMETT 2002, LLC, and
27 DOUGLAS EMMETT MANAGEMENT, LLC
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the
4 age of 18 years and not a party to the within action. My business address is 11812 San
Vicente Boulevard, Suite 210, Los Angeles, California 90049-6622.

5 On April 19, 2011, I served the foregoing document described as: **NOTICE OF**
6 **MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S**
7 **COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
8 **SUPPORT THEREOF** on the interested parties in this action by placing a true and
correct copy of said document in a sealed envelope addressed as follows:

9 **Michael J. Simkin, Esq.**
10 SIMKIN & ASSOCIATES, INC.
1925 Century Park East, Suite 2120
Los Angeles, California 90067-2722

11 Tel: 310.788.9089; Fax: 310.282.7590

12 X BY MAIL: I am "readily familiar" with the firm's practice of collection and
13 processing correspondence for mailing. Under that practice it would be deposited
14 with U.S. postal service on that same day with postage thereon fully prepaid at
15 Los Angeles, California in the ordinary course of business. I am aware that on
16 motion of the party served, service is presumed invalid if postal cancellation date
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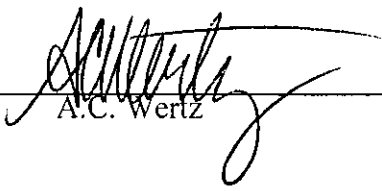
17 _____ BY PERSONAL SERVICE: I caused said envelope(s) to be delivered by hand to
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19 _____ BY FACSIMILE TRANSMISSION: I caused such document to be sent via
20 facsimile to each of the addressees listed above.

21 X (STATE) I declare under penalty of perjury under the laws of the State of
22 California that the above is true and correct.

23 Executed on April 19, 2011 at Los Angeles, California.

24 
25 _____
A.C. Wertz

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