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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:	)	Case No. 09-91879-D-13G
	)	
FRED P. TODD and SUSAN L. TODD,	)	
	)	
	)	
Debtors.	)	
_____	)	
	)	
SCANDIA NURSERY, INC., et al.,	)	Adv. Pro. No. 09-9073-D
	)	
	)	Docket Control No. FW-1
Plaintiffs,	)	
	)	
v.	)	
	)	
FRED P. TODD and SUSAN L. TODD,	)	DATE: January 25, 2010
	)	TIME: 2:00 p.m.
Defendants.	)	DEPT: D
	)	

Case No. 09-91879-D-13G

Adv. Pro. No. 09-9073-D

Docket Control No. FW-1

DATE: January 25, 2010  
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This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

# MEMORANDUM DECISION

On November 9, 2009, defendants Fred P. Todd and Susan L. Todd (the "Todds") filed a Motion to Dismiss the Complaint With Prejudice, bearing Docket Control No. FW-1 (the "Motion"). The Motion is brought pursuant to Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), made applicable in this proceeding by Fed. R. Bankr. P. 7012.<sup>1</sup> Plaintiffs Scandia Nursery, Inc. and Bjorn Bergstrom

1. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 (collectively "Scandia") oppose the Motion. For the reasons set  
2 forth below, the Motion will be denied.

3 I. INTRODUCTION

4 The dispute in this proceeding involves an Asset Purchase  
5 Agreement (the "APA") pursuant to which the Todds purchased from  
6 Scandia the assets of a business known as Scandia Nursery, in  
7 Oakdale, California. The complaint sets forth claims for relief  
8 under § 523(a)(2), (4), and (6) for damages arising from the  
9 Todds' alleged breach of an agreement to secure their obligation  
10 for the purchase price with a deed of trust against their  
11 residence at 16335 26 Mile Road, also in Oakdale ("the  
12 Property").<sup>2 3</sup> Scandia also seeks imposition of a constructive  
13 trust on the Property in its favor and specific performance of  
14 the alleged agreement to execute and record a deed of trust.

15 The Todds contend the complaint is barred by California's  
16 statute of frauds and by an integration clause in the APA.

17 II. ANALYSIS

18 This court has jurisdiction over the Motion pursuant to 28  
19 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding  
20 under 28 U.S.C. § 157(b)(2)(I) and (O).

21 / / /

22 \_\_\_\_\_  
23 2. The Motion also makes a single mention of an option to  
24 buy the land on which the nursery is situated, but the complaint  
25 and the exhibits to it do not contain any reference to such an  
option, and the possibility of such an option appears to play no  
role in the Motion.

26 3. Scandia also alleges that the Todds falsely represented  
27 that there were no liens against the Property, and made a false  
28 promise to maintain life insurance on Fred P. Todd, with Scandia  
as beneficiary, as a additional security for payment of the  
purchase price.

1 A. Standards for Dismissal under Rule 12(b)(6)

2       The United States Supreme Court has recently adopted a  
3 "plausibility" standard for assessing Rule 12(b)(6) motions,  
4 analyzing the complaint before it in terms of whether it  
5 contained enough factual allegations, taken as true, to plausibly  
6 suggest that the plaintiff was entitled to relief. Bell Atl.  
7 Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945  
8 (2007). "[W]e do not require heightened fact pleading of  
9 specifics, but only enough facts to state a claim to relief that  
10 is plausible on its face." 127 S. Ct. at 1974.

11       The Court did not disturb its earlier pronouncement in  
12 Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974), that on a  
13 motion to dismiss, "[t]he issue is not whether a plaintiff will  
14 ultimately prevail but whether the claimant is entitled to offer  
15 evidence to support the claims." 416 U.S. at 236. Thus, "a  
16 well-pleaded complaint may proceed even if it appears 'that a  
17 recovery is very remote and unlikely.'" Bell Atl. Corp., 127 S.  
18 Ct. at 1965, quoting and characterizing Scheuer v. Rhodes, 416  
19 U.S. at 236.

20 B. The Statute of Frauds

21       The Todds contend that the alleged agreement to provide a  
22 deed of trust against their home is an agreement for the sale of  
23 an interest in real property, is therefore subject to the statute  
24 of frauds, and is not alleged to be in writing. Thus, the  
25 argument goes, because the complaint depends upon the allegation  
26 of such an agreement, it fails to state a claim upon which relief  
27 can be granted.

28 / / /

1 The applicable statute of frauds provides that:

2 The following contracts are invalid, unless they, or  
3 some note or memorandum thereof, are in writing and  
4 subscribed by the party to be charged or by the party's  
agent: . . . (3) An agreement . . . for the sale of  
real property, or of an interest therein . . . .

5 Cal. Civ. C. § 1624(a).

6 An oral agreement to grant a lien against real property as  
7 security for a debt is within the statute of frauds. Landes  
8 Construction Co. v. Royal Bank of Canada, 833 F.2d 1365, 1370  
9 (9th Cir. 1987).<sup>4</sup> The next question, then, would ordinarily be  
10 whether the writings in this case are sufficient to satisfy the  
11 requirements of the statute of frauds such that the agreement is  
12 enforceable.

13 However, the court need not resolve that issue for purposes  
14 of this decision, because even if the alleged agreement to  
15 provide the deed of trust is not sufficiently evidenced in  
16 writing,<sup>5</sup> Scandia's complaint withstands dismissal. California  
17 law is clear that a party may maintain an action for damages for  
18 fraud even where the alleged underlying contract is invalid for  
19 failure to comply with the statute of frauds. Levin v. Knight,

20  
21 4. The plaintiffs cite Cal. Civ. C. § 1624(a)(7) for the  
22 proposition that an agreement to secure a loan by a deed of trust  
23 need not be in writing unless the loan is made by a commercial  
lender. However, that subdivision applies to a promise to make a  
loan or extend credit, not to a promise to provide a deed of  
trust as security for a loan.

24 5. The court assumes for purposes of this decision only  
25 that the writings in this case do not satisfy the statute of  
frauds as to the agreement to provide the deed of trust.  
26 However, that point is far from clear, particularly in light of  
Sterling v. Taylor, 40 Cal. 4th 757, 766 (2007). In that case,  
27 the court held that, for purposes of determining whether the  
statute of frauds is satisfied, extrinsic evidence is admissible  
28 to resolve an uncertainty in the terms of a written memorandum.  
40 Cal. 4th at 766.

1 780 F.2d 786, 788 (9th Cir. 1986), citing Tenzer v. Superscope,  
2 Inc., 39 Cal. 3d 18, 29 (1985); see also Texaco, Inc. v.  
3 Ponsoldt, 939 F.2d 794, 801 (9th Cir. 1991).

4 Scandia's first claim for relief is based on § 523(a)(2),  
5 false representation, and thus, under Tenzer, survives the  
6 Motion. Scandia's second and third claims for relief are based  
7 on intentional torts (§ 523(a)(4) and (a)(6)), which for purposes  
8 of this analysis, are akin to fraud claims, and thus, are  
9 allowable under Tenzer.<sup>6</sup> In its fourth and fifth claims for  
10 relief, Scandia asserts remedies based on the facts alleged in  
11 the first three claims for relief, and not based on a breach of  
12 contract. These claims for relief will survive the Motion as  
13 well.<sup>7</sup>

14 The complaint survives for another reason as well. "The  
15 doctrine of estoppel to plead the statute of frauds may be  
16 applied where necessary to prevent either unconscionable injury  
17 or unjust enrichment" (Tenzer, 39 Cal. 3d at 27, citing Monarco,

18  
19 6. See Tenzer, citing "the general rule ``that the statute  
20 of frauds, having been enacted for the purpose of preventing  
21 fraud, shall not be made the instrument of shielding, protecting  
or aiding the party who relies upon it in the perpetration of a  
fraud or in the consummation of a fraudulent scheme."" 39 Cal.  
3d at 30 (citations).

22 7. See Warren v. Merrill, 143 Cal. App. 4th 96, 113 (2006),  
23 citing Mazzera v. Wolf, 30 Cal.2d 531, 535 (1947) [constructive  
24 trust is appropriate where party has acquired property to which  
he is not justly entitled, such as by fraud or breach of  
25 fiduciary duty; statute of frauds is no bar]; see also Monarco v.  
26 Lo Greco, 35 Cal. 2d 621, 626 (1950) ["In the case of partly  
27 performed oral contracts for the sale of land, specific  
28 enforcement will be decreed whether or not there have been  
representations going to the requirements of the statute [of  
frauds], because its denial would result in a fraud on the  
plaintiff who has gone into possession or made improvements in  
reliance on the contract."]; Landes Construction, 833 F.2d at  
1370 n.1.

1 35 Cal. 2d at 623), such as where "one party has been induced by  
2 the other seriously to change his position in reliance on the  
3 contract" (Monarco, 35 Cal.2d at 623) or where one party has  
4 received the benefit of the other's performance (id., at 623-24).  
5 The facts alleged by Scandia in this case -- that it transferred  
6 the assets of its business to the Todds in reliance on their  
7 promise to provide a deed of trust -- taken as true, are  
8 sufficient to plausibly suggest that estoppel applies, and thus,  
9 that the plaintiffs are entitled to relief. See Bell Atl. Corp.,  
10 127 S. Ct. at 1965.

11 C. The Integration Clause

12 The Todds also argue that an integration clause in the APA  
13 precludes consideration of anything beyond the four corners of  
14 the APA, that the alleged agreement to provide the deed of trust  
15 is not mentioned in the APA, and thus, that the complaint, being  
16 based on that agreement, must be dismissed.

17 This argument overlooks two important provisions contained  
18 in the APA itself. First, the parties agreed that payment of the  
19 purchase price would be by means of a promissory note in the form  
20 attached as Exhibit A to the APA. The note, in turn, expressly  
21 states not only that it is "secured by a Deed of Trust of even  
22 date," but that in the event of a sale of the property described  
23 in the deed of trust, the balance due on the note would become  
24 all due and payable.

25 Second, the APA contains the following provision:

26 The parties agree to execute and deliver any other  
27 documents or instruments not specifically referred to  
28 herein, which are necessary or reasonably required by a  
party to carry out the intents and purposes of this  
agreement.

1 Complaint for Determination of Dischargeability of Debt, filed  
2 October 9, 2009, Exhibit 1, ¶15(E).

3 This provision directly contradicts the Todds' contention  
4 that the integration clause was intended by the parties to  
5 preclude consideration of any documents other than the APA  
6 itself.

7 Finally, the Todds' argument assumes that the existence of  
8 an integration clause in the APA ends the analysis. It does not.  
9 The law on integration clauses is not a body of law unto itself.  
10 It is simply a part of the analysis undertaken in determining the  
11 application of the parol evidence rule, which is, simply stated,  
12 that if a contract is determined to be integrated, "its terms may  
13 not be contradicted by evidence of any prior agreement or of a  
14 contemporaneous oral agreement." Cal. C. Civ. Proc. § 1856.  
15 The initial inquiry in determining whether a written contract is  
16 integrated is "whether the parties intended their writing to  
17 serve as the exclusive embodiment of their agreement." Masterson  
18 v. Sine, 68 Cal. 2d 222, 225 (1968) (emphasis added); Banco Do  
19 Brasil v. Latian, 234 Cal. App. 3d 973, 1001 (1991).

20 In making this determination, the court looks not only to  
21 the presence or absence of an integration clause in the contract,  
22 but to the collateral agreement itself, "to determine whether the  
23 parties intended the subjects of negotiation it deals with to be  
24 included in, excluded from, or otherwise affected by the  
25 writing," and to the circumstances at the time of the writing.  
26 Masterson, 68 Cal. 2d at 225-26; see also Gerdlund v. Elec.  
27 Dispensers Int'l, 190 Cal. App. 3d 263, 270-71 (1987).

28 / / /

1 Even if the court concludes that the written contract is  
2 integrated, the court may admit extrinsic evidence to explain its  
3 meaning, so long as that evidence tends "to prove a meaning to  
4 which the language of the [written agreement] is reasonably  
5 susceptible'" Banco Do Brasil, 234 Cal. App. 3d at 1001, quoting  
6 Bert G. Gianelli Distributing Co. v. Beck & Co., 172 Cal. App. 3d  
7 1020, 1037 n. 4 (1985), and not a meaning that varies or  
8 contradicts the terms of the writing. Gerdlund, 190 Cal. App. 3d  
9 at 271.

10 Finally, the parol evidence rule contains a fraud exception  
11 (Cal. C. Civ. Proc. § 1856(g)), and the presence of an  
12 integration clause has no effect on the fraud exception.  
13 Continental Airlines, Inc. v. McDonnell Douglas Corp., 216 Cal.  
14 App. 3d 388, 424 (1989).

15 In the present case, it is possible that if the court  
16 examined evidence on both sides, it would conclude that the  
17 parties intended the Todds' payment of the purchase price to be  
18 secured by a deed of trust. There is, after all, the reference  
19 to a deed of trust and to a due-on-sale clause in the promissory  
20 note. The Todds would likely be asked to explain their  
21 understanding of the reason for this language if it was other  
22 than Scandia contends. And if the court reached such a  
23 conclusion, it is also possible the court would find that the  
24 property intended to be encumbered was the Property, if for  
25 example, that was the only real property owned by the Todds at  
26  
27  
28



1 the time.<sup>8</sup>

2 In short, the presence of an integration clause in the APA  
3 does not conclude the inquiry, and the complaint is not subject  
4 to dismissal at this stage in the proceeding.

5 III. CONCLUSION

6 For the reasons set forth above, the Motion will be denied.  
7 The court will issue an appropriate order.

8 Dated: February 16, 2010

9 \_\_\_\_\_/s/\_\_\_\_\_  
10 ROBERT S. BARDWIL  
11 United States Bankruptcy Judge  
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25 8. See, e.g., Sterling, 40 Cal. 4th at 767-68, discussing  
26 Preble v. Abrahams, 88 Cal. 245 (1891) [written contract that  
27 described the land to be sold only as "forty acres of the eighty-  
28 acre tract at Biggs," without specifying which 40 acres were  
meant; court held to be admissible parol evidence that the  
sellers, in a contemporaneous transaction, sold the western half  
of the 80 acres to a third party and that the defendant agreed to  
purchase the other 40].