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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EIGHT OXFORDS PROPERTY MANAGEMENT, INC., Plaintiff, Cross-complainant and Appellant, v. ASSI SUPER, INC., et al., Defendants, Cross-defendants and Respondents.	B206438 (Los Angeles County Super. Ct. Nos. BC329242 and BC367841)

APPEAL from judgments of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed in part, reversed in part.

Law Offices of Mann & Zarpas and Lloyd S. Mann for Plaintiff, Cross-complainant and Appellant.

Law Offices of Barak Lurie, Barak Lurie and Amy C. Vanderwood for Defendants, Cross-defendants and Respondents.

The issue in this appeal is whether any of the three identical actions filed by sublessee Eight Oxfords Property Management, Inc. (Eight Oxfords) should survive challenges brought by the defendants to those actions. We conclude the fraud causes of action are barred by the doctrine of collateral estoppel and that the trial court properly struck the remainder of the fourth amended complaint as an unauthorized amendment. The trial court erred in sustaining the demurrer to four of the causes of action in a related action. The third action, a cross-complaint by Eight Oxfords, must be abated.

FACTUAL AND PROCEDURAL SUMMARY

These appeals arise from five overlapping lawsuits and two prior appeals. Resolution of the issues in the current appeal requires that we review the convoluted procedural history of this overlapping litigation. In part, our factual and procedural summary is taken from the summaries in our two previous opinions regarding unlawful detainer judgments entered against Eight Oxfords in favor of its landlord, Assi Super, Inc. (Assi): *Assi Super, Inc. v. Eight Oxfords Property Management, Inc.* (*Assi I*) (Dec. 3, 2007, B193742 [nonpub. opn.]) and *Assi Super, Inc. v. Eight Oxfords Property Management, Inc.* (*Assi II*) (May 5, 2008, B197128 [nonpub. opn.]).[1]

A. The Factual Background

Oxford Management Company, Inc., as lessee, and Kwang K. Pak, Kyong R. Pak, Kenneth K. Lee, and Catherine C. Lee, collectively as lessors, entered into a master lease in 1997 for property located at 3525 West 8th Street, Los Angeles (the property). The property included a two-story commercial retail building and a vacant parking area. Pursuant to a settlement agreement in 2001, Assi became the successor lessee under the master lease.

In March 2003, Eight Oxfords entered into a sublease with Assi by which it leased portions of the property. The sublease term ran from December 1, 2002 to November 30,

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[1] Our subsequent page references to portions of the nonpublished opinions in *Assi I* and *Assi II* are to the Lexis version of those opinions.

2007, with options to extend the term for a total of 15 years. The sublease provided for escalating rent, and payment of a share of operating expenses for common areas of the property. The sublease required Eight Oxfords to construct a parking facility on the property at its sole expense. It did not specify a date for completion of the parking structure. It provided that any amendment be in writing, signed by "both parties." The sublease was signed by Steven Y. Rhee on behalf of Assi and by Jerry J. Yang on behalf of Eight Oxfords. The four master lessors signed a consent to the sublease. We begin our review with discussion of the unlawful detainer actions brought by Assi.

B. Assi's First Unlawful Detainer Action

In July 2004, Assi served Eight Oxfords with three separate three-day notices to pay rent or quit pursuant to Code of Civil Procedure section 1161. The first was based on a claimed $80,000 in unpaid rent. The second was based on a claim that Eight Oxfords owed $233,700.98 for its share of operating expenses. The third was based on the failure of Eight Oxfords to construct the parking structure on the property. Each three-day notice warned that if Eight Oxfords failed to perform, Assi would commence legal proceedings to recover possession of the property and to declare the sublease forfeited.

Assi filed a complaint for unlawful detainer, alleging causes of action on each ground raised in the notices to quit.[2] It prayed for $80,000 in back rent plus interest; $233,700.98 in unpaid operating expenses plus interest; for forfeiture of the sublease; for possession of the premises; and for costs of suit and fees. Following a bench trial, the court issued a statement of decision finding that Eight Oxfords materially breached the provisions of the sublease "(1) by failing to pay rent due . . . in the amount of $80,000; (2) by failing to pay Defendant's share of [common area maintenance charges] in the amount of $215,327.55; and (3) by failing to engage in any step whatsoever to commence construction of the parking structure. Any one of these breaches constitutes a separate and sufficient basis for forfeiture of the Lease. Accordingly, [Eight Oxfords] has forfeited the Lease, and [Assi] should be entitled to possession of the property."

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[2] *Assi Super, Inc. v. Eight Oxfords Property Management, Inc.* (LASC No. BC319425).

The trial court rejected Eight Oxfords's defense based on a purported amendment to the sublease. Initially, the court found that the amendment applied to only two of the three issues, so that forfeiture of the sublease would be appropriate even if the amendment were binding. The court also found that Eight Oxfords failed to meet its burden of establishing that the signatory to the purported amendment had ostensible authority to bind the sublessor, Assi. The sublease was deemed forfeited and possession awarded to Assi, but the order to vacate the premises was stayed for 30 days. Assi was awarded back rent, operating expenses, and interest for a total award as of May 31, 2006 of $349,375.43 plus costs and attorney fees. The court subsequently granted Eight Oxfords' request for relief from the forfeiture of the sublease, conditioned on payment of all monies due and completion of the parking structure, and entered judgment in favor of Assi.

C. Our Opinion in Assi I

On appeal from the first unlawful detainer judgment, in *Assi I*, we affirmed on the grounds that Eight Oxfords owed rent and had failed to build the parking structure as agreed under the sublease. We reversed the judgment on the basis of insufficient evidence to the extent it was based on the failure to pay operating expenses.

Our treatment in *Assi I* of Eight Oxfords's claim that the sublease had been amended is relevant to the resolution of the current appeals. The purported amendment is dated March 17, 2003, four days after the sublease was executed. The next day, Wayne Yee, attorney for Assi, wrote to Eight Oxfords, repudiating the amendment on behalf of his clients: "After my review and an explanation of the legal effect of the proposed amendments on the sublease to my clients, I have been instructed to inform you that the proposed amendments are unacceptable, that my clients do not consent to the proposed amendments, and my clients will not submit the proposed amendments to the owners of the property, Mr. PAK and Mr. LEE, for their consent." Yee told Eight Oxfords that the original terms of the sublease remained in effect. He invited a written response if Eight Oxfords disagreed with the content of his letter. None was received.

A year later, Wayne Yee again wrote to Jerry Yang of Eight Oxfords, attaching a

copy of his earlier letter. He reiterated that Steven Rhee had no authority to modify the sublease because he was neither an officer nor a director of Assi. Mr. Yee stated that only Daniel Rhee had the authority to make changes to the sublease. The letter also told Eight Oxfords that Assi's acceptance of rent payments of $25,000 per month was not an acknowledgement that this was the correct amount of rent.

In *Assi I*, we rejected Eight Oxfords's argument that the amendment to the sublease was valid because Steven Rhee had ostensible authority to act on behalf of Assi. We concluded that Eight Oxfords was unable to establish that its reliance on Steven Rhee's authority to sign the purported amendment to the sublease was reasonable. We found substantial evidence to support the trial court's conclusion that there was no effective amendment to the original terms of the sublease. (*Assi I*, pp. 16-17.) We also held that the portion of the judgment forfeiting the sublease was moot in light of the subsequent trial court order giving Eight Oxfords relief from the forfeiture. (*Assi I*, pp. 23-24.)

D. Assi's Second Unlawful Detainer Action

Eight Oxfords did not satisfy the conditions of the trial court's order relieving it from forfeiture of the sublease. The appeal in *Assi II* arose from a second unlawful detainer action filed by Assi against Eight Oxfords when it failed to build the parking structure in compliance with the schedule set by the trial court.[3] In *Assi II* we stated that it was undisputed that Eight Oxfords had made the payments required by the trial court as a condition of relief from the forfeiture. Upon a review of the extensive evidence presented at the second unlawful detainer trial, we held that the judgment was supported by substantial evidence.

E. Eight Oxfords Files First (Lead) Action

In February 2005, while the first unlawful detainer action was pending in the superior court, Eight Oxfords filed a complaint for indemnification against Steven Y. Rhee, who allegedly acted on behalf of Assi. (LASC No. BC329242.) We refer to

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[3] *Assi Super, Inc. v. Eight Oxfords Property Management* (LASC No. BC360648).

this as the lead action. The indemnification cause of action was based on the purported amendment to the sublease, which would have reduced the monthly rent to be paid by Eight Oxfords. Eight Oxfords claimed that Assi materially breached the amendment by refusing to accept the reduced rent payments allowed under the purported amendment as full and complete payment. Allegedly, Assi's position was that the amendment negotiated by Steven Rhee was unenforceable because he lacked authority to negotiate on behalf of it. Eight Oxfords alleged that it agreed to the amendment and made payments under its terms in detrimental reliance upon Steven Rhee's purported authority to execute the amendment.

The trial court found that the lead action was related to the already pending first unlawful detainer action brought by Assi, and transferred it to the department hearing that case. Eight Oxfords filed a first amended complaint for indemnification in the lead action in May 2005. This complaint named Steven Y. Rhee and his uncle, Seung Kil Lee, as defendants. This version of the complaint alleged that Steven Y. Rhee and Seung Kil Lee signed the Korean language version of the purported amendment. Eight Oxfords asserted that, contrary to the position taken by Assi in the first unlawful detainer action, Steven Y. Rhee and Seung Kil Lee had authority to bind Assi to the terms of the amendment. It also alleged that if the court found that they lacked authority, then Eight Oxfords suffered damages, including loss of the sublease.

Steven Y. Rhee and Seung Kil Lee moved for summary judgment or, in the alternative, for summary adjudication on grounds of collateral estoppel. On December 14, 2006, the trial court found that Eight Oxfords had no right to either express or implied indemnification. Although it found the motion for summary judgment to be defective for unspecified reasons, it treated it as a motion for judgment on the pleadings. The trial court concluded: "Therefore, there are no allegations that would support a claim for indemnification against [Steven Y.] Rhee and [Seung Kil] Lee." Eight Oxfords was given leave to amend.

F. Eight Oxfords Files Second Action

The record on appeal does not reflect what occurred in the lead action between this point and May 9, 2007. (This is the first of many lacunae in the record on appeal.) Notwithstanding pendency of the lead action, on February 6, 2007, Eight Oxfords filed a new complaint for implied indemnification, fraud and deceit by intentional misrepresentation, fraud and deceit by negligent misrepresentation, and fraud and deceit by promise made without intention to perform against another Assi principal, Seung Man Rhee. (LASC No. BC365920.) We refer to this as the second Eight Oxfords action, or "second action."

The complaint in the second action is very similar to the first amended complaint in Eight Oxfords's lead case, since it is based on the alleged negotiations between the parties before the sublease was signed and the circumstances surrounding the negotiation and execution of the purported amendment to the sublease. The gravamen of the complaint is that Eight Oxfords relied on statements by people, who represented themselves as authorized agents of Assi, to the effect that the sublease would be amended to reflect terms more favorable to Eight Oxfords. Eight Oxfords alleged it acted in reliance on those representations and that otherwise it would not have executed the sublease. In reliance on the representations that the sublease had been amended, Eight Oxfords alleged it paid the lower rent and did not progress with the construction of the parking structure, thereby creating the grounds invoked by Assi in the first unlawful detainer action. It alleged that defendant Seung Man Rhee never intended to abide by the terms of the amendment, and fraudulently induced Eight Oxfords to enter into the sublease and purported amendment. Eight Oxfords claimed a right to express or implied indemnification for the loss of the sublease on the property.

G. Eight Oxfords's Cross-Complaint

In the meantime, on a date not shown by the record before us, Assi filed an action against Eight Oxfords in Los Angeles Superior Court (No. BC367841). That complaint

also is not in the record on appeal nor is the gravamen of the complaint described.[4] On May 9, 2007, the trial court ruled that the action by Assi against Eight Oxfords (No. BC367841) was related to Eight Oxfords's original case, No. BC329242. Case No. BC329242 was made the lead case.

At some point, Eight Oxfords filed a cross-complaint to the Assi complaint. Once again this document is not in the record on appeal.

H. Consolidation

On June 5, 2007, by stipulation of the parties, the trial court consolidated the second Eight Oxfords action with the lead action. The effect of this order, together with the trial court's May 9, 2007 order relating the lead action and Assi's action, was that three actions between Assi and Eight Oxfords were pending before a single judge.

I. September 2007 Amendments to Pleadings

Appellant's appendix, prepared by Eight Oxfords, does not include the second and third amended complaints filed in the lead action. In May 2007, defendant Seung Man Rhee (a principal of Assi) filed a demurrer to Eight Oxfords's "Complaint for Damages."[5]

On September 14, 2007, Eight Oxfords informed the trial court that it had filed a first amended complaint in the second action, which rendered the demurrer filed by Seung Man Rhee moot. On the same day, Eight Oxfords also advised the trial court that it had filed a first amended cross-complaint in Assi's action (No. BC367841), which rendered a pending demurrer by Assi moot. The parties agree that the allegations of these two pleadings, in the form of 15 causes of action, are virtually identical.

The timing of these amendments is significant because of the status of the lead action at the time. Unfortunately, the record on appeal does not include the third

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[4] There is no issue in this appeal regarding the disposition, whatever it may have been, of Assi's complaint in No. BC367841. The only appellate issues relate to Eight Oxfords's cross-complaint in that action.

[5] Since Seung Man Rhee was not a defendant in the lead action at the time, we construe this as a demurrer brought in the second Eight Oxfords action, although it bears only the case number of the lead action.

amended complaint filed by Eight Oxfords in the lead action, the demurrer filed by the defendants to that pleading, or Eight Oxfords's opposition. What we do have is a minute order dated September 27, 2007 reflecting the ruling on a demurrer brought by Steven Y. Rhee and Seung Kil Lee (defendants in the lead action), and a separate demurrer brought by Seung Man Rhee (defendant in the second action).

The trial court ruled that since leave to file a fourth amended complaint in the lead action was never sought, the third amended complaint was the operative pleading and the demurrer brought by defendants Steven Y. Rhee and Seung Kil Lee was not moot. Apparently these defendants had invoked the doctrine of collateral estoppel based on the ruling by the trial court in the first unlawful detainer action.[6] This argument was rejected by the trial court, which said: "As noted in the files of this action, the Court's prior rulings did not rely on Judge Minter's [the judge on the first unlawful detainer judgment] decisions, therefore, collateral estoppel and/or res judicata probably would not apply. No arguments regarding the appeal status have force and effect with respect to today's ruling."

As to the causes of action for fraud and deceit in the third amended complaint in the lead action, the court found "no allegations of reasonable reliance and changed position are present." The trial court also ruled that Eight Oxfords had failed to allege its fraud claims with the requisite specificity. (See *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 649.) Eight Oxfords was given 20 days leave to amend. A point of contention in these appeals is whether the trial court confined Eight Oxfords to amending the two causes of action in the third amended complaint with an admonition that a proposed fourth amended complaint containing an additional 13 causes of action would not be allowed. The parties have not provided a reporter's transcript of this hearing. We address that issue below in our discussion of the questions on appeal.

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[6] From the context of the arguments later made in the demurrer to the fourth amended complaint and on appeal, we infer that this collateral estoppel argument related to the rejected Eight Oxfords arguments that Steven Rhee had authority to execute the amendment to the sublease and that Eight Oxfords reasonably relied on representations made regarding the sublease and amendment.

The demurrer of Seung Man Rhee in the second action was taken off calendar and the first amended complaint in that action was filed.

J. Eight Oxfords's Fourth Amended Complaint in the Lead Action

On October 5, 2007, Eight Oxfords filed its fourth amended complaint, alleging 15 causes of action. The named defendants were Assi, Seung Man Rhee, Steven Y. Rhee, Sung Kil Lee, Sung Gil Lee, and Sung Chul Lee (also known as Daniel Rhee and as Daniel Lee). Apparently, Assi, Seung Man Rhee, Sung Gil Lee, and Daniel Rhee had not been named as defendants in the third amended complaint in the lead action.[7]

It is uncontested that the fourth amended complaint alleged the same causes of action alleged by Eight Oxfords in its first amended complaint in its second action (LASC No. BC365920), and in its first amended cross-complaint in *Assi v. Eight Oxfords* (LASC No. BC367841). These causes of action were for breach of lease, money paid, breach of implied warranty, breach of express warranty, violation of Civil Code section 2343, subdivision (2), rescission of contract, fraudulent inducement, conspiracy to defraud, fraudulent concealment, unjust enrichment, breach of implied covenant of good faith and fair dealing, conversion, fraud, and negligent misrepresentation.

The defendants named in the fourth amended complaint filed a joint demurrer. They argued that Eight Oxfords failed to allege facts sufficient to state causes of action for fraud because it could not have relied on any purported representations by any of the defendants because the purported amendment was repudiated by Assi immediately. In addition, the defendants invoked an integration clause[8] in the sublease to argue that Eight

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[7] The fourth amended complaint named "Seung Gil Lee, also known as Seung Kil Lee," as a defendant. The demurrer brought by the defendants to this pleading lists "Sung Kil Lee" and "Seung Gil Lee" as separate individuals. Since both Sung Kil Lee and Seung Gil Lee are listed as respondents in this appeal, we treat each as a party to the fourth amended complaint.

[8] The parties refer to the integration clause of the sublease as the "'complete agreement'" clause, as it is denominated in the sublease. As we explain below, it is an integration clause.

Oxfords could not rely on any representations by defendants not contained in that agreement.

Eight Oxfords opposed the demurrer on the ground that it had alleged reasonable reliance as part of its fraud causes of action. It also argued the integration clause and the parol evidence rule did not negate its reasonable reliance on the misrepresentations. Eight Oxfords argued that each of the causes of action was adequately pled.

A concurrent motion to strike the 13 new causes of action of the fourth amended complaint was brought on the ground that Eight Oxfords was not authorized to add them. Eight Oxfords argued the trial court specifically allowed leave to amend the third amended complaint.

Eight Oxfords had another, novel, theory in opposition to the motion to strike. It reasoned: (1) the allegations of the fourth amended complaint in the lead action are identical to the allegations of the first amended complaint in the second action and in the first amended cross-complaint; (2) the first amended complaint in the second action and the first amended cross-complaint were filed as a matter of right without court order (Code Civ. Proc., § 472); (3) therefore, the new claims for relief in the fourth amended complaint in the lead action add nothing new to the consolidated action.

K. Demurrer to First Amended Cross-Complaint

At the same time, the defendants were demurring to Eight Oxfords's first amended cross-complaint. The hearing on this demurrer was set for the same day as the hearing on the demurrer and motion to strike the fourth amended complaint in the lead action. The opposition, if any, by Eight Oxfords to the demurrer to the first amended cross-complaint is not in the record on appeal.

L. Trial Court Rulings

On December 3, 2007, we filed our opinion in *Assi I*, holding that the purported amendment to the sublease was invalid. Shortly after that, the trial court ruled on the demurrer in the lead action on December 12, 2007. Since we are not provided a transcript of that hearing, we do not know whether our opinion in *Assi I* was discussed.

The trial court sustained the demurrer to the fourth amended complaint without leave to amend. It was sustained as to fraud and deceit by intentional misrepresentation and by negligent misrepresentation because the court found "[n]o allegations of reasonable reliance and 'changed position.'" The motion to strike the fourth amended complaint was granted as to the 13 new causes of action. On its own motion, the trial court struck the first amended complaint in the second action, (No. BC365920) as "an improper attempt to file the same pleading after the Court has repeatedly denied the opportunity to do so."

The court also sustained the demurrer to the first amended cross-complaint without leave to amend. It sustained the demurrer to the first cause of action for breach of lease, second cause of action for money paid, sixth cause of action for rescission, and the twelfth and thirteenth causes of action for conversion, but did not state the basis for that ruling. The trial court also sustained the demurrer to the third cause of action for implied warranty, the fourth cause of action for breach of express warranty, and the fifth cause of action for violation of Civil Code section 2343, subdivision (2). The court found that these claims were based on the argument that the agents allowed amendment of the sublease and therefore were liable by way of implied or express warranty while the landlord should be liable for violating the Civil Code. The court held: "In the related action, it has been determined that the landlord never approved of changing the [sub]lease. At both previous demurrer and at summary judgment in that case, the Court therefore found that there were no allegations nor facts to support express indemnification nor implied indemnification. As the landlord never approved the [sub]lease, there can be no true allegations to support the Civil Code claim."

The demurrer was sustained as to the eighth and ninth causes of action for conspiracy because no argument was raised in opposition, and because there is no such cause of action. The demurrer was sustained to the tenth cause of action for unjust enrichment. The trial court held this cause of action, premised on quasi-contract, was improper since there is a valid contract. The demurrer was sustained to the eleventh cause of action for breach of the implied covenant of good faith and fair dealing because

no argument was made in opposition, and because there is no valid cause of action for breach of contract upon which this claim may be based. The demurrer was sustained to the seventh cause of action for fraudulent inducement and fraudulent concealment, the fourteenth cause of action for fraud, and the fifteenth cause of action for negligent misrepresentation. "The latter two are identical to the causes of action in the fourth amended complaint in BC329242 and the first is another attempt to raise the exact same claim. As noted several times in BC329242, there are no allegations of reasonable reliance and 'changed position.'"

Judgment in favor of the cross-defendants against Eight Oxfords was entered on the cross-complaint in No. BC367841 on January 10, 2008. The trial court entered judgment in favor of defendants against Eight Oxfords in the lead case (No. BC329242) on February 6, 2008. Finally, the same day, the trial court dismissed the first amended complaint in the second action (No. BC365920) and granted judgment in favor of defendants. Eight Oxfords filed timely appeals from these judgments.

DISCUSSION

I

In reviewing an order sustaining a demurrer "'"[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also

McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415 [noting that our review is de novo].)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

II

Eight Oxfords argues it alleged valid causes of action for fraud and deceit by both intentional and negligent misrepresentation because paragraph 109 in each of the three charging pleadings adequately pled the requisite reasonable reliance on defendants' alleged misrepresentations.[9] Defendants argue that our holdings in *Assi I* preclude an allegation of reasonable reliance to support Eight Oxfords's claims for fraud. They rely on the portion of our opinion in *Assi I* rejecting Eight Oxfords's claims that the amendment to the sublease was valid on the theory that the Assi principal who signed it had ostensible agency to do so. After reviewing evidence that Assi immediately repudiated the purported amendment to the sublease, we held: "Based on this record, Eight Oxfords was unable to establish the critical element that its reliance on Steven Rhee's authority to sign the purported amendment to the sublease was reasonable. We find substantial evidence to support the trial court's conclusion that there was no effective amendment to the original terms of the sublease." (*Assi I*, pp. 16-17.)

A. Legal Principles

The issue preclusion or collateral estoppel aspect of the doctrine of res judicata "bars the relitigation of *specific issues* that were actually litigated in an earlier proceeding and decided adversely to the party against whom the doctrine is asserted. [Citations.]" (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 531.) "For this doctrine to be successfully invoked, the issue as to which it is asserted must be 'identical' to one presented in the first matter [citation]; the issue must have been 'actually litigated in the former proceeding' [citation]; the issue must have been 'necessarily decided' in that proceeding [citation]; the former proceeding must have resulted in a '"'final judgment'"'

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[9] The charging pleadings on appeal are the fourth amended complaint in the lead action (No. BC329242), the first amended complaint in the second action (No. BC365920), and the first amended cross-complaint in the Assi action (No. BC367841).

[citation]; the judgment must have been ‘“‘on the merits’”’ [citations]; and the party against whom the doctrine is asserted must have been a party, or in privity with a party, to the prior proceeding [citation].” (*Ibid.*)

B. Finality

Anticipating that defendants would assert the bar of collateral estoppel, Eight Oxfords argues that the doctrine could not have served as the basis for the trial court’s rulings since our opinion in *Assi I* was not yet final when the trial court sustained the demurrers without leave to amend. “Therefore, to the extent that the respondents intend to argue collateral estoppel or res judicata, there has never been a hearing at a time where those issues were ripe.”

Although the remittitur in *Assi I* had not yet issued when the trial court ruled, this does not necessarily render the doctrine of collateral estoppel inapplicable under the circumstances presented here. The opinion in *Wood v. Herson* (1974) 39 Cal.App.3d 737, which arose in a remarkably similar context, is instructive. The issue in *Wood* was whether a judgment in an unlawful detainer action in which the legal issues between the parties were fully litigated should be given collateral estoppel effect to bar a subsequent civil action between the same parties. An appeal had been taken from the unlawful detainer judgment, but was not pursued and had never been dismissed by the Court of Appeal. As to the bar of collateral estoppel, the Court of Appeal reasoned: “[W]ere we to reverse the summary judgment in the instant action and dismiss the pending appeal in the former action, a later motion for summary judgment, if made, would necessarily have to be granted for the reasons set forth herein. To allow a reversal on such a technicality would promote a gross injustice and unnecessarily lengthen the litigation between the parties.” (*Id*. at p. 748.)

It is uncontested that our opinion in *Assi I* became final when remittitur issued February 8, 2008, two days after the last judgment on appeal was filed. Therefore, were we to reverse the judgments on this ground, the defendants could raise the issue on remand in a new demurrer or motion for summary judgment. As did the court in *Wood v. Herson*, *supra*, we conclude that this would unnecessarily lengthen the already extended

litigation between the parties. We decline to engage in such a futile act. Were we to review the issue again, we would reach the same conclusion we reached in *Assi I*.

C. Identity of the Issues

The second question is whether the issues resolved in *Assi I* resolve the issue of reliance for the fraud causes of action alleged by Eight Oxfords. Eight Oxfords alleged fraud based on both intentional and negligent misrepresentation. "The elements of fraud are '"(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (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; see also *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 402.) The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408; see also *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, fn. 4 [negligent misrepresentation is a species of the tort of deceit and like fraud, requires a misrepresentation, justifiable reliance and damage].)" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184-185.)

"Reliance is 'justifiable' only when 'circumstances were such to make it reasonable for plaintiff to accept defendant's statements without an independent inquiry or investigation.' (*Wilhelm v. Pray* (1986) 186 Cal.App.3d 1324, 1332, italics omitted.)" (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) While justifiable reliance is ordinarily a question of fact, the Supreme Court explained in *Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th at page 1239, "'whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' [Citation.]"

In *Assi I*, we held that Eight Oxfords could not establish "that its reliance on Steven Rhee's authority to sign the purported amendment to the sublease was

reasonable." (*Assi I*, p. 17.) We reached that conclusion after reviewing evidence presented at the first unlawful detainer trial that Assi immediately and repeatedly repudiated the purported amendment. (*Ibid.*) We held there was no effective amendment to the sublease, and that Eight Oxfords could not reasonably rely on the purported amendment, or on representations regarding Steven Rhee's authority to execute that document. To the extent that Eight Oxfords's claims of justifiable reliance are based on these same representations, they are barred by the doctrine of collateral estoppel.[10]

None of these allegations is sufficient to overcome our determination that Eight Oxfords could not rely on the repudiated amendment to the sublease, or on Steven

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[10] Paragraph 151 of the fourth amended complaint in the lead action, the first amended complaint in the second action, and the first amended cross-complaint allege Eight Oxfords's justifiable reliance on the alleged misrepresentations by defendants. Nine separate bases for reliance are alleged. Subparagraph 151a alleged that Assi continually played a "'shell game'" with its corporate officers by allowing various persons to represent that they were officers of the corporation. Subparagraph 151b alleged that defendants Steven Y. Rhee and Seung Gil Lee were the primary Assi representatives with whom Eight Oxfords dealt, including the execution of contracts. Subparagraph 151c alleged that Assi has asserted rights based on unspecified "various contracts" signed or entered into orally by Steven Y. Rhee or Seung Gil Lee. Subparagraph 151d alleges a two-decade history of dealings between various members of the Rhee Brothers, Inc. and the Yang family (principals in Eight Oxfords) including oral agreements which were later memorialized after partial performance. Similarly, subparagraph 151e alleges a history of Assi honoring agreements (unspecified) with Eight Oxfords made by Seung Gil Lee, Steven Rhee and Seung Man Rhee.

Subparagraph 151f is expressly based on alleged representations made by Steven Rhee that he had authority to sign the sublease and the amendment. Subparagraph 151g alleges that Seung Gil Lee, Daniel Rhee, and Syng Man Rhee all told Yang of Eight Oxfords that Lee had the authority to bind Assi, and that Lee had signed the sublease. Subparagraph 151h alleges that Daniel Rhee of Assi knew that Eight Oxfords had signed the sublease as a result of the representations alleged, and that Lee and Steven Y. Rhee were in the process of finalizing the agreement between the parties by preparing the amendment. It alleges that Rhee did not inform Eight Oxfords that Lee and Steven Y. Rhee lacked authority to bind Assi. Finally, subparagraph 151i alleges that on numerous unspecified occasions, "both prior to the execution of the Sublease Agreement and prior to the execution of the Amendments, Daniel Rhee expressly represented to Plaintiff that he had no authority to make decisions on behalf of Assi without consulting with Lee or [Steven Y.] Rhee."

Y. Rhee's authority to act for Assi. The gravamen of Eight Oxfords's complaints and cross-complaint is that it performed under the terms of the sublease *as amended* in reliance on misrepresentations made by principals of Assi. Our holding in *Assi I* undermines the crucial element that this reliance was justifiable.

D. Privity

Eight Oxfords argues in its reply brief that Daniel Rhee, Lee, and Steven Rhee were not parties to all of the Eight Oxfords lawsuits against Assi, and therefore were not in privity with Assi and cannot invoke res judicata or collateral estoppel. This turns the privity requirement of the doctrine on its head. Assi is invoking the doctrine of collateral estoppel against Eight Oxfords, which had a full opportunity to litigate its claims in the unlawful detainer action that led to our decision in *Assi I.* "[T]he party *against whom the doctrine is asserted* must have been a party, or in privity with a party, to the prior proceeding [citation]." (*Ferraro v. Camarlinghi, supra*, 161 Cal.App.4th at p. 531, italics added.)

The doctrine of collateral estoppel "'rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.' [Citations.]" (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 89-90.) Here, Eight Oxfords was a party in *Assi I* and is the plaintiff in this action. The requirement of identity of the parties is satisfied.

E. Integration Clause

Assi argues the integration clause in the sublease, with the parol evidence rule, prohibits Eight Oxfords from asserting any representations made before the sublease was executed as a basis for its claims of fraud. First, we observe that while Assi was a party to the sublease, the individual defendants were not. The integration clause has no application to the individual defendants. Second, as to *Assi*, an integration clause may

not be invoked to exempt parties from liability for fraud. (Civ. Code § 1668; see *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486.)

We conclude that defendants satisfied the elements of collateral estoppel based on our decision in *Assi I*, which precludes Eight Oxfords from alleging justifiable reliance. The trial court properly sustained the demurrer to the causes of action for fraud in the fourth amended complaint on this ground.

III

The trial court also cited Eight Oxfords's failure to plead fraud with the requisite specificity. We agree.

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus "'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect."' [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' [Citation.] *A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must* '*allege the names of the 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*.' [Citation.]" (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 645, italics added.)

Eight Oxfords's claims of justifiable reliance do not comply with this pleading requirement. As we have seen, the allegations of paragraph 151 are vague as to specific misrepresentations, the time they were made, and by whom. (See fn. 10, *supra*.) Subparagraph 151d is illustrative. It alleges: "There was a history of dealings between various members of Rhee Brothers, Inc. [involved in Assi] and the Yang family [principals of Eight Oxfords], going back more than two decades, including a history of oral agreements that were honored, performed, and later documented accurately by the parties after they had been partially performed."

IV

Defendants argue the trial court acted within its discretion in striking the 13 new causes of action alleged by Eight Oxfords in its fourth amended complaint.

A trial court has wide discretion to strike out any pleading not filed in conformity with an order of the court, or because no request for permission to amend was sought where such leave is required. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613; *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 829.) Both sides claim the trial court's ruling on the defendants' demurrer to the third amended complaint supports their positions on the motion to strike. Assi claims the trial court denied Eight Oxfords permission to file its proposed fourth amended complaint (containing the 13 new causes of action) and granted leave only as to the existing fraud causes of action. Eight Oxfords claims that it was given broad leave to amend, without limitation.

Assi's position is bolstered by language in the minute order from the December 12, 2007 hearing. In striking the first amended complaint in the second action on its own motion, the trial court said: "This is an improper attempt to file the same pleading after the Court has repeatedly denied the opportunity to do so." We infer that this is a reference to Eight Oxfords's attempt to add the 13 new causes of action in the lead case, since the first amended complaint in the second action and the first amended cross-complaint previously had not been subject to challenge by demurrer.

As appellant, it was Eight Oxfords's burden to provide an adequate record on appeal to support its contrary position. But we are given no reporter's transcript of the hearing on the demurrer to the third amended complaint, the proposed fourth amended complaint attached to Eight Oxfords's opposition to the demurrer, or the third amended complaint itself. We therefore have no basis to conclude that Eight Oxfords sought leave of the court to include 13 new causes of action in the fourth amended complaint. This inference is reinforced by the argument made by Eight Oxfords in opposition to the motion to strike. It attempts to bootstrap permission to plead the 13 new causes of action in the fourth amended complaint by arguing that the same causes of action were included

in its amendments to the first amended complaint in the second action and in the cross-complaint.

As we have discussed, while the demurrer to the third amended complaint was pending, Eight Oxfords filed a first amended complaint in the second action, and a first amended cross-complaint in Assi's action. Eight Oxfords claimed it filed these pleadings as of right under Code of Civil Procedure section 472. Each of these pleadings alleged the same 15 causes of action which were later alleged in Eight Oxfords's fourth amended complaint. Once the new causes of action were included in the two related actions, Eight Oxfords argued the motion to strike should have been denied because it was not adding new causes of action to the consolidated action, although it conceded that the fourth amended complaint added new defendants and claims for relief based on new legal theories. It repeats this argument on appeal.

Assi cites *Pagett v. Indemnity Ins. Co.* (1942) 54 Cal.App.2d 646, to argue we should affirm the ruling on the motion to strike.[11] That approach has been rejected. The "test now applied is whether recovery is sought 'on the same general set of facts.'" (5 Witkin, Cal. Procedure, *supra*, § 1235, p. 672.) But as we have seen, the issue here is not relation back of the amendments, but the efforts of Eight Oxfords to thwart the orders of the court by filing new pleadings with identical allegations. This is not permissible. (*Janis v. California State Lottery Com.*, *supra*, 68 Cal.App.4th at p. 829 [order granting motion to strike affirmed where amended complaint reallaged causes of action trial court warned plaintiff not to raise again].)

Assi also argues we should apply statutory abatement under Code of Civil Procedure section 430.10, subdivision (c). Under the statutory plea in abatement, "[t]he pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action." (*Leadford v. Leadford*

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[11] The rule discussed in *Pagett* regarded a change of cause of action as the equivalent of commencing a new cause of action, and the amendment was either rejected or denied relation back effect. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1234, pp. 671-672.)

(1992) 6 Cal.App.4th 571, 574.) We conclude that the traditional doctrine of abatement does not apply here, where what really is at issue is the filing of an amended pleading in violation of the court's orders.

The trial court denied Eight Oxfords permission to file the 13 causes of action which were not part of the third amended complaint; the fourth amended complaint (including these causes of action) was filed in violation of that order. The trial court did not abuse its discretion by striking these causes of action. (*Leader v. Health Industries of America, Inc., supra*, 89 Cal.App.4th at p. 612.) We turn to the court's ruling on the demurrer to the first amended cross-complaint.

V

The first amended cross-complaint alleges the same 15 causes of action alleged in the fourth amended complaint. Our conclusion that the fraud causes of action are barred by the doctrine of collateral estoppel applies with equal force to the cross-complaint. Of the remaining 13 causes of action, Eight Oxfords only makes arguments on appeal regarding the sufficiency of its causes of action for breach of contract (first cause of action); money paid (second cause of action); conversion (twelfth and thirteenth causes of action); and rescission (sixth cause of action). The remaining causes of action have been abandoned. (*Leader v. Health Industries of America, Inc., supra*, 89 Cal.App.4th at p. 611.)

A. Contract, Conversion, and Common Count

The gravamen of these causes of action is that Assi improperly retained Eight Oxfords's $200,000 security deposit and overpayments toward operating expenses. In *Assi II*, we found it undisputed that Eight Oxfords fully paid back rent and operating expenses the trial court ordered paid as a condition of its order relieving Eight Oxfords from forfeiture of the sublease in the first unlawful detainer. (*Assi II*, p. 5.)

Assi invokes section 4.1 of the sublease, which provides: "If [Eight Oxfords] fails to pay rent or to perform any other obligations to be performed by [Eight Oxfords] under this Sublease, [Assi] may use, apply, or otherwise expend all or any portion of the deposit to satisfy [Eight Oxfords's] obligation or to compensate [Assi] for any loss or damage

resulting from [Eight Oxfords's] default or failure to perform. The use, application or expenditure of the deposit by [Assi] shall not prevent [Assi] from exercising any other remedy provided in this Sublease or by law and shall not be construed as liquidated damages."

We conclude that the application of this sublease clause is not subject to resolution on demurrer. Eight Oxfords alleges that Assi was fully compensated for any damages resulting from breach of the sublease, but kept the $200,000 deposit and the overpayment of operating expenses. We held Eight Oxfords breached the sublease by failing to build the parking structure in both *Assi I* and *Assi II*. But that does not establish as a matter of law that Assi was entitled to retain the full deposit as damages for that default. Assi also argues that Eight Oxfords cannot pursue these causes of action because it breached the sublease. That contention is forfeited for failure to cite supporting authority. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161.) The trial court erred in sustaining the demurrer to these causes of action.

B. Rescission

In its sixth cause of action for rescission, Eight Oxfords alleged that it entered into a written agreement whose terms are set forth in the sublease and the purported amendment. Our conclusion in *Assi I* that the purported amendment is not valid precludes Eight Oxfords from relying on its terms for this cause of action. Eight Oxfords alleges that it entered into this contract "as a result of mistake, fraud and duress for the reasons set forth hereinabove." In the alternative, it alleges that "in the event that Assi's entry into the contract is found not to be the result of fraud, then Assi, as well, was mistaken as to the terms of the contract, thus resulting in a mutual mistake as to the contract's terms."

"The grounds for rescission are stated in Civil Code section 1689. One such ground exists when consent to a contract is given by 'mistake.' The term 'mistake' in Civil Code section 1689, however, is a legal term with a legal meaning. [¶] The type of 'mistake' that will support rescission is defined in Civil Code section 1577 ('mistake of fact') and Civil Code section 1578 ('mistake of law')." (*Hedging Concepts, Inc. v. First*

Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1421.) The *Hedging* court held that the supposed mistake was the plaintiff's subjective misinterpretation of the contract, which was at most a mistake of law. (*Ibid.*)

"A mistake of law as defined by Civil Code section 1578 exists only when 1) all parties think they know and understand the law but all are mistaken in the same way, or 2) when one side misunderstands the law at the time of contract and the other side knows it, but does not rectify that misunderstanding." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra*, 41 Cal.App.4th at p. 1421.) Here, there can be no rescission based on mistake of law because Assi immediately repudiated the purported amendment to rectify any misunderstanding by Eight Oxfords as to the terms of their agreement.

The alternative ground for rescission is mistake of fact. In *Donovan v. RRL Corp*. (2001) 26 Cal.4th 261, the Supreme Court adopted the approach of the Restatement Second of Contracts, which "'authorizes rescission for a unilateral mistake of fact where 'the effect of the mistake is such that enforcement of the contract would be unconscionable.'" (*Id*. at p. 281, quoting Rest.2d Contracts, § 153, com. a, p. 394.) Under that approach, "[o]nly where the mistake results from 'a failure to act in good faith and in accordance with reasonable standards of fair dealing' is rescission unavailable." (*Donovan, supra*, at p. 283, citing Rest.2d Contracts, § 157.) The *Donovan* court explained that in this context, the term "good faith" refers to "'honesty in fact in the conduct or transaction concerned.'" (*Donovan, supra*, at p. 284.)

Our finding in *Assi I* that Eight Oxfords could not rely on the purported amendment means that Eight Oxfords cannot satisfy this good faith requirement. Assi repudiated the purported amendment immediately. But Eight Oxfords now attempts to claim mistake based on its belief that the purported amendment was part of its agreement with Assi. The trial court properly sustained the demurrer to the rescission cause of action in the first amended cross-complaint.

We reverse the judgment on the first amended cross-complaint only in so far as it sustains the demurrer to the causes of action for breach of contract, money paid, and conversion.

VI

We return to the abatement issue. We emphasize that Eight Oxfords is not authorized to bring multiple actions based on the same causes of action against the same parties. The trial court dismissed the first amended complaint in the second action on its own motion, as an improper attempt to file the same pleading when the court had denied the opportunity to do so repeatedly. In light of our conclusions in this case, the causes of action for fraud, rescission, and other causes of action abandoned on appeal may not be pursued by Eight Oxfords in its first amended complaint in the second action.

That leaves us with two pending actions (the first amended cross-complaint and the first amended complaint in the second action) which allege identical causes of action for breach of contract, money paid, and conversion against identical defendants. The trial court erred in dismissing the second amended complaint. The proper order under mandatory statutory abatement when a plaintiff has two actions pending with the same causes of action is to abate, or stay, the second action pending termination of the first action. (Code Civ. Proc., § 430.10, subd. (c); *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770-771; *Plant Insulation Co. v. Fiberboard Corp.* (1990) 224 Cal.App.3d 781, 792.) On remand, the trial court is directed to vacate its order dismissing the second amended complaint, and enter an order staying that action pending termination of the first amended cross-complaint.

DISPOSITION

The judgment in No. BC367841 is reversed to the extent that demurrers were sustained to the breach of contract, money paid, and conversion causes of action in the first amended cross-complaint, and is otherwise affirmed. The judgment dismissing the case in No. BC365920 is reversed, and the trial court is directed to enter a new

order staying that action. The judgment in No. BC329242 is affirmed in its entirety. Respondents are to have their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.