



Superior Court of California County of San Benito

Tentative Decisions for December 13, 2023

Courtroom #2: Judge Thomas P. Breen

CU-18-00149 Kevin Scott Essary, et al. v. Agripharma LTD, et al.

Plaintiffs: Dawna Cilluffo, Kenneth Taylor

Defendant: Bradley Sullivan (Agripharma); Terence O'Hara (REC Enterprises, LLC)

Cross Complaint 4:

Cross Complainant: Terence O'Hara (REC Enterprises)

Cross Defendant: Bradley Sullivan (Agripharma), Dawna Cilluffo , Kenneth Taylor (Kevin Essary, David Anderson; DBA: Willow Glen Construction))

Cross Complaint 3:

Cross Complainant: Bradley Sullivan (Agripharma)

Cross Defendants: Dawna Cilluffo, Kenneth Taylor (Kevin Essary, David Anderson ; DBA Willow Glen Construction)

*Cross Complaint 2:

Cross Complainant: Dawna Cilluffo , Kenneth Taylor (Kevin Essary, David Anderson ; DBA Willow Glen Construction)

Cross Defendants: Bradley Sullivan (Agripharma); Thomas Guy, Janet Stinnett, Jennifer Boswell (Dryco Construction); Lilianne Chaumont (First Alarm); David Harris (Indoor Air Design); Colette Stone (Lyons Brothers); Richard Hatem (Pacific Coast Fire); Nina Klawunder (Scott Wooding)

Cross Complaint 1:

Cross Complainant: David Harris (Indoor Air Design)

Cross Defendants: Dawna Cilluffo, Kenneth Taylor (Kevin Essary, David Anderson; DBA Willow Glen Construction.); Bradley Sullivan (Agripharma); Terence O'Hara (REC Enterprises)¹

On for Cross Defendant Dryco's 8-10-23 Motion for Summary Judgment or in the alternative, Summary Adjudication premised on CCP§437c subdivision (a) and (f), alleging no triable issues of material fact entitling Dryco to summary judgment or summary adjudication as a matter of law.

¹ As a matter of clarity and convenience the parties will be listed by name.

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10-11-23 Willow Glen Construction's opposition is filed. They dispute that the scope of work did not include the alleged defects. There are triable issues of material fact dictating that the motion should be denied. The claims for indemnity, breach of contract, and breach of warranty cannot be decided as a matter of law given the existence of numerous issues of triable material fact.

10-20-23 Dryco's reply declaration in support of motion states that the argument that there are triable issues of material fact is reliant on a selective reading of the deposition of Mr. Saisi, who oversaw DRYco's work. They do not dispute the factual basis presented in WG's own interrogatory answers, answers to requests for admissions, or the testimony of one of their principals, MR. Anderson.

Argument : The parties generally agree that the construction defects alleged by REC against WG which WG attributes to Dryco are 1) The south rolling gate is difficult to operate and lacks automatic closure; 2) the fence on the perimeter of three sides of the property is not 12 feet high and it is "improperly sited;" 3) the Pedestrian Gates lack panic hardware; 4) the parking lot and walkways have an excessive slope rendering them non-compliant with ADA; and 5) irrigation equipment was removed and not reinstalled. The issue here, factually, is that REC, the owner of the real property in question leased the property to Agripharma, which entered into construction contract with WG to perform tenant improvements. Dryco was a subcontractor to WG. The master subcontract required that Dryco obtain commercial general liability insurance naming WG as an additional insured. Dryco complied with this requirement. Dryco was provided a work authorization, and two subsequent change orders (UMF 70-73.) There were no other work authorizations or change orders, or other writings setting out further contractual obligations by Dryco regarding the project. (UM 74); Dryco completed their work by the end of December 2017. (UMF 8)

Dryco argues that WG conceded that Dryco's work met industry standards and was accepted by both WG and Agripharma at the time of completion in December 2017. They also argue that there is no evidence to support WG's contention that Dryco's scope of work embraced ADA work, and argues that the proposal to include such work was never accepted or made part of the master subcontract. (UMF 15). WG disputes this assertion. They argue that the cause of action based in breach of contract for express contractual indemnity lacks merit because the indemnity clause in the master subcontract specifically excludes claims that arise out of design defects, the actions of the owner or other subcontractors or claims that do not relate to Dryco's work

In their Reply, Dryco notes that WG primarily relies upon the deposition of Mr. Saisi, but the selected sections do not negate Saisi's testimony that he was present at least part of the time Dryco was on site (Taylor Dec, ex 4, Saisi depo p. 74:14-19). Moreover, WG does not contradict the testimony of their own principal, Mr. Anderson, nor other evidence in Dryco's UMF² ; nor do they dispute the factual basis presented in WG's interrogatory answers or answers to requests for admission. No triable issues are raised as to the causes of action for indemnity, breach of contract, or breach of warranty. There is no duty to defend an indemnity

² The court notes that specifically referenced sections of Mr. Anderson's deposition, provided as Dryco's Exhibit G, are missing. These missing pages, specifically referenced as supporting the contentions and inferences drawn by Dryco, and argued as being uncontroverted, cannot be examined or assessed. Nor can the court give weight to unrepresented exhibits in assessing the objections posed.

when there is no possibility for coverage under the agreement. (*Stephenson v. Argonaut Ins. Co.* (2004) 125 Cal. App. 4th 962,970.) There is no evidence of any ongoing dispute over material facts regarding any of REC's claims imputed to Dryco by WG. The only evidence is the speculation of Mr. Clink. They have met their burden regarding unclean hands, waiver, and estoppel as affirmative defenses based on WG's failure to give timely notice. No triable issue of material fact exists to the cause of action for failing to name WG as additional insured, given the documentary evidence.

WG's opposition notes that there are multiple triable issues of material fact. The deposition of Stephen Saisi, Dryco's PMK, taken October 3, 2023 indicated that he was not on site at any time during Dryco's work, nor received written or verbal confirmation that Dryco's work was completed and accepted by WG. That no one informed him of inspection by WG on the project, or that no defects had been found or "punch lists" issued. WG asserts that there were site plans left that indicate different building requirements, including installation of certain hardware. (Clink Depo371:13-373.5; 398:23-400:4; 403.19-405:2). It is WG's position that there are material issues of triable fact as to whether Dryco performed all of the terms of the contracted work to specification and in a workmanlike manner. Dryco's person most knowledgeable, Mr. Saisi, testified in deposition that he was not present during the time the work in question was performed and thus cannot attest to it being performed to specification and in a workmanlike manner, despite Dryco having been paid on the contract. Defendant has failed to prove their affirmative defenses.

Legal Standards: A cross defendant may move for a summary judgment if the cross complainant's case lacks any merit or there is an affirmative defense to the entire case. (CCP§437c sub (a)(1) and (p)(2).) The cross defendant may move for a summary adjudication on one or more causes of action within the case if the cause of action has no merit or there is an affirmative defense to it. (CCP§437c sub. (f)(1).) These forms of relief may be pled as independent motions, or pled in the alternative in a summary judgment motion. (CCP § 437c sub (f)(2).) As the moving party, they have the burden to establish both that WG cannot establish one or more of the elements of their cause of action. (*Issakhani v. Shadow Glen Homeowners Assoc., Inc.* (2021) 62 Cal. App. 5th 917, 924.) A party moving for summary adjudication based on an affirmative defense has the burden of showing undisputed material facts in support of each element of their affirmative defense; once that burden is met, it shifts to the cross complainant to show that there is a triable issue of material fact as to the affirmative defense. A cause of action lacks merit if either one or more elements of the cause of action cannot be separately established, or the defendant establishes an affirmative defense to that cause of action. (CCP§437c sub (o).)

A motion for summary judgment should only be granted if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (CCP §437c sub (f)(1).) The declarations of a party opposing should be construed liberally to determine the existence of triable issues of fact, and any doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. (*Bison v. Douglas Emmett Realty Fund* 1988 (2008) 174 Cal. App. 4th 1534, 1542.) It is, as noted, the moving party's burden to make the prima facie case that there is no triable issue of material fact entitling them to summary adjudication as a matter of law. (*Agular v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 926, 850.) The motion must be established by admissible evidence establishing the moving party's right to the relief sought, and evidentiary facts are needed, not

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mere conclusion of fact or law. (*Tuchscher Devel. Ent., Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal. App. 4th 1219, 1240.) The procedure, itself is statutory. (CCP §473c); and strict compliance with the statute is required. This is necessary to ensure there is no infringement to a party's right to trial. (*Bahl v. Bank of America* (2001) 89 Cal. App. 4th 389, 394-395.) Summary adjudication motions are subject to the same rules and requirements as summary judgment motions. (CCP §437c sub (f)(2).) They have a similar purpose and produce similar result on a more limited scale. Rather than resolving the case entire, they narrow down the causes of action, defenses, and claims lacking merit. The motion is no longer deemed a disfavored remedy (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal. 5th 536, 542.) It is regarded as a "particularly suitable means to test the sufficiency of the plaintiff's or defendant's case. " (*Id.*)

A cause of action lacks merit if one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or if the defendant establishes an affirmative defense to the cause of action. (CCP §437c sub (o); *Light v. Dept. of Parks and Rec.* (2017) 14 Cal. App. 5th 75, 102. (summary adjudication properly granted on defendants' motion for plaintiff's claim for intentional infliction of emotional distress when evidence did not show that defendant's conduct was extreme or outrageous).) Another basis is that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. This is ordinarily applied with regard to the duty to defend or indemnify in insurance cases. (*Upland Anesthesia Med. Grp. V Doctors' Co.*(2002) 100 Cal. App. 4th 1137, 1140-1145 (judge properly granted summary adjudication favoring defendant insurer in coverage dispute with its insured on finding that insured is not entitled to insurance defense under the terms of the policy.) In case

Analysis: This case centers around the underlying complaint by WG against Agripharma and REC, which allege causes of action for breach of contract, foreclosure of mechanic's lien, quantum meruit, and account stated to recover for monies owed under the Project Contract. REC filed its FACC on December 24, 2018, against WG alleging certain defects in construction, including claims about the functioning of the security gate, and that the landscape irrigation system was removed and not reinstalled. WF then filed its cross complaint on March 11, 2019, naming Dryco as "Zoe 1." This cross complaint framed ten causes of action. REC subsequently filed its SACC on May 26, 2022, again alleging the security gate was not functioning properly, site fencing was improperly cited, the parking lot and ramp failed to meet ADA specifications, and the landscape irrigation system was removed and not reinstalled. Thus, WG attributes the construction defects alleged by REC to Dryco as follows: the south rolling security gate operates with difficulty and lacks automatic closure; the perimeter fence is not 12 feet high and not properly cited; there is no panic hardware on pedestrian gates; there is excessive slope in the parking lot and walkways making them non-compliant with ADA; the irrigation equipment was removed and not reinstalled. Dryco asserts they are entitled to summary judgment or summary adjudication on WG's cross complaint. They argue the second cause of action (Breach of Contract for Express Contractual indemnity) fails because the alleged defects were outside Dryco's scope of work, that their work met industry standard, and was accepted. They argue thus that WG cannot prove that Dryco failed to perform all of the terms required under the contract or that they acted in a manner prohibited by contract. As a result, the duty to defend implied by the indemnification clause of the contract does not arise because if a claim against the indemnitee

is not “embraced by the indemnity duty, there is no duty to defend.” (*City of Bell v. Sup. Ct.* (2014) 220 Cal. App. 4th 236, 249.) In order for indemnity to arise there needs to be a showing of fault on the part of the indemnitor, and resulting damage based on contractual or equitable basis. (*Id.*) However, this presupposes that there is no triable issue of material fact as to the elements of the claim for breach of contractual indemnity.

Here, there are triable issues of material fact as to whether Dryco fully performed the terms of the contract. The testimony of witnesses in deposition indicate that there is a factual dispute as to whether the copy of the job site plans referenced in Ex3 constituted a representation of the full scope of work, including portions of the work relating to the installation of an automatic gate. Until the factual issue of what the scope of the work contracted to be performed by Dryco is established, it is thus premature to decide as a matter of law whether the claim is embraced by the duty to indemnify and defend or not. Moreover, there remains a triable issue of material fact as to whether the work performed met industry standards in certain respects such that a triable issue of material fact remains as to whether the Defendant is in breach. Similarly, the third cause of action for equitable indemnity, survives as there is question of material fact as to whether Dryco was at fault, in effect, whether Dryco is in breach as referenced above. This also raises issues of material fact on which the Fourth cause of action is premised.

For much the same reasons as stated above, the motion for summary adjudication as regards the fifth, seventh, eighth, ninth, and tenth causes of action must also be denied. The foregoing claims each involve issues relating to whether the indemnification clause of the contract is triggered or not, which is necessarily premised on a determination related to the underlying work at the REC site performed by Dryco as WG’s subcontractor. While the court is cognizant that there are numerous references to the testimony of Mr. Anderson (Ex. G.), many of the pages cited in support of many of Dryco’s UMFs are not in the exhibit. The court cannot determine whether the statements actually are and whether they pass evidentiary muster for consideration as support for the facts asserted.

Proposed Rulings

- 1) Moving party’s Request for Judicial Notice is GRANTED as prayed regarding Exhibits A through F of the Cross Defendant’s compendium of exhibits filed 8-10-23.
- 2) Evidentiary objections: The Cross Complainant’s evidentiary objections to the declaration of Steve Saisi are overruled as to objection numbers 5, 7, 10, 15, and 17. The remaining evidentiary objections are sustained.
- 3) Evidentiary objections: Cross Defendant’s Evidentiary objections regarding
 - a. Cross Complainant’s objections to Cross Defendant’s UMF: The court sustains the following objections, 1, 5, 6, 7, 8, 10 (as to UMF 15, 17, 19 only), 11, 13, 14, 16 (as to UMF 37, only), 17 (as to UMF 42 only); 20, 21 (as to UMF 56,57, 59 only); 22, 23, 34, 25.
 - b. The court overrules the following objections: 3, 4, 10 (as to UMF 16, only); 15, 16 (as to UMF 48 only); 17 (as to UMF 43, only) 19, 21 (as to UMF 65 only); 26.
- 4) The Motion for Summary Judgment is Denied.
- 5) The Motion for Summary Adjudication is Denied as to the second, third, fourth, fifth, sixth, seventh eighth, ninth, and tenth causes of action.

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