TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, May 1, 2024 at 3:00 p.m.
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1-2. SCV-271884, Cresson v. Always Engineering, Inc.

The demurrers to the first and fifth causes of action are SUSTAINED without leave to amend. The demurrer to the fourth cause of action is SUSTAINED; leave to amend is granted to allow Plaintiff to bring the complaint into compliance with CCP §430.10(g). The motion to strike is GRANTED without leave to amend as to the entirety of the prayer section of the TAC except for paragraph D. Plaintiff shall prepare a written order consistent with this ruling and in compliance with CRC 3.1312.

- **Procedural posture**

  A. Original complaint

  This matter was initially filed in San Mateo County on November 21, 2019. The complaint

alleged causes of action against Defendants for (1) breach of the covenant of good faith and fair dealing (2) conversion, and (3) unfair business practices in violation of Bus. & Prof. Code § 17203. It was transferred to Sonoma County by stipulation of the parties on August 3, 2022.

B. First Amended Complaint

Plaintiff voluntarily dismissed the unfair business practices cause of action on February 15, 2023, and filed a First Amended Complaint ("FAC") on February 23, 2023. The first two causes of action in the FAC were substantially unchanged from the original complaint. The FAC added two new causes of action against two new Defendants: (3) breach of contract against Solis Construction and (4) breach of contract against Bay Cities Fire Suppression. Neither of the new causes of action was alleged against Always Engineering or Hocheder. Neither of the new Defendants has appeared in this matter.

On May 11, 2023, Defendants demurred to, and moved to strike portions of, the FAC. Plaintiff dismissed the first cause of action, breach of the covenant of good faith, on September 6, 2023. The demurrer and motion to strike were heard on September 13, 2023. On October 19, 2023, the Court issued an order denying the motion to strike and sustained Defendants' demurrer to the one remaining cause of action against Defendants, conversion, with leave to amend.

C. Second Amended Complaint

Plaintiff filed a Second Amended Complaint ("SAC") on November 14, 2023. The SAC adds several allegations to the conversion cause of action in response to the Court's rationale for sustaining the demurrer to the FAC. The causes of action against Solis Construction and Bay Cities Fire Suppression were unchanged. Defendants demurred to, and moved to strike portions of, the SAC on December 18, 2023. Those motions were set for hearing on May 1, 2024.

D. Third Amended Complaint

On November 29, slightly over two weeks after filing the SAC and three weeks before Defendants had demurred to it, Plaintiff moved for leave to replace the SAC with a Third Amended Complaint ("TAC"). The conversion cause of action against Defendants, and the causes of action against Solis Construction and Bay Cities Fire Suppression, are unchanged from the SAC. The TAC adds two new causes of action against Defendants: (4) breach of contract and (5) breach of fiduciary duty.

On March 25, 2024, Plaintiff filed a request to dismiss the action against Solis Construction and Bay Cities Fire Suppression.

Following a hearing on March 29, 2024, the court granted leave to file the TAC and ordered the hearing on any demurrer or motion to strike to be set on May 1, 2024. Plaintiff filed the TAC on April 8, 2024. It is identical to the proposed TAC submitted with the motion for leave to file it, with the

exception that the second and third causes of action against Solis Construction and Bay Cities Fire Suppression are designated "Dismissed."

E. Substitution of attorney

On February 22, 2024, counsel for Plaintiff substituted out of the case and was replaced by Plaintiff in propria persona.

F. The instant demurrer and motion to strike

Defendants filed the instant demurrer and motion to strike for filing on April 9, 2024. Plaintiff submitted opposition on April 15, 2024. This matter comes on calendar for hearing on those two motions, with an expedited hearing date as provided by the Court's order after the March 29, 2024 hearing.

- **Governing law**

A. Standard on demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) A demurrer may only challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (CCP § 430.30(a).) In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.)

Complaints are read as a whole, in context, and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded and matters that may be judicially noticed, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Opinions, speculation, or allegations contrary to law or judicially noticed facts are also disregarded. (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702.)

Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Development v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged.

(*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 872.) Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

B. Motion to strike

1. Generally

A motion to strike lies where a pleading contains "irrelevant, false, or improper matter[s]" or is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP § 436(b).) However, "falsity" must be demonstrated by reference to the pleading itself or judicially noticeable matters, not extraneous facts. (*See* CCP § 437.)

2. Punitive damages

A motion to strike is also properly directed to unauthorized claims for damages, i.e. damages that are not allowable as a matter of law. (*See, e.g. Commodore Home Systems, Inc. v. Sup. Ct.* (1982) 32 Cal.3d 211, 214.)

Punitive damages are available in noncontract cases "where the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code § 3294.) "Malice" means conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (*Ibid.*) A conscious disregard for the safety of others may constitute malice. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 28.) Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression." (See, e.g., *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

- **Demurrer**

G. First cause of action: conversion

1. Permit application as property subject to conversion

Defendants comment that "As more succinctly argued in AEI's Demurrer to Plaintiff's TAC, it is not possible to convert a permit application from someone who holds neither a lien upon nor title to permit application." This comment appears, with no citation to authority, in a footnote in the Defendants' Memorandum of Points and Authorities in support of the instant demurrer, so it is not

clear where Defendants are saying that this point is "more succinctly argued." It is not mentioned in Defendants' Notice of Demurrer.

Nevertheless, there is no question that a plaintiff in an action for conversion must establish "either ownership and the right of possession or actual possession [of the property] at the time of the alleged conversion thereof." (*General Motors Acceptance Corp. v. Dallas* (1926) 198 Cal. 365, 370.) Title is one way to establish ownership, and a lien "can establish the immediate right to possess needed for conversion." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 610-611; *Plummer v. Day/Eisenberg* (2010) 184 Cal.App.4th 38, 45.) Plaintiff has not alleged any factual basis for a finding that he had ownership, the right of possession, or actual possession of the permit application at the time Defendants allegedly converted it. Therefore, the complaint does not sufficiently state a cause of action for conversion.

The demurrer to the first cause of action is SUSTAINED for this reason. Leave to amend is denied, both because, as discussed next, it will be denied for an independent reason, and because the Court does not believe it is possible to allege title, ownership, right of immediate possession, or actual possession of an application for a permit.

2. Economic loss rule

The "economic loss rule" is the principle that "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 551.) Tort claims between parties to a contract "are barred when they arise from—or are not independent of—the parties' underlying contracts." (*Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 923.)

In its October 19, 2023 ruling, the Court sustained Defendants' demurrer to the conversion cause of action in the FAC, in part, because the Court found that it was barred by the economic loss rule:

> "Plaintiff has alleged that an agreement existed between Plaintiff and Defendants with the essential terms being 'Defendants were to perform services related to the design and installation of septic system for two residences located in unincorporated Sonoma County including processing of the requisite permits for such work.' (First Amended Compliant, ¶ 9.) There are no further facts alleged as to the terms of the agreement. The allegations underlying this cause of action for conversion are 'Defendants unilaterally and without permission cancelled the permit that was then pending in the County of Sonoma. Defendants did not have the right under the Agreement to cancel the permit and did so without any justification whatsoever or prior notice to Plaintiff.' (FAC ¶ 10.)

These factual allegations do not sufficiently establish that Defendants are alleged to have violated a duty outside of those owed under the contract between the parties."

The TAC alleges that part of Defendants' obligation under the contract was to "manage Plaintiff's application for a permit from the County of Sonoma to install the Septic Systems." (TAC ¶ 10.) This is fundamentally the same allegation as the above-quoted one from the FAC that the contract required Defendants to "process[] the requisite permits for such work." (FAC ¶ 9.) Although, as discussed below, neither the FAC nor the TAC includes a copy of the contract between the parties, both complaints clearly allege that Defendants were contractually obligated to acquire a permit for the septic system work. The question, then, is whether any of the modifications to the conversion cause of action in the TAC overcome the problem, identified by the Court in its October 19 ruling, that the FAC did not allege the violation of a duty outside of the provisions of the contract.

The Court finds that they do not. The conversion cause of action in the TAC differs from the version in the FAC in several respects. First, it describes the allegedly converted property as simply "the Permit Application," eliminating all references to "the plans that the defendants took from the County permitting agency without permission from plaintiff." (TAC ¶¶ 24-27; see FAC ¶¶ 21, 22.) Second, it alleges that Defendants "agreed to act [as] a fiduciary for Plaintiff in connection with managing the Permit Application to approval." (TAC ¶ 25.) Third, it alleges that Defendants "intentionally and substantially interfered with Plaintiff's property by cancelling the Permit Application which act exceeded the scope of its agency and was done without the consent and knowledge of Plaintiff." (TAC ¶ 27.) Fourth, it alleges that Defendants "cancelled the Permit Application to force Plaintiff to start a new application from scratch as a form of punishment for Plaintiff's untimely payment." (TAC ¶ 30.) None of these amendments is relevant to the question of whether Defendants' conduct constituted a tort independent of their contractual obligations.

According to Plaintiff's allegations, Defendants were obligated under the terms of the contract to acquire a permit for the anticipated septic system work, and Defendants did not do so. If Defendants had never taken any action at all to acquire the permit, there is no question that that would have constituted a breach. Plaintiff alleges that Defendants took *some* action to acquire it, but then deliberately cancelled whatever they had done in response to a dispute over payments. That put Plaintiff in the same position he would have been in if they had not even begun the process. The allegation that Defendants began the process but did not complete it does not convert the damages allegedly suffered by Plaintiff from contract damages to tort damages.

Plaintiff has now had an opportunity to amend his conversion cause of action to overcome the problem discussed in this section and has failed to do so. Additionally, Plaintiff has not explained how

he could cure the defects through an amendment. Accordingly, the demurrer to the first cause of action is SUSTAINED without leave to amend.

H. Fourth cause of action: breach of contract

1. Non-compliance with CCP § 430.10(g)

In their opposition to Plaintiff's motion for leave to file the TAC, Defendants pointed out that "plaintiff has not produced the contract that contains the provisions purportedly breached by AEI." In its ruling on that motion, the Court responded:

> ". . . the Court warns Plaintiff that the following bright-line rules apply to any complaint for breach of contract, and that failure to comply with them is grounds for sustaining a demurrer or granting a motion to strike:
>
> '[T]he complaint must indicate on its face whether the contract is written, oral, or implied by conduct. (Code Civ.Proc., § 430.10, subd. (g).) If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference. (*Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 59.)'
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> (*Otworth v. Southern Pacific* (1985) 166 Cal.App.3d 452, 458-459.) The easiest way for Plaintiff to comply would be to follow the standard practice of attaching a copy of the contract to the TAC as an exhibit."

Plaintiff did not follow the Court's advice: the TAC contains no exhibit, and is as silent regarding the nature and contents of the alleged contract between the parties as all of the prior versions of the complaint. In his opposition to the instant demurrer, Plaintiff states that he and AEI "entered into a written contract on April 22, 2016," and in his declaration he states that he "retained a copy of the April 2016 contract." But that is no substitute for either setting out the terms of the written contract verbatim in the complaint or attaching a copy of it as an exhibit, as required by law. (*Wise, supra,* 223 Cal.App.2d at p. 59.) It is difficult to understand why, if Plaintiff has a copy of the contract, he did not attach it to the TAC after the Court explicitly pointed out to him that it was necessary to do so.

The demurrer to the fourth cause of action is SUSTAINED. Leave to amend is granted so that Plaintiff may correct the deficiency discussed in this section.

2. Statute of frauds

Civ. Code § 1624, also known as the Statute of Frauds, provides that a contract "that by its terms is not to be performed within a year from the making thereof" is invalid unless it is in writing. Defendants submit that "given the nature of the work the contract involved, it is reasonable to assume

that two septic systems could not be designed, the necessary permits for them obtained, and built within one year." The Court does not know how long it would be "reasonable to assume" those things would take, and declines to speculate. Defendants point out certain passages in the TAC that demonstrate that the process *did* take longer than a year, but that is not the question; if there is no written contract, the question is whether the terms of the oral contract explicitly rule out performance within a year. It is impossible to answer that question without knowing the exact terms of the contract, which do not appear in the complaint.

Because Plaintiff declares that he and Defendants had a written contract, the Court will not sustain the demurrer on the basis of the Statute of Frauds. Again, it is not enough to merely state in a declaration that a written contract exists; the contract must either be attached to the complaint as an exhibit or its terms must be set out verbatim in the body of the complaint. (CCP § 430.10(g); *Wise, supra,* 223 Cal.App.2d at p. 59.)

3. Certificate of merit

CCP § 411.35 requires that before filing an action for professional negligence against a registered architect or engineer, the plaintiff must file a certificate declaring that he has consulted with another architect or engineer in the same discipline as the defendant, and "concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action." Defendant argues that this requirement applies here because, in Defendant's view, the instant lawsuit is a "thinly veiled attempt to cloak AEI's alleged professional negligence in a breach of contract claim."

As it has done before, the Court disagrees. The gravamen of Plaintiff's complaint is that Defendant reneged on its contractual obligation to acquire permits for the construction of septic systems. It is *not* that Defendant designed defective septic systems, or anything along those lines. That is clear from the language of the complaint, and Plaintiff confirms in his declaration that his "complaint has nothing to do with the quality of AEI's civil engineering services." Therefore, this is not an "action . . . arising out of the professional negligence of a person . . . holding a valid registration as a professional engineer." Rather, it is an action against a person holding such a registration, but arising out of something other than professional negligence. A professional engineer can certainly agree to acquire permits, but doing so is not part of the "professional practice of rendering service or creative work requiring education, training and experience in engineering sciences and the application of special knowledge of the mathematical, physical and engineering sciences," which is what professional engineers do, by definition. (Bus. & Prof. Code § 6701.) Anyone can apply for permits, licensed or not. Therefore, any misconduct alleged by Plaintiff related to Defendant's failure to acquire permits is not "professional" in nature.

Fifth cause of action: breach of fiduciary duty

Defendants argue that Plaintiff's breach of fiduciary duty claim duplicates his professional negligence claim, but again, the Court does not agree that the breach of contract cause of action is a professional negligence claim.

Defendants also argue that "Plaintiff has failed to allege facts demonstrating that AEI owed Plaintiff a fiduciary duty or that AEI breached that duty." The Court disagrees. Plaintiff has alleged that "Defendant Hocheder and defendant AEI agreed to act as a fiduciary for Plaintiff in connection with managing the Permit Application to approval." (TAC ¶ 25.) For purposes of the instant demurrer, that is sufficient to plead that Defendants owed Plaintiff a fiduciary duty. Moreover, the complaint suggests that Defendants acted as Plaintiff's agent in applying for construction permits; agency frequently (though not necessarily) implies a fiduciary relationship. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1339.) As to breach, Plaintiff alleges in that same passage that Defendants agreed to "manag[e] the Permit Application to approval," and that they "cancelled the Permit Application to force Plaintiff to start a new application from scratch." (TAC ¶¶ 25, 30.) That is sufficient at this stage to plead that Defendants breached their duty.

However, the problem with the breach of fiduciary duty claim is the economic loss rule, discussed above in the context of the conversion claim. Plaintiff's allegation that Defendants "agreed to act as a fiduciary" strongly suggests that that agreement was part of the contract between the parties. The Court can confirm that once Plaintiff produces the actual contract, but if it is true, then the fifth cause of action is a tort claim that "arise[s] from . . . the parties' underlying contract[]," and is therefore barred. (*Sheen, supra,* 12 Cal.5th at p. 923.) In effect, the economic loss rule prevents plaintiffs from asserting tort claims, for which punitive damages are available, based on conduct that is cognizable as a contract claim, for which they are not. That appears to be what Plaintiff is attempting to do by alleging that the same conduct constitutes both breach of contract and breach of fiduciary duty.

As with the conversion claim, the Court finds that this deficiency cannot be cured by amendment. Plaintiff has not explained how he could cure this defect through amendment. Therefore, the demurrer to the fifth cause of action is SUSTAINED without leave to amend.

- **Motion to strike**

As noted above, the Court will sustain Defendants' demurrers to the conversion and breach of fiduciary duty causes of action, leaving only the breach of contract claim. Punitive damages are not available for breach of contract. (Civ. Code § 3294(a) ["In an action for the breach of an obligation *not arising from contract*" (emphasis supplied)]; *Miller v. National American Life Ins. Co.* (1976) 54

Cal.App.3d 331, 336 [no punitive damages for breach of contract "even where the breach is intentional, wilful, or in bad faith"].)

The TAC does not seek punitive damages in connection with the breach of contract claim. The Court will strike paragraphs A and E from the prayer section of the TAC, but it is not necessary to do so because the Court will sustain demurrers to the corresponding causes of action. On its own motion, the Court will also strike paragraphs B and C from the prayer section, as they relate to causes of action that are dismissed in the TAC. Leave to amend is denied.

- **Conclusion**

The demurrers to the first and fifth causes of action are SUSTAINED without leave to amend.

The demurrer to the fourth cause of action is SUSTAINED on the basis that it is non-compliant with CCP § 430.010(g). Leave to amend is granted to allow Plaintiff to cure that deficiency. "Following an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. [Citation.] The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

The entirety of the prayer section of the TAC, with the exception of paragraph D, is STRICKEN without leave to amend.

As it did in its order after the hearing on March 29, 2024, the Court reminds Plaintiff that pursuant to CCP § 583.310, this case must be brought to trial within five years from the date it was commenced. It was commenced on November 21, 2019. Therefore, the Court will have no option but to dismiss the case if the trial in this matter does not begin before November 21, 2024. That is less than seven months away. If Plaintiff files an amended complaint and Defendants demur to it, Plaintiff may file an ex parte motion to shorten time for the hearing, but the Court warns Plaintiff that its law and motion calendar is extremely crowded.

3. MCV-261436, United Financial Casualty Company v. Estrada Matas

Plaintiff's **unopposed** request to set aside the dismissal of this action is GRANTED pursuant to CCP § 473(b). CCP § 473(b) provides for mandatory relief from dismissal where application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect. All of

those requirements are met here. The Court will sign the proposed order lodged with the moving papers.

4. 23CV00172, Fuentes-Garcia v. Hernandez

Plaintiff's unopposed motion to compel discovery responses from Defendants Angel Hernandez and Joshua Canning is GRANTED. Plaintiff's request for sanctions is GRANTED in the amount of $860. Defendants shall provide responses to Plaintiff's discovery requests, without objections, within 30 days of notice of an order on this motion. Plaintiff's counsel shall submit a written order consistent with this tentative ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

5. SCV-269878, Lendora Capital, LLC v. Kreck

Plaintiff's Motion for Summary Judgment Pursuant to CCP Section 437c is CONTINUED to the law and motion calendar of JULY 31, 2024 at 3:00 p.m., in this Department because there is no proof of service showing proper service or notice of this motion or hearing. Prior to the new hearing, the moving party must file timely proof of service in accordance with California Rule of Court 3.1300, demonstrating service of notice of the hearing.

The Court CONTINUES the motion due to the defect in service. Plaintiff must file complete and proper proof of service showing service, at least 75 days prior to the hearing date, on Defendants of all moving papers and the notice of the hearing date.

Facts and History

Plaintiff complains that it and Defendants entered into an agreement (the "Agreement") by which Plaintiff agreed to purchase all rights to a 15% of the future receivables (the "Receivables") of Defendants, but Defendants have breached and defaulted on the Agreement by preventing Plaintiff from making the agreed-upon withdrawals. Plaintiff alleges that Defendants Timberline Pacific Co, Inc., dba Timberline Pacific Co ("Timberline") and Nicholas Kreck ("Kreck") executed and delivered to Plaintiff a Merchant Pre Qualification form (the "Form"), before entering into the Agreement, the Receivable had an agreed value of $284,810.00 (the "Value"), pursuant to the Agreement, Defendants agreed to have one bank account approved by Plaintiff (the "Bank Account") from which Defendants authorized Plaintiff to make daily ACH withdrawals until the $284,810.00 was fully paid to Plaintiff. Plaintiff allegedly remitted its purchase price for the Receivables and Defendants initially complied but

then prevented any further withdrawals. It also alleges that Defendant Kreck executed a personal guaranty (the "Guaranty") by which he agreed to be personally liable for any balance due in the event that they breached the Agreement. Plaintiff identifies three causes of action: 1) breach of the Agreement as to Timberline; 2) breach of the Guaranty as to Kreck; and 3) unjust enrichment as to all Defendants.

Plaintiff obtained a default judgment in March 2022 but the default judgment was set aside in June 2022.

Subsequent litigation included discovery motions, among them Plaintiff's motion to deem requests for admission ("RFAs") which it had served on Defendant to be deemed admitted due to Defendants' failure to respond. The Court granted the motion to deem the RFAs admitted and entered an order to that effect on July 26, 2023.

In the meantime, after Plaintiff had served the discovery motions and before the hearing on those motions, the court on July 12, 2023 granted the motion of Defendants' attorney, Scott Lewis ("Lewis"), to withdraw as counsel of record. Since that date, Defendants have been unrepresented. The Court also notes that one Defendant, Timberline, is a corporation and thus may not appear without an attorney.

Motion

Plaintiff moves for summary judgment on its claims against Defendants. Plaintiff argues that the established facts demonstrate all elements of its causes of action.

There is no opposition.

Service and Notice

Plaintiff properly filed proofs of service for both the original moving papers and, later, for the notice of the hearing date. However, both proofs of service fail to show proper service on Defendants. They show service by mail but do not show service on Defendants themselves. Instead, they show only service on Lewis, Defendants erstwhile attorney, at the address of Lewis's law firm, 438 1st Street, 4th Floor, Santa Rosa, CA. Defendants' address of record, and as reflected in the order relieving Lewis as attorney, is 1250 Lytton Springs Road, Healdsburg, CA.

The failure to show any proper service at all on Defendants also implicates the mandatory 75-day notice period. The motion requires at least 75 days' notice, plus the usual additional time for service by mail, 5 days, or plus 2 days for service by fax, "Express Mail," or other method providing for overnight delivery. CCP section 437c(a); see *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636-637. The court has no power to shorten the 75-day notice period without the parties' consent. *McMahon v. Sup.Ct.* (2003) 106 Cal.App.4th 112, 116.

Because there is no proof of service showing any proper service or notice on Defendants, the Court must find that there has been no notice at all, and that the motion still requires at least 75 days notice. The Court will continue the motion to the law and motion calendar in this Department **on July 31, 2024**.

Authority Governing Motions for Summary Judgment

Any party may move for summary judgment. Code of Civil Procedure ("CCP") section 437c(a). A party is entitled to summary judgment if demonstrating "that the action has no merit or that there is no defense to the action or proceeding." CCP section 437c(a).

As the party moving for summary judgment on its own complaint, a plaintiff "has met [the] burden of showing that there is no defense to a cause of action if that party" produces evidence establishing each element for each cause of action or duty it wants adjudicated. CCP §437c(p)(1); *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287. A plaintiff moving for summary judgment in its favor on its own claims against the defendant merely needs to establish all the elements of each cause of action that the plaintiff raises. CCP section 437c(p)(1); *Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 565. Since the plaintiff as the moving party does not need to negate affirmative defenses, the burden then shifts to defendants to negate an element of the cause of action or establish affirmative defenses. CCP §437c(p)(1); *Oldcastle Precast, supra*.

The court must consider reasonable inferences drawn from evidence and as long as these inferences are not based on mere speculation, but on actual evidence, such inferences may create a triable issue of fact. CCP§437c(c); *Waschek v. State of Calif.* (1997) 59 Cal.App.4th 640, 647; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 841.

Inferences from circumstantial evidence can create a triable issue, as long as they are not based on speculation or surmise. *Joseph E. DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161; *Aguilar v. Atlantic Richfield Corp.* (2000) 78 Cal.App.4th 79, 117. These inferences must be "more likely than not." *Aguilar*, 117; *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 487. There is also a policy to liberally construe the opposition's evidence and strictly construe the evidence of the moving party. *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 21; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.

Separate Statement and Evidence

Plaintiff presents 25 facts, set forth in three separate sections, one for each identified cause of action, with some partial repetition. Plaintiff primarily bases each proffered fact on the evidence set forth the RFAs which it served on Defendants and which this court ordered to be deemed admitted. It

also relies on testimony of employee Carlton McKoy, Senior Colelctions Manager and Custodian of Records for Plaintiff.

Plaintiff's cited evidence establishes all of the proffered facts. In brief, Plaintiff's established facts show that Defendants have, due to the order deeming the RFAs admitted, admitted each of the facts in question as well as the supporting evidence; these show that Defendants submitted the application Form, representing Kreck as owner of Timberline; the Receivable had an agreed value of $284,810.00; Defendants agreed to have one bank account approved by Plaintiff from which Defendants authorized Plaintiff to make daily ACH withdrawals until the $284,810.00 was fully paid to Plaintiff; as part of the transaction, Defendant Kreck executed a personal Guaranty by which he agreed to be personally liable for any balance due in the event that they breached the Agreement; pursuant to the terms of the Guaranty, Kreck would be unconditionally liable for all payments due and owing to Plaintiff on or about September 28, 2021 Defendants breached the Agreement by preventing Plaintiff from obtaining further withdrawals; Plaintiff has performed all conditions, covenants, and promises pursuant to the Agreement, or these have been excused by Defendants' conduct; Kreck, s admitted in the RFAs, has also failed to pay as obligated in the Guaranty, thereby breaching the Guaranty; pursuant to the terms of the Agreement and Guaranty, should Plaintiff be required to bring an action to recover the money owed, Defendants would also be liable for Plaintiff's out-of-pocket costs and expenses related to litigation, including reasonable attorneys' fees, costs, and litigation expenses; Defendants, as admitted in the RFAs, have breached the Agreement and caused damages to Plaintiff in the amount of $235,985.36 as the remaining balanced owed to Plaintiff under the Agreement, plus attorneys' fees, interest, and costs.

Defendants have not opposed the motion, and thus have not presented any facts or evidence to dispute Plaintiff's showing.

Discussion

Breach of contract requires the following elements: an enforceable contract, Plaintiff's performance or excused nonperformance, Defendant's breach, and damage to Plaintiff. *Wall Street Network, Ltd. v. N. Y. Times Co*. (2008) 164 Cal.App.4th 1171, 1178; *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co* (2004) 116 Cal. App. 4th 1375, 1391 n.6; see 4 Witkin, Cal.Proc. (6th Ed. 2021, March 2024 Update), Pleading, section 525.

Strictly speaking, there is no cause of action called "unjust enrichment." *Jogani v. Sup. Ct.* (2008) 165 Cal.App.4th 901, at 911 ("[U]njust enrichment is not a cause of action") and *Melchior v. New Line Prods., Inc.* (2003) 106 Cal.App.4th 779, at 794 (defining it as a principle underlying a remedy and a form of restitution).

Nonetheless, it is clear that a party may claim a relief or remedy based on the principle of unjust enrichment as a form of restitution, and they even at times refer to it as a "cause of action." Courts have long and repeatedly indicated that a party may assert a claim for restitution based on unjust enrichment, the three elements being 1) receipt of a benefit; 2) unjust or wrongful retention of the benefit; and 3) at the expense of another. See, e.g., *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238; *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593; *Lectrodryer v. SeoulBank* (2000) 77 Cal. App. 4th 723, 726; *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal. App. 3d 122, 134; *Hirsch v. Bank of Amer.* (2003) 107 Cal.App.4th 708, 716, 722. As the court stated in *Professional Tax Appeal*, *supra*, "[t]he elements of a cause of action for unjust enrichment are simply stated as "receipt of a benefit and unjust retention of the benefit at the expense of another." As explained in *McBride v. Boughton* (2004) 123 Cal. App. 4th 379, at 388, "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it … is unenforceable or ineffective for some reason" and may be available based upon torts.

Plaintiff's established facts, undisputed, demonstrate all of the above elements. Plaintiff is entitled to summary judgment. Based on the substantive merits of this motion, Plaintiff is entitled to an order granting the motion in full.

Conclusion

The Court CONTINUES the motion as set forth above due to the defects in service and notice.

6. MCV-260982, State Farm Mutual Automobile Insurance Company v. Ruffin

Plaintiff's Motion to Vacate Dismissal and of Nonappearance is GRANTED. Plaintiff shall prepare a written order consistent with this ruling and in compliance with CRC 3.1312.

Facts and History

Plaintiff is bringing a claim for insurance subrogation against Defendants for injuries which the latter allegedly caused to Plaintiff's insured when they allegedly caused an automobile accident at the intersection of the Rohnert Park Expressway and Commerce Blvd in Rohnert Park, California, on April 13, 2022. It alleges that Defendants negligently caused the accident and injuries and as a result it paid its insureds.

The Court on July 11, 2023, issued an Order to Show Cause Re: Dismissal ("OSC") and set a hearing for September 5, 2023. The OSC indicated it was for failure to file a case management

statement, failure to timely request entry of default and failure to prosecute. Plaintiff did not appear on September 5, 2023, and the Court again issued and served an Order to Show Cause Re: Dismissal, setting a hearing on the OSC for October 24, 2023. The September 5, 2023, OSC indicated that it was for failure to file and serve a timely Case Management Conference ("CMC") statement and failure to appear at the OSC. It required a written response to the OSC to be filed and served by 5 court days before the October 24, 2023, hearing.

No party filed a written response before the hearing and no party appeared at the hearing. The Court therefore dismissed the entire action without prejudice.

Motion

Plaintiff moves the Court to vacate the dismissal pursuant to Code of Civil Procedure sections 187 and 473(b), asserting that the failure to appear and contest the OSC was a result of mistake, inadvertence, surprise or excusable neglect. Plaintiff contends that its attorney contacted the court the day before the hearing and obtained instructions on how to appear remotely, but when she attempted to do so via Zoom, the meeting was vacant, and she does not know why she was unable to appear successfully. Counsel does not indicate why the Motion to Vacate Dismissal was not filed until December 14, 2023, or why counsel did not contact the Court at 3:30 when there were technical issues with Zoom.

There is no opposition to this motion.

Discussion

Code of Civil Procedure ("CCP") §473(b) allows plaintiffs and defendants to set aside dismissals or defaults. This motion must normally be made within a reasonable time, not to exceed 6 months from the date the order was entered. CCP §473(b). The motion must be brought within 6 months and the grounds for seeking relief do not affect the deadline. *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 345.

An order setting aside the default is discretionary where based on mistake, inadvertence, surprise, or excusable neglect. CCP § 473(b).

There is also a policy in favor of hearing cases on their merits and the motion to vacate should be granted if the moving party shows a credible, excusable explanation. *Elston v. City of Turlock* (1985) 38 Cal.3d 227. The provision of this section authorizing a court to relieve a party from a judgment or order resulting from mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed so as to dispose of cases on their merits. *Ramsey Trucking Co. v. Mitchell* (1961) 188 Cal.App.2d Supp. 862.

Aside from a default where defendant fails to answer in time, a party may move to set aside an

order that is the "procedural equivalent of a default," and which deprives a party of his or her day in court. *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618. It therefore applies to dismissal for failure to attend a hearing or to oppose a motion to dismiss based on failure to prosecute. *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1661; *Peltier v. McCloud River R.R.Co.* (1995) 34 Cal.App.4th 1809, 1817-1819.

In *Bouvet v. Layer* (1940) 40 Cal.App.2d 43, an attorney had confused the calendar date and courtroom number of a hearing, accidentally mixing up the date of the hearing and the courtroom number when marking his calendar, with the result that he failed to show. The court entered a default judgment, he moved to vacate it, and the trial court granted the motion. The appellate court ruled that this was not an abuse of discretion and showed sufficient basis for vacating the default since the attorney simply made an honest mistake.

In this instance, Plaintiff demonstrates a sufficient basis for vacating the dismissal, the facts set forth in the declaration of attorney Janelle McCammack. She contacted the court the day before the hearing and obtained instructions on how to appear remotely, but when she attempted to do so via Zoom, the meeting was vacant, and she does not know why she was unable to appear successfully. The Court notes that she failed to address the requirement to file a timely written response as set forth in the OSC, but this is not dispositive given that a written response may not have altered the outcome, but the failure to appear clearly was the final factor in leading to the dismissal and the Court may have not dismissed the action had Plaintiff appeared even without submitting a written response. The declaration also failed to address why the Court was contacted the day prior to the hearing but then was not contacted at the time of the hearing when there were technical issues with Zoom or why the Motion to Vacate was not filed until December 14, 2023. However, no party has opposed this motion.

Conclusion

Under the circumstances, the Court GRANTS the motion. Plaintiff shall prepare a written order consistent with this ruling and in compliance with CRC 3.1312.