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9 ERICH CHASE and DENISE SPENARD

10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF MARIN**

12 ERICH CHASE and DENISE SPENARD,) Case No.: CV 055836
13 Plaintiffs,)
14 vs.) MEMORANDUM OF POINTS AND
15 ALFRED CHAPUIS,) AUTHORITIES IN SUPPORT OF
16 Defendant) DEMURRER TO CROSS-COMPLAINT

17 ALFRED CHAPUIS,)
18 Cross-Complainant) HEARING DATE: April 6, 2006
19 vs.) HEARING TIME: 9:00 a.m.
20 ERICH CHASE and DENISE SPENARD) DEPARTMENT NO.: B
21 Cross-Defendants.) HEARING JUDGE: Hon. Michael B. Dufficy
22) DATE ACTION FILED: December 30, 2005
23) DATE SET FOR TRIAL: No date set

1 **I. INTRODUCTION**

2 This action arises out of Defendant Alfred Chapuis' ("Defendant") repudiation of an
3 agreement to sell his real property to Plaintiffs Erich Chase and Denise Spenard ("Plaintiffs")
4 after a realtor convinced him that she could sell the property for more money. Plaintiffs seek
5 specific performance of the parties' agreement and damages. On February 3, 2006, Defendant
6 filed a Cross-Complaint (hereinafter "Cross-Complaint") alleging that Plaintiffs are guilty of
7 Elder Financial Abuse (First Cause of Action); Fraud (Second Cause of Action); and Intentional
8 Interference with Prospective Economic Advantage (Third Cause of Action). Plaintiffs
9 respectfully request that the Court sustain their demurrer without leave to amend as to each cause
10 of action because Defendant has failed to allege essential elements of each of the causes of
11 action, and the allegations that are in the Cross-Complaint show that there is at least one element
12 of each cause of action that Defendant cannot establish.

13 **II. THE ALLEGATIONS OF THE CROSS-COMPLAINT**

14 The Cross-Complaint alleges the following facts, the truth of which is presumed for
15 purposes of this demurrer only:

16 In or about January 2005, Plaintiffs falsely represented to Defendant that his property at
17 265 Grandview Avenue in Novato, California (the "Property") was worth \$350,000. Cross-
18 Complaint, ¶¶ 7, 14. In reliance on Plaintiffs' representation, Defendant entered into a "tentative
19 agreement" to sell the property to Plaintiffs for \$350,000. *Id.*, ¶¶ 7, 16, 19.

20 In or about March 2005, Defendant contacted a realtor. *Id.*, ¶ 8. The realtor informed
21 Defendant that the value of the Property was "far in excess of the \$350,000 value represented"
22 and that "the value of the property was closer to \$499,000." *Id.*, ¶ 8. Defendant then informed
23 Plaintiffs that he would not sell the Property to them for \$350,000, and that he would be "listing
24 the property for sale with Margaret Kapranos of Frank Howard Allen Realtors," which he did.
25 *Id.*, ¶¶ 8, 22.

1 Plaintiffs took the position that the January 2005 agreement with Defendant was a
2 binding contract, and filed the present lawsuit to enforce the agreement. *Id.*, ¶ 9. Plaintiffs also
3 recorded a notice of the lawsuit with the County Recorder and “advised several prospective
4 purchasers that cross-complainant [Defendant] was in contract with them to purchase the
5 property.” *Id.*, ¶¶ 9, 19, 24, 27.

6 Defendant has a loan secured by the Property which is due in June 2006. Defendant
7 needs to sell the Property in order to repay the loan because Defendant has no assets other than
8 the Property with which to repay the loan. *Id.*, ¶¶ 11, 19, 27.

9 As set forth herein, these facts are insufficient to state a claim for Elder Financial Abuse,
10 Fraud or Intentional Interference with Prospective Economic Advantage.

11 **III. ARGUMENT**

12 **A. STANDARD OF REVIEW**

13 “A general demurrer is a vehicle whereby the entire pleading to which it is addressed is
14 searched to find any material and necessary allegation to be missing.” *Seidner v. 1551 Greenfield*
15 *Owners Assn.* (1980) 108 Cal.App.3rd 895, 903. “The function of a demurrer is to test the
16 sufficiency of a plaintiff’s pleading by raising questions of law . . . factual allegations of the
17 complaint, properly pleaded, are deemed admitted . . .” *Wilhelm v. Pray, Price, Williams &*
18 *Russell* (1986) 186 Cal.App.3d 1324, 1330. “Leave to amend is properly denied when the facts
19 are not in dispute and the nature of the claim is clear, but there is no liability under substantive
20 law.” *Id.*

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2 **B. THE COURT SHOULD SUSTAIN THE DEMURRER WITHOUT LEAVE**
3 **TO AMEND BECAUSE THE CONDUCT FROM WHICH ALL OF**
4 **DEFENDANT’S ALLEGED DAMAGES ARISE, IS PRIVILEGED**

5 While Defendant alleges that Plaintiffs fraudulently induced him to execute an agreement
6 to sell his property to them at a below-market price, he does not allege that this fraud caused him
7 any damages – because he repudiated the agreement shortly after its execution and refused to sell
8 the property to the Plaintiffs at the agreed price. Cross-Complaint, ¶¶ 8-9. Instead, Defendant
9 alleges that Plaintiffs have damaged him by filing this lawsuit seeking to enforce the agreement,
10 recording a lis pendens, and giving prospective purchasers notice of the claim made in this
11 lawsuit, thereby rendering him unable to market and sell the Property. Cross-Complaint, First
12 Cause of Action (Elder Financial Abuse) ¶¶ 10-11; Second Cause of Action (Fraud), ¶ 19; Third
13 Cause of Action (Interference with Prospective Economic Advantage), ¶ 27. As a matter of law,
14 however, Plaintiffs’ filing this lawsuit, recording a lis pendens, and giving prospective
15 purchasers notice of the claims made in this lawsuit, are absolutely privileged and cannot serve
16 as a basis for a claim of damages on any of the causes of action alleged.

17 California Civil Code § 47 provides in relevant part that: “A privileged publication or
18 broadcast is one made . . . (b) In any . . . (2) judicial proceeding, (3) in any other official
19 proceeding authorized by law, or (4) in the initiation or course of any other proceeding
20 authorized by law.” “The privileges of Civil Code section 47, unlike evidentiary privileges
21 which function by the exclusion of evidence (see Evid. Code, § 900 et seq.), operate as
22 limitations upon liability.” *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma,*
23 *Inc.* (1986) 42 Cal.3d 1157, 1168.

1 The California Supreme Court has construed Section 47 to provide absolute immunity
2 from liability for damages allegedly caused by a party initiating or maintaining a legal
3 proceeding, recording a lis pendens, and making out of court statements to third parties regarding
4 the legal proceeding, unless the party is alleged, and proven, to be guilty of abuse of process or
5 malicious prosecution – neither of which Defendant has alleged in this case. *Oren Royal Oaks*
6 *Venture*, 42 Cal.3d at 1163-1170¹; *Albertson v. Raboff* (1956) 46 Cal.2d 375 (applying Section
7 47 to preclude a tort action for "disparagement of title" based on the defendant's filing of a notice
8 of lis pendens); *Pettitt v. Levy* (1972) 28 Cal.App.3d 484 (affirming trial court's decision to
9 sustain a demurrer without leave to amend a complaint alleging fraud and negligent
10 misrepresentation because false statements and falsified documents submitted in opposition to
11 plaintiff's request for variance were absolutely privileged under Section 47, and noting that
12 Section 47's limitation on liability includes any publication that has any reasonable relation to
13 the action even though published outside the proceeding at issue, and that malicious prosecution
14 is the sole exception to the privilege); *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 737
15 (affirming directed verdict on claim of intentional interference with prospective economic
16 advantage because conduct that formed basis for claim – filing complaint and making statements
17 to third parties regarding the complaint - was privileged under Section 47); *Agostini v. Strycula*
18 (1965) 231 Cal.App.2d 804 (sustaining demurrer without leave to amend a complaint alleging
19 damages for inducing breach of contract, where underlying conduct was privileged under Section
20 47.)

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22 ¹ To state a claim for malicious prosecution, a party must plead "that the prior action (1) was
23 commenced by or at the direction of the defendant and was pursued to a legal termination in his [the party
24 claiming malicious prosecution's] . . . favor . . . ; (2) was brought without probable cause . . . ; and (3) was
25 initiated with malice" *Oren Royal Oaks Venture*, 42 Cal.2d at 1169. To state a claim for abuse of
process, a party must plead "first, an ulterior purpose, and second, a wilful act *in the use of the process*
not proper in the regular conduct of the proceeding" - "the mere filing or maintenance of a lawsuit -- even
for an improper purpose -- is not a proper basis for an abuse of process action." *Id.*, at 1168 (emphasis
added).

1 In *Oren Royal Oaks Venture, supra*, the California Supreme Court affirmed summary
2 judgment in the defendant’s favor where the plaintiff sought damages caused by the defendant’s
3 initiation and maintenance of a mandamus action, but failed to allege or show the essential
4 elements of either an abuse of process or a malicious prosecution cause of action. The Court
5 explained that allowing a party to face potential liability for pursuing its legal remedies, in the
6 absence of any allegation or proof that the party not only lost the suit, but had no probable cause
7 to bring the suit, and initiated the suit with malice, as required to state a claim for malicious
8 prosecution, would improperly “chill” the right to seek redress in the courts; “The elements of
9 the common law malicious-prosecution cause of action have evolved over time as an appropriate
10 accommodation between the freedom of an individual to seek redress in the courts and the
11 interest of a potential defendant in being free from unjustified litigation.” *Id.*, at 1169.

12 Accordingly, Plaintiffs respectfully request that the court sustain Plaintiffs’ demurrer to
13 Defendant’s Elder Financial Abuse, Fraud, and Intentional Interference with Prospective
14 Economic Advantage causes of action, without leave to amend.

15 **C. THE COURT SHOULD SUSTAIN THE DEMURRER TO THE FIRST**
16 **CAUSE OF ACTION FOR ELDER FINANCIAL ABUSE, WITHOUT**
17 **LEAVE TO AMEND**

18 The Court should also sustain the demurrer to Defendant’s claim of Elder Financial
19 Abuse because the Cross-Complaint does not allege that Plaintiffs took, secreted, appropriated,
20 or retained any of Defendant’s real or personal property, or that Plaintiffs assisted another person
21 to do so, which is the *sin quo non* of a “financial abuse” claim. *See* Cal. Wel. & Inst. Code §
22 15610.30(a)(1), (2).² The Court should sustain the demurrer to this claim without leave to amend

23 _____
24 ² California’s Elder Abuse and Dependent Adult Civil Protection Act (“Elder Abuse Act”), provides in
25 relevant part that “‘Financial abuse’ of an elder or dependent adult occurs when a person or entity does
any of the following (1) Takes, secretes, appropriates, or retains real or personal property of an elder or
dependent adult to a wrongful use or with intent to defraud, or both. (2) Assists in taking, secreting,

1 because the allegations of the Cross-Complaint show that Plaintiffs did not take, secret,
2 appropriate or retain Defendant’s property.

3 Specifically, the Cross-Complaint alleges that Plaintiffs attempted to purchase
4 Defendant’s real property for \$350,000, but that, after consulting with a realtor, Defendant
5 refused to sell the property to Plaintiffs for \$350,000. (*Id.*, ¶¶ 7, 8). The Cross-Complaint thus
6 makes clear that, in this case, Plaintiffs did not obtain the property at all.

7 The purpose of the Elder Abuse Act is to protect individuals who are taken advantage of
8 because they are unable to protect themselves. Cal. Wel. & Inst. Code § 15600; *See also, e.g.,*
9 *Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426,
10 432-33 (“The Elder Abuse Act’s remedial purpose is to protect elder and dependent adults who
11 are residents of nursing homes and other health care facilities from reckless neglect and various
12 forms of abuse.”) In this case, even if Plaintiffs attempted to defraud Defendant, by his own
13 admission, Defendant was able to, and did, thwart their scheme. Cross-Complaint, ¶¶ 7, 8, 24.
14 Section 15610.30 does not apply to this case and the Court should sustain the demurrer to the
15 First Cause of Action for Elder Financial Abuse without leave to amend.

16 The Court should also sustain the demurrer to this Cause of Action because Defendant
17 has failed to allege that the financial abuse – the inducement to enter an agreement to sell the
18 property below market value - caused him any damage. In fact, he alleges that he repudiated the
19 agreement shortly after its execution and refused to sell the property to the Plaintiffs at the
20 agreed price. Cross-Complaint, ¶¶ 8-9.

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25 appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or
with intent to defraud, or both.” Cal. Wel. & Inst. Code § 15610.30(a)(1), (2).

1 **D. THE COURT SHOULD SUSTAIN THE DEMURRER TO THE SECOND**
2 **CAUSE OF ACTION FOR FRAUD**

3 “The essential allegations for an action in fraud or deceit are false representation as to a
4 material fact, knowledge of its falsity, intent to defraud, justifiable reliance and resulting
5 damage. The absence of any one of these required elements will preclude recovery.” *Wilhelm*,
6 186 Cal.App.3d at 1331. To survive a demurer, each element of the fraud claim must be alleged
7 “in full, factually and specifically, and the policy of liberal construction of pleading will not
8 usually be invoked to sustain a pleading that is defective in any material respect.” *Id.*

9 Defendant’s Second Cause of Action is defective because it does not allege a factual
10 basis for the conclusory assertion that Plaintiffs knew that “the property was worth
11 approximately \$499,000.” Cross-Complaint, ¶¶ 14, 18; *See Wilhelm*, 186 Cal.App.3d at 1331
12 (affirming judgment sustaining demurrer to fraud cause of action where “the complaint fails to
13 plead with specificity a factual basis for how Cohen ‘knew’ the representations she
14 communicated to Goodman on behalf of Leedy were false.”)

15 The allegations of the Cross-Complaint also preclude a showing of “justifiable reliance,
16 i.e., circumstances were such to make it *reasonable* for plaintiff to accept defendant's statements
17 without an independent inquiry or investigation.” *Wilhelm*, at 1332 (emphasis in original.)
18 While Defendant makes the conclusory claim that he relied on Plaintiffs’ representations, and
19 asserts that it was reasonable for him to do so because he “did not have access to information
20 about the comparable sales in the neighborhood,” he admits that he did not rely on Plaintiffs, and
21 that he did have access to such information – namely, that he was able to, and did, “consult with
22 a real estate agent about the sale of the property” and retained the services of this licensed
23 professional who provided him with an assessment the value of the property. Cross-Complaint,
24 ¶¶ 8, 16; *See Wilhelm*, at 1332 (affirming judgment sustaining demurrer without leave to amend
25 where, although complaint alleged reasonable reliance, the allegations of the complaint showed

1 that it was not reasonable for plaintiff to rely on defendant because plaintiff was able to, and did,
2 seek the independent advice of an attorney).

3 Finally, Defendant does not allege that the fraud caused him any damages. He alleges
4 that he repudiated the allegedly fraudulently induced agreement shortly after its execution and
5 refused to sell the property to the Plaintiffs at the agreed price. Cross-Complaint, ¶¶ 8-9; *Fraker*
6 *v. Sentry Life Ins.* (1993) 19 Cal.App.4th 276, 285-286 (granting judgment on the pleadings
7 where the pleading failed to show that the alleged damages were caused by the alleged fraud.)

8 **E. THE COURT SHOULD SUSTAIN THE DEMURRER TO THE THIRD**
9 **CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH**
10 **PROSPECTIVE ECONOMIC ADVANTAGE**

11 To state a claim for intentional interference with prospective economic advantage,
12 Defendant must allege both that Plaintiffs interfered with Defendant’s economic expectations,
13 and that the interference “was wrongful by some legal measure other than the fact of interference
14 itself.” *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393. In this
15 case, Plaintiffs’ interfering acts consist of filing this lawsuit, recording a lis pendens, and
16 informing prospective purchasers of Plaintiffs’ legal action asserting that Defendant contracted
17 to sell the Property to them. Cross-Complaint, ¶ 24. Because Civil Code Section 47 renders this
18 conduct absolutely privileged, it “may not be utilized as the basis for a claim of interference with
19 prospective advantage.” *Brody*, 87 Cal.App.3d at 737-738.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court sustain the
3 demurrer without leave to amend as to each cause of action in the Cross-Complaint.

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5 Dated: March 9, 2006

6 CHILVERS & TAYLOR PC

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8 By: _____
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