SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: March 26, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	17CV315735	Funding Circle USA, Inc. v. K&S Realty, Inc. et al.	Order of examination: parties to appear.
LINE 2	23CV414965	Citizens for Free Speech and Equal Justice, LLC v. Robison, Sharp, Sullivan & Brust et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	23CV416504	Romeo Nava v. Michael Nava et al.	Motion to strike the punitive damages allegations: in light of the court's ruling sustaining the demurrer, the court DENIES the motion as MOOT.
LINE 4	23CV416504	Romeo Nava v. Michael Nava et al.	Demurrer: notice is proper, and the demurrer is unopposed. The court finds that defendant has adequately shown a basis to SUSTAIN the demurrer as to all causes of action, with 10 days' leave to amend, based on the insufficiency of the allegations. (Code Civ. Proc., § 430.10, subd. (e).) The court OVERRULES the demurrer based on uncertainty. (Code Civ. Proc., § 430.10, subd. (f).)
LINE 5	22CV404186	Wells Fargo Bank, N.A. v. Melmar G. Agarin	OFF CALENDAR
LINE 6	23CV413179	Manuel Moreno v. Nader Mahvan et al.	Click on LINE 6 or scroll down for ruling in lines 6-8.
LINE 7	23CV413179	Manuel Moreno v. Nader Mahvan et al.	Click on LINE 6 or scroll down for ruling in lines 6-8.
LINE 8	23CV413179	Manuel Moreno v. Nader Mahvan et al.	Click on LINE 6 or scroll down for ruling in lines 6-8.

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LINE 9	22CV394057	Roseanne Smith et al. v. Celia Yuliana Oseguera et al.	Motion to compel third-party Cal-Western Property Management Company to comply with subpoena for documents. Notice is proper, and the motion is unopposed. The court finds that the requested documents are relevant and therefore finds good cause to GRANT the motion. Cal-Western shall produce all remaining responsive documents within 10 days of notice of entry of this order.
LINE 10	23CV412649	Eric Raeburn et al. v. Manuel Delgado et al.	OFF CALENDAR. After the court already prepared its tentative ruling, the moving party called to withdraw the motion on the eve of the hearing. In the future, please do not wait until the last minute to withdraw a noticed motion.
LINE 11	23CV419045	Bank of America N.A. v. Thao Schultz	Motion to deem RFAs admitted: notice is proper, and the court has received no opposition to the motion. The court finds good cause to GRANT the motion, as defendant has failed to provide timely responses to the RFAs. Moving party to prepare proposed order.
LINE 12	23CV411435	Ke Fang v. Ritula Malhotra	Click on LINE 12 or scroll down for ruling in lines 12-13.
LINE 13	23CV411435	Ke Fang v. Ritula Malhotra	Click on LINE 12 or scroll down for ruling in lines 12-13.
LINE 14	22CV407745	Olivia Ramirez et al. v. Country Motors et al.	Petition for approval of compromise of minor's claim. Parties to appear (either remotely or in person), in accordance with CRC 7.952.

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LINE 15	22CV407745	Olivia Ramirez et al. v. Country Motors et al.	Petition for approval of compromise of minor's claim. Parties to appear (either remotely or in person), in accordance with CRC 7.952.
LINE 16	23CV413349	Duaa Haggag et al. v. Ronald Eugene Davis et al.	Petition for approval of compromise of minor's claim. Parties to appear (either remotely or in person), in accordance with CRC 7.952.

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Calendar Line 2
Case Name: *Citizens for Free Speech and Equal Justice, LLC v. Robison, Sharp, Sullivan & Brust et al.*
Case No.: 23CV414965

I. BACKGROUND

This is a case alleging legal malpractice by a Nevada law firm that represented a California company in California. Plaintiff Citizens for Free Speech and Equal Justice, LLC ("Citizens") has brought this complaint against Robison, Sharp, Sullivan & Brust, the Nevada firm ("RSSB"), as well as two of its partners: Frank Gilmore and Kent R. Robison.

According to the complaint, Citizens is in the sign, construction, and advertising business. (Complaint, ¶ 8.) In 2018, Citizens brought a civil rights action against the City of San Jose (the "2018 federal action"). (*Id.* at ¶ 9.) In September 2018, Citizens entered into a written representation agreement with Defendants, who handled various aspects of the 2018 federal action. (*Id.* at ¶¶ 10-14.) In 2020, the City of San Jose filed a lawsuit against Citizens, and Citizens filed a second federal lawsuit that was later consolidated with the 2018 federal action. (*Id.* at ¶¶ 15-16.) The complaint alleges various deficiencies with respect to Defendants' representation of Citizens. It states the following causes of action:

1. Professional Negligence;
2. Breach of Fiduciary Duty;
3. Breach of Contract.

On July 5, 2023, Gilmore and RSSB (but not Robison) filed separate answers to the complaint. On the same date, RSSB and Robison (but not Gilmore) filed a cross-complaint. Finally, Robison (but not the other two defendants) filed a motion to quash service of summons under Code of Civil Procedure section 418.10 on the same date. The motion to quash argues that the court lacks personal jurisdiction over Robison, because he does not have the requisite contacts with the State of California.

This motion was originally scheduled to be heard on November 28, 2023, the Tuesday after Thanksgiving. On November 14, 2023, after Citizens' opposition was already overdue, the parties filed a joint stipulation proposing that Citizens' deadline to submit an opposition brief be extended to November 23, 2023 (*i.e.*, the day before Thanksgiving), even though the court would still be expected to post a tentative ruling on November 27, 2023, the Monday after Thanksgiving. The court denied this thoughtless proposal. The parties then submitted a stipulation to continue the hearing date, which the court ultimately granted with a new hearing date of March 26, 2024.

II. THE MOTION TO QUASH

A. Legal Standards

Code of Civil Procedure section 418.10, subdivision (a)(1), authorizes a defendant to file a motion to quash service of summons "on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc. § 418.10, subd. (a)(1).)

Once a defendant files a motion to quash, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. (*Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1160; see also *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160,

1167 ["A plaintiff opposing a motion to quash service for lack of personal jurisdiction has the initial burden to demonstrate facts establishing a basis for personal jurisdiction."].) Nevertheless, "where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law." (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1313 (*Elkman*) [italics omitted]; see also *Greenwall v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 [citing *Elkman*].)

There are 'two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.'" (*Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 976 [quoting *Ford Motor Company v. Montana Eighth Judicial District Court* (2021) 592 U.S. __, 141 S.Ct. 1017].) Where general jurisdiction exists as a result of a non-resident defendant's "continuous and systematic" activities in the state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.)

If a non-resident defendant's contacts with California are not sufficient for general jurisdiction, the defendant may still be subject to specific personal jurisdiction by the state if it meets a three-prong test: 1) the defendant must have purposefully availed itself of the state's benefits; 2) the controversy must arise out of or be related to the defendant's contacts with the state; and 3) considering the defendant's contacts with the state and other factors, California's exercise of jurisdiction over the defendant must comport with fair play and substantial justice. (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).)

B. Analysis

Robison argues that he is a resident of Nevada, and that the California courts lack both general and specific personal jurisdiction over him. (Motion, p. 1:22-25.) Citizens responds that Robison consented to jurisdiction by filing a cross-complaint in this matter. (Opp., p. 3:5.) Citizens further contends that the court has specific personal jurisdiction over Robison. (*Id.* at p. 4:15.)

1. Consent or Waiver as a Basis for Jurisdiction

"A state may exercise jurisdiction over an individual on a number of bases, including consent and the individual's appearance in the action. [Citations.] Consent is considered as one of the four traditional bases for the exercise of personal jurisdiction over a nonresident defendant and it is separate from the 'minimum contacts' analysis. [Citations.]" (*Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 658.) "If the defendant raises an issue for resolution or seeks relief available only if the court has jurisdiction over the defendant, then the appearance is a general one. [Citation.]" (*Factor Health Management v. Superior Court* (2015) 132 Cal.App.4th 246, 250.) "A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed." (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 7 (*Obrecht*), internal quotation marks and citations omitted.) "Such participation operates as consent to the court's exercise of jurisdiction in the proceeding." (*Id*. at p. 8.) "By generally appearing, a defendant relinquishes all objections based on lack of personal jurisdiction or defective process or service of process. [Citations.]" (*Ibid*.)

Here, Citizens persuasively argues that Robison either consented or waived any objection to this court's personal jurisdiction over him by filing a cross-complaint against Citizens in this same case, thereby making a general appearance in the case. As noted above, the two parties to the cross-complaint are RSSB and Robison, but not Gilmore, and this was

filed *on the same day* as the present motion to quash. By seeking affirmative relief in this court via his cross-complaint, Robison has essentially recognized the authority of this court to proceed. Robison offers no authority for the proposition that a party who pursues affirmative relief in a proceeding via a cross-complaint may nevertheless contest the court's personal jurisdiction over him in that proceeding. (See *Kim v. Sumitomo Bank* (1993) Cal.App.4th 974, 979 [court need not consider points unsupported by legal authority].)

In reply, Robison argues that his name was "inadvertently and erroneously included" in the cross-complaint. (Reply at p. 2:20-21.) The court finds this difficult to believe, given the deliberate choices that were made in the defendants' four different July 5, 2023 filings, each of which has a different combination of the defendants named as the filing party. The file does reflect that Robison subsequently submitted a request for dismissal of the cross-complaint as to himself on March 20, 2024, a week after receiving Citizens' opposition to this motion and a day before submitting his reply. This does not alter the court's conclusion. Robison offers no authority for the proposition that, after making a general appearance in a case and affirmatively availing itself of the court's authority in the form of a cross-complaint, a defendant may suddenly "undo" that action by withdrawing a pleading, after being called out on it by the opposing party. The court is not aware of any such authority. On the contrary, the basic principle of the law is quite clear that once a general appearance has been made, all objections are thereby waived. (See *Obrecht, supra*, 245 Cal.App.4th at p. 8 ["By generally appearing, a defendant relinquishes all objections based on lack of personal jurisdiction. [Citations.]"].)

For this reason alone, the court concludes that it must deny the motion to quash.

2. Specific Personal Jurisdiction

Citizens also argues that this court has specific jurisdiction over Robison under the three-part test set forth in *Pavlovich, supra*. (Opp., pp. 4-6.) Citizens submits a declaration of counsel Samuel D. Almon with its opposition. The declaration authenticates Exhibit A, a copy of transcript excerpts from Robison's deposition taken on February 23, 2024 ("Transcript"). Citizens contends that Robison's deposition testimony shows that all three prongs of the specific personal jurisdiction test are satisfied.

The court finds this question to be a closer call. Although Robison has been admitted *pro hac vice* in California courts in past years and has represented California clients from time to time, he is not admitted to the California bar, does not live in California, and did not represent Citizens in this case. He is not a signatory to the retainer agreement with Citizens. His primary connection to this case is that he is law partners with Gilmore, who is admitted in California and who did represent Citizens, and that the partners share "five percent" of their collective revenues in a shareholder fund. Although there is also some dispute between the parties as to whether Robison provided legal advice to Citizens regarding a potential *forum non conveniens* motion, that conversation appears to have arisen in the context of a discussion in which Citizens asked Robison to take over the case from Gilmore, and Robison refused. (Transcript, pp. 31:10-34:9.) Based on the totality of these circumstances, the court tends to agree with Robison that it would be a major stretch to find that he purposefully availed himself of the benefits of State of California in connection with this matter, or that the present controversy arises out of or is related to his contacts with the state. (*Pavlovich, supra*, 29 Cal.4th at p. 269; see also *Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243, 255-256.)

III. CONCLUSION

Nevertheless, because the court has concluded that Robison did purposefully avail himself of the California forum by filing his cross-complaint in this particular case, thereby waiving any objection to the court's jurisdiction in this case, the court DENIES the motion to quash.

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Calendar Lines 6-8
Case Name: *Manuel Moreno v. Nader Mahvan et al.*
Case No.: 23CV413179

I. BACKGROUND

This is an action for negligence and premises liability brought by plaintiff Manuel Moreno against several defendants: Poong Yeub Lee and Suk Kyong Lee (together, the "Lees"), Nader Mahvan, Srinvasa Shashidar, Chegu Sweta V ("Sweta V"), and various Does.

Moreno filed the complaint on March 20, 2023. It alleges two causes of action against all defendants: negligence and premises liability. According to the complaint, Moreno was injured on July 6, 2021 when an outdoor wall dividing property between the defendants fell over. There are no exhibits attached to the complaint, and the complaint itself is notably quite vague as to how Moreno came to be at the location where the wall collapsed and how the several defendants are liable for his injury. The complaint for the most part refers only to "Defendants."

Currently before the court is a motion for summary judgment brought by the named defendants—Mahvan, Shashidar, Sweta V, and the Lees (hereinafter referred to collectively as "Defendants"). The motion was filed on January 12, 2024. Moreno filed an opposition on March 12, 2024.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 444.)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c(f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (See *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345, citing *Johnson v.*

American Standard, Inc. (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."].) Accordingly, the court has not considered the reply declaration of counsel Merve Kanter or the attached exhibit.[1]

"A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.'" (*Madden v. Summit View, Inc*. (2008) 165 Cal.App.4th 1267, 1272 [internal citations omitted].)

B. Basis for Defendants' Motion

Defendants move for summary judgment on the ground that "the individual causes of action for premises liability and general negligence fail because plaintiff cannot establish that the Defendants owed any duty of care to the plaintiff and/or is immune from liability pursuant to the *Privette* doctrine since they hired a licensed contractor to perform the work, plaintiff Moreno worked as an employee for that licensed contractor, the allegedly dangerous condition of the subject wall was known to plaintiff, and the moving defendants did not retain control over safety of the worksite." (Notice of Motion and Motion at p. 2:6-12.)

Defendants' supporting memorandum makes it clear that the basis for the motion is the complete defense afforded by the *Privette* Doctrine. The doctrine applies to both causes of action in the complaint, which are essentially redundant. (See, e.g., *Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619 [explaining that premises liability is simply a form of negligence].) As a general matter, "[a]n action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

C. Analysis

The *Privette* Doctrine comes from the California Supreme Court's decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 698 ("*Privette*") and related cases such as *Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253 and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 ("*Hooker*"), as well as their progeny. Under the *Privette* Doctrine,

[1] Moreno's "objection" to the reply has also not been considered.

"when the contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person who hired the contractor—a nonnegligent party—advances no societal interest that is not already served by the workers' compensation system." (*Privette, supra*, 5 Cal.4th at 692.) Therefore, "[a]n employee of an independent contractor generally may not sue the contractor's hirer for work-related injuries." (*Id*. at 702.) Instead, the injured employee is generally limited to worker's compensation remedies against his employer.

1. Defendants' Initial Burden

While the complaint is notably lacking in specific allegations, it is undisputed for purposes of the current motion that on July 6, 2021, Moreno was employee of Empire Remodeling, Inc. ("Empire"), a licensed contractor. Empire entered into a written contract with Defendants on June 21, 2021 to demolish a portion of the exterior wall that ran along the property line dividing Defendants' three properties. The City of Cupertino had informed Defendants that the wall needed to be repaired or replaced. Moreno was injured while he and two of his coworkers at Empire were tearing down a portion of the wall on defendant Mahvan's property. Moreno has already received compensation of "at least $240,000" for his injury through the Workers' Compensation system. (See Defendants' Separate Statement of Undisputed Material Facts ("UMFs") Nos. 4, 10, 13, 15, 26, 30, and 31.)

Defendants have established through the undisputed evidence supporting these UMFs that Moreno was injured while working in the course and scope of his employment with Empire, that Empire was working as a contractor for Defendants pursuant to a written contract, and that Moreno was compensated for his injuries through Empire's workers' compensation insurance. That evidence consists specifically of: Exhibit A (a copy of the complaint), Exhibit F (Moreno's responses to Defendants' requests for admissions), Exhibit G (excerpts from Moreno's deposition testimony), Exhibit H (excerpts from Mahvan's deposition testimony), Exhibit I (excerpts from Shashidar's deposition testimony), Exhibit K (excerpts from Poong Yeub Lee's deposition testimony), Exhibit L (excerpts from the deposition of Ahmad Riazi, the owner of Empire), Exhibit M (a copy of the March 9, 2020 City of Cupertino inspection report directing Defendants to retain a contractor to fix the wall), Exhibit N (a copy of the contract between Defendants and Empire), Exhibit P (a copy of Empire's contractor's license, with proof of workers' compensation insurance attached), and Exhibit R (copies of records produced by the State Compensation Insurance Fund, showing payments to Moreno). This establishes that the *Privette* Doctrine provides a complete defense in this case unless Moreno can show that a recognized exception applies.

2. Moreno's Rebuttal

As an initial matter, Moreno does not dispute that the *Privette* Doctrine is generally applicable to these facts, as his responsive separate statement does not dispute UMF Nos. 4, 10, 13, 15, 26, 30, and 31. Instead, Moreno argues that one of the recognized exceptions to the Doctrine, the "retained control" exception, applies here. (See Opposition at p. "i," lines 27-28 and pp. 6:10-7:24.)

a) The "Retained Control" Exception to the *Privette* Doctrine

"There are exceptions to the *Privette* doctrine. One allows a contractor's employee to sue the hirer of the contractor when the hirer (1) retains control over any part of the work and (2) negligently exercises that control (3) in a manner that affirmatively contributes to the employee's injury. (*Hooker*, *supra*, 27 Cal.4th at p. 209.) Another exception permits recovery when the hirer (1) has a nondelegable legal duty (2) which it breaches (3) in a manner that affirmatively contributes to the injury. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 669–670, 672, (*Padilla*); *Hooker*, at pp. 210, 215; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146–147, 62 Cal.Rptr.3d 479 (*Evard*).)" (*Khosh v. Staples Construction Company* (2016) 4 Cal.App.5th 712, 717 ("*Khosh*").)

With respect to the first exception, the retained control exception: "In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg v. Fillner* Construction, Inc. (2012) 202 Cal.App.4th 1439, 1446.) "An affirmative contribution may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done . . . . A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution. (*Khosh*, *supra*, at p. 3, citing *Hooker*, *supra*, 27 Cal.4th at p. 215.) Affirmative contribution occurs where a general contractor is actively involved in, or asserts control over, the manner of performance of the contracted work. (*Hooker*, *supra*, 27 Cal.4th at p. 215; see also *Delgadillo v. Television Center, Inc*. (2018) 20 Cal.App.5th 1078, 1092-1093 [affirmative contribution to injury occurs when the hirer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work; by contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution].) In addition, "[s]uch affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee," as "[t]here will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker*, *supra*, at p. 212, fn. 3.)

If a contract worker becomes injured after the delegation of safety to the contractor, the court presumes that the contractor alone—and not the hirer—was responsible for any failure to take reasonable precautions. Thus, contract workers must prove that the hirer both retained control *and* actually exercised that retained control in such a way as to contribute to the injury. "A presumptive delegation of tort duties occurs when the hirer turns over control of the worksite to the contractor so that the contractor can perform the contracted work. Our premise is that ordinarily when the hirer delegates control, the hirer simultaneously delegates all tort duties the hirer might otherwise owe the contract workers. Whatever reasonable care would otherwise have demanded of the hirer, that demand lies now only with the contractor. If a contract worker becomes injured after that delegation takes place, we presume that the contractor alone—and not the hirer—was responsible for any failure to take reasonable precautions." (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 271 (*Sandoval*) [internal citation omitted].)

b) Application to the Circumstances of this Case

In this case, Moreno contends that Riazi did not actually control the work that his company, Empire, was hired to perform. Moreno claims that despite his own personal recommendations as to how the work should have been performed, "Defendant Mahvan refused to authorize the use of the requisite safety equipment including a bobcat, jackhammers, and braces . . . . The homeowner Defendants decided that the wall should be removed by only using a sledgehammer. If Defendant Mahvan had truly left up the job [sic] to the contractor, Plaintiff would have had access to the equipment to keep the job safe." (Opposition at p. 7:14-22.)

Moreno contends that it is part of Defendants' initial burden on summary judgment to establish that no exception applies. (See Opposition at p. 7:25-26.) This is incorrect. Defendants have met their initial burden of showing that the *Privette* Doctrine applies and provides a defense, through UMFs undisputed by Moreno. It is then Moreno's burden to respond with admissible evidence raising a triable issue as to whether the retained control exception applies here. Again, as part of the *Privette* Doctrine, the court initially presumes that the contractor (Riazi and Empire), not the hirer (Mahvan and co-defendants), is responsible for any injury to a contract worker that occurs after the hirer turns the worksite over to the contractor, and where such injuries have been compensated through the workers' compensation system. (See *Sandoval*, *supra*.)

(1) Defendants' Evidence

In his deposition, Moreno testified that Arash Riazi had the last call as to what equipment would be used for taking down the wall. (Defendants' Exhibit G at pp. 80:18-81:8.) He also testified that he did not speak with Mahvan or the other defendants on the day of the incident, before he began to demolish the wall with sledgehammers. (*Id.* at pp. 96:13-97:5 and 118:15-120:13.) He noted that he discussed using a Bobcat or jackhammers with Riazi at the job site and that it was Riazi who later told him they were not going to be provided because of costs. (*Id.* at pp. 106:12-108:4.) He further testified that before the day of the accident he had a conversation with Mahran, who was reluctant to have a Bobcat used near his swimming pool. "And that's when I told him I didn't have no—no dealing with the cost or anything like that. I mean, that was between him and Arash." (See *id.* at pp. 123:23-125:16 and pp. 137:19-140:22.) "He just wanted to keep the cost down. But like I said, I had nothing to do with that." When asked: "And none of the neighbors nor Mr. Mahvan gave you any instructions on how to do your work; correct?" Moreno answered "Correct." (Exhibit G at p. 146:20-22.)

Riazi testified in his deposition that he generally could not recall the discussions as to how to tear down the wall, but he also admitted when asked about using a bobcat that "Bobcat was not a question either from me or Manuel or anybody else, no." (Defendants' Exhibit L at p. 61:20-22.) He testified that he did not rent a rototiller, jackhammers, or a Bobcat and did not provide anything else to Moreno because "[a]s far as my understanding is, he [Moreno] had the tools he wanted to tear down the wall, yes." (*Id.* at pp. 64:15-65:5.) He also testified that a Bobcat would not have made sense for the job and that neither Mahvan nor any of the other Defendants told him how to take the wall down or what tools to use. (See *id.* at p. 120:14-16, pp. 122:18-123:5, pp. 126:15-127:5, pp. 130:16-131:3, pp. 134:16-135:8, and pp. 135:16-136:10.)

(2) Moreno's Evidence

Moreno has submitted a packet of exhibits in support of his opposition, consisting of nine exhibits, authenticated by a declaration from counsel Brandon Miller. Moreno relies on three of these exhibits to support his contention that Mahran retained control over how the work was done: Exhibit 1 (excerpts from Moreno's deposition testimony), Exhibit 2 (excerpts from the deposition testimony of Rudy Moreno, plaintiff's brother), and Exhibit 7 (excerpts from Riazi's deposition testimony). (See Moreno's Response to Separate Statement, UMF Nos. 12 and 23 and "Additional Material Facts" Nos. 54 and 56.)

The deposition testimony of Moreno and Riazi, the same testimony submitted by Defendants, does not support a reasonable inference that Mahran retained control over the project and actually exercised that control to dictate how the work was to be performed. As for Rudy Moreno's testimony, he stated that, as to the "homeowner" (Mahvan), "I never had conversations with him. It was 'Hi' and 'Bye,' that was it. Everything was through Arash." (Exhibit 2, p. 27:14-16.) He then testified that he spoke to the homeowner "[b]riefly. The guy wanted to know how much it was going to cost and I don't know. I told him 'I am not doing that part. I am just here to do the work.'" (*Id.*, p. 30:7-10.) He admitted that the proposal for the Bobcat was rejected by "both Arash and the homeowner. The whole thing was they didn't want to spend too much money . . . ."

When asked who "shot down" the idea of using metal bracing, Rudy Moreno testified "Everything was those guys, because they were always together, they were always side by side, and then they'd go into their own language, and I lost—you know, I didn't know what was going on after that. And then he never said anything. And when I would ask him, he goes, 'It's not important.' That's all—we used to get that a lot, 'It's not important.' Q. When you say 'he,' who are you talking about there? A. Arash." (Exhibit 2 at p. 54:8-20.) When asked, "Did you ever tell your plans," meaning plans for possible use of a Bobcat or a jackhammer, "to homeowner Nader Mahvan directly?" Rudy Moreno testified "No. Everything to Arash. Q. And was Arash the one telling your opinions to homeowner Nader Mahvan? A. Yes. Q. And at some point you said they were speaking in their own languages that you did not understand, correct? A. Well, they spoke in English, then they moved on to their language, yes. Q. And you mentioned that your opinions in terms of using a Bobcat and jackhammer was shot down because of the cost, correct? A. Correct. Q. Who told you about this cost concern, Mr. Moreno? A. It was easy to see and understand and read. It was the homeowner, it was always—every time we would go to him, he would shake his head. He always shook his head, and always went back to referring to his tenants, how he lost so much money because of those people." (*Id.*, pp. 96:7-97:3.)

This examination of Rudy Moreno's testimony demonstrates that he never observed Mahvan (or any of the other defendants) retain control over the manner the work would be performed and actually exercise such control over the work. He never directly communicated with Mahvan regarding how to perform the contracted work and he did not observe Mahvan, as opposed to Riazi, dictate a particular method of work. At best, his testimony establishes the unremarkable fact that Mahvan was acutely focused on the overall cost of the project.

Excerpts from Mahvan's deposition testimony, submitted by Moreno, also do not support an argument that Mahvan retained control over the work and actually exercised such control. Rather, these excerpts confirm that Mahvan relied on Riazi to make the decisions as to

what would be required to perform the work. (Plaintiff's Exhibit 6 at p. 97:15-22 ["Q. All right. So you don't know if the wall was – or if Arash was planning to tear down the wall by hand or by machine or any of those details? A. No. As far as I was concerned, that he can come with a hammer and chisel and bring a thousand slaves. I didn't care about that. I just wanted him to do the wall. That was my – I didn't need to get involved in what he does with the – to remove the wall."].)

(3) Conclusion

Based on the foregoing evidence, the court finds that Moreno has failed to establish the application of the "retained control" exception to the *Privette* Doctrine. All of this evidence is insufficient to raise a triable issue as to whether Mahran, as opposed to Riazi, retained control of the work that Riazi and Empire were hired to perform, much less that Mahran (or any co-defendant) actually exercised such control in a manner that affirmatively contributed to Moreno's injury. (See *McGrory v. Applied Signal Technology, Inc*. (2013) 212 Cal.App.4th 1510, 1530 ["a material triable controversy is not established unless the inference is reasonable"].)

The motion for summary judgment is GRANTED.

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Calendar Lines 12-13
Case Name: *Ke Fang v. Ritula Malhotra*
Case No.: 23CV411435

Plaintiff Ke Fang moves for leave to amend his complaint against his former tenant, Ritula Malhotra. The court GRANTS the motion.

1. Procedural History

This matter began as an unlawful detainer action on February 22, 2023. After a number of delays caused by Malhotra, the matter finally proceeded to trial on September 5, 2023. On September 6, the first day of jury selection, Malhotra vacated the residence, rendering the unlawful detainer action moot. The trial court in Department 12 (Judge Isger) then set the matter for an order to show cause re: dismissal on September 21, 2023. At the OSC hearing, Fang asked that the case not be dismissed in order to proceed with the case as an ordinary civil action. He also asked that his ex parte application to amend his complaint be granted. The court denied the ex parte application "without prejudice" and sent the matter back to the civil pretrial case management department (*i.e.*, Department 10).

Fang re-filed his application for leave to amend as a noticed motion on October 26, 2023. The court set the matter for a hearing on December 14, 2023. Malhotra then filed the first of many continuance requests. The court (the undersigned) granted Malhotra's first ex parte request and reset the hearing for January 30, 2024. On January 18, 2024, Malhotra filed a second request to continue the hearing on this motion, as well as to continue the case management conference. The court granted this second request, as well, and set both the hearing on this motion and the case management conference on March 26, 2024. On March 14, 2024, Malhotra filed a third ex parte request for a continuance, suggesting that the hearing on this motion be held on the same day as the hearing on her later-filed motion for leave to file a cross-complaint, which had now been calendared for April 16, 2024. The court denied this third request, noting that Malhotra had already delayed the hearing on Fang's motion two times and that the issues in Fang's motion and her motion were distinct. On March 15, 2024, Malhotra filed a fourth ex parte application, asking that the court "reconsider" its March 14 order. The court denied this request (in an admittedly perfunctory order) on the same date. On March 21, 2024, Malhotra filed a fifth ex parte application, asking the court to "mark" her March 20, 2024 opposition brief as "valid," and again asking for a continuance of the hearing. On the same date, the court issued an order stating that it would review and consider Malhotra's late-filed opposition (filed on March 20 even though the deadline was March 13) and again finding no basis to continue the March 26, 2024 hearing. The court did remind Malhotra that she could appear either remotely by MS Teams or in person, based on her own preference.

Malhotra's March 20, 2024 opposition brief was actually the second opposition that she filed in response to this same motion. She filed the first opposition on November 9, 2023, two weeks after Fang originally filed the motion. The court has reviewed and considered both oppositions.

2. Discussion

Given that this is no longer an unlawful detainer case and is now an ordinary civil action, Fang seeks to amend his complaint to add causes of action against Malhotra for: (1) breach of contract, (2) abuse of process, and (3) malicious prosecution (for bringing a separate restraining order case). In her oppositions, Malhotra does not claim any undue delay by Fang in having brought his motion, nor does she identify any prejudice that would result from granting it, which are the customary bases upon which a motion for leave may be denied. Instead, she tries to argue the merits of these causes of action, claiming that Fang is estopped from bringing them by virtue of his promise to "end" the dispute if she moved out, that the causes of action are "without proof," and that the new causes are being brought for an improper, retaliatory purpose. All of these arguments are premature in a motion for leave to amend. In deciding the present motion, the court makes no decision as to the merits of the amended pleading, or even its sufficiency, other than that Malhotra has not demonstrated that allowing it would be futile on its face.

Finally, Malhotra argues that Judge Isger already denied the motion for leave to amend on September 21, 2023, and so it should not be granted now.[2] This argument misses the mark, because the previous denial was expressly without prejudice, and it was a denial of an ex parte application, not a noticed motion. Accordingly, there is no barrier to the present court addressing the present motion on the merits.

The court discerns no prejudice to Malhotra from allowing Fang's amended pleading, and so the motion is GRANTED. Fang must file his amended complaint within 10 days of this order.

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[2] Malhotra erroneously argues that the denial occurred on September 6, rather than September 21, 2023.