

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

**Department 3
Honorable William J. Monahan, Presiding**

Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 9/10/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (9/9/2024) you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV409352	David Rubin vs Andrea Galatea	Hearing: Order of Examination against Andrea Galatea by Plaintiff David Rubin OFF CALENDAR. No proof of service.
LINE 2	24CV434341	Susan Lee et al vs JP Builders, Inc. et al	Hearing: Demurrer to Complaint by Defendant Wesco Insurance Company Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.
LINE 3	24CV440301	Kent Taylor vs Allstate et al	Hearing: Demurrer to Complaint by Defendant Allstate Unopposed and SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Moving party to prepare order for signature by court.

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LINE 4	23CV423142	Beverly Hughes vs McDonald's Corporation	<p>Motion: Compel Plaintiff Beverly Hughes's responses to Form Interrogatories, Set One and Request for Monetary Sanctions by Defendant McDonald's Corporation</p> <p>Unopposed and GRANTED.</p> <p>Plaintiff shall provide code-compliant verified responses (without objections) to Defendant's form interrogatories, set one ("FI set one"), within 20 days of notice of entry this order.</p> <p>Plaintiff shall pay Defendant reasonable monetary sanctions (of 2 hours at \$195/hour plus a \$60 filing fee for a total) of \$450 (incurred in this FI, set one motion) within 20 days of notice of entry this order.</p> <p>Moving party to submit order for signature by court.</p>
LINE 5	23CV423142	Beverly Hughes vs McDonald's Corporation	<p>Motion: Admissions Deemed Admitted Specified in the First Set of Requests for Admission to plaintiff Beverly Hughes ("Plaintiff") and Request for Monetary Sanctions by Defendant McDonald's Corporation ("Defendant").</p> <p>Unopposed and GRANTED.</p> <p>The truth of all matters specified in Defendant's first set of requests for admissions ("RFA set one") to Plaintiff are deemed admitted by Plaintiff.</p> <p>Plaintiff shall pay Defendant reasonable monetary sanctions (of 2 hours at \$195/hour plus a \$60 filing fee for a total) of \$450 (incurred in this RFA set one motion) within 20 days of notice of entry this order.</p> <p>Moving party to submit order for signature by court.</p>
LINE 6	23CV409651	ROIC California, LLC vs Larry Nguyen et al	<p>Motion: Withdraw as attorney by Alex Park to be Relieved as Counsel for Defendant Larry Nguyen</p> <p>Unopposed and GRANTED.</p> <p>Moving attorney to update proposed order to show Case Management Conference on 11/12/2024 at 10:00 AM in Dept. 3 and submit to court for signature.</p>

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LINE 7	23CV414665	All Seasons Roofing & Waterproofing, Inc. vs Timothy Duran et al	Motion: Withdraw as attorney by Leilanie Mendoza to be relieved as counsel for Defendant/Cross Defendant FXR CONSTRUCTION INC Unopposed and GRANTED. Moving attorney to prepare order for signature by court.
LINE 8	22CV401943	Daniel Frishberg vs PlayerUp.com	Hearing: Motion hearings for Alternative Service of the Defendants by Plaintiff Daniel Frishberg Plaintiff Daniel Frishberg ("Plaintiff")'s Motion for alternative service of the defendants is DENIED WITHOUT PREJUDICE. Plaintiff failed to file any supporting declaration under penalty of perjury or cite any legal authorities in support of this motion. The court will prepare the order.
LINE 9	23CV414686	Susan Pickett, et al vs Hilton Worldwide, Inc., et al.	Plaintiff Susan Pickett's ex parte application for an order to continue the hearing date and briefing schedule on defendants Interstate Management Company, LLC and Fontana Hotel Group, LLC's motion for summary judgment or, in the alternative, summary adjudication. [See order filed 9/5/2024 signed by Judge Pennypacker on 9/4/2024 to appear for oral argument on 9/10/2024 at 9am in Dept. 3.] APPEAR (in person or by Teams) for oral argument.
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Case Name: *Susan Lee et al. v. JP Builders, Inc. et al.*

Case No.: 24CV434341

I. Factual and Procedural Background

Plaintiffs Susan Lee and Cadir Lee (collectively, “Plaintiffs”) are the owners of real property at 15781 Hidden Hill Road, Los Gatos, CA (“the Property”). (Complaint (“Compl.”), ¶ 1.)

Plaintiffs name numerous defendants in their complaint, including Wesco Insurance Company (“Wesco”), Peter Chin Liou (“Peter”)¹ and Lina Huang Liou (“Lina”), and JP Builders, Inc. (“JP Builders”), among others. Wesco is a corporation in the business of issuing contractor’s license bonds. (Compl., ¶ 14.) Peter is a developer of real estate and Lina is a real estate agent. (Compl., ¶¶ 26-27.) JP Builders is a contractor that was issued state license number 864185. (Compl., ¶ 2.)

At some point, Peter and Lina entered into a written construction contract with JP Builders for the Property. (Compl., ¶ 28.) Unknown to Plaintiffs at the time, Peter ignored grading recommendations related to the Property. (Compl., ¶ 31.) Thereafter, Peter and Lina sold the Property to Plaintiffs pursuant to a written contract. (Compl., ¶ 32.) Peter and Lina made a written assignment of rights to Plaintiffs that included claims against the relevant contractors.² (Compl., ¶ 33.)

During Plaintiffs’ ownership of the Property, they have experienced drainage and flooding problems. (Compl., ¶ 34.) The contractors, including JP Builders, performed work at the Property with defects and below the standard of care. (Compl., ¶ 35.)

On January 4, 2023, a storm brought heavy rain and high winds to Los Gatos and the power went out at the Property. (Compl., ¶ 38.) Because of this power outage, electric pumps did not function and the water levels rose and eventually flooded the basement of the Property, as well as the garage and a storage shed. (Compl., ¶¶ 40-41.)

On April 3, 2024, Plaintiffs filed their complaint, asserting the following causes of action:

- 1) Breach of Contract;
- 2) Defective Construction;
- 3) Violation of Contractor’s License Law;
- 4) Concealment;
- 5) Violation of Civil Code § 1102; and
- 6) Professional Negligence.

¹ Because individuals involved in this case share the same last name, the Court will refer to them by their first names. No disrespect is intended. (See *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² Several contractors are named in this action and are referred to collectively by Plaintiffs as the Contractor Defendants.

On July 22, 2024, defendant Wesco filed its demurrer to the complaint and its second, third, and sixth causes of action. Plaintiffs oppose the motion and Wesco filed a reply.

II. Request for Judicial Notice

In support of its demurrer, Wesco requests the Court take judicial notice of the license status page and license history page from the California Contractors State License Board relating to JP Builders, pursuant to Evidence Code section 452, subdivision (c). Plaintiffs have filed an objection to the request on the ground the request is not an official act of a state department. In reply, Wesco cites no authority to support judicial notice of a printout of a web page. The request is DENIED. (See e.g., *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 761 [“the mere fact that a statement appears on a Web page does not mean that it is not reasonably subject to dispute”].)

III. Demurrer

Wesco demurs to the entire complaint on the ground it is time-barred, and the second, third, and sixth causes of action on the grounds they are time-barred or fail to state sufficient facts to constitute a cause of action.

a. Improper Service

Plaintiffs argue in opposition that they were not properly served with Wesco’s demurrer. In particular, Plaintiffs assert that they were improperly electronically served and that service was made on only one attorney, who was on vacation at the time. In its reply, Wesco contends that it served Plaintiffs thirty days earlier than required under Code of Civil Procedure section 1005 and that Plaintiffs’ counsel contacted Wesco to confirm agreement of electronic service. On this basis, Wesco’s counsel assumed Plaintiffs also agreed to be electronically served. The Court finds this argument persuasive. In any event, Plaintiffs were able to file a substantive opposition and a separate list of objections to the demurrer and request for judicial notice. Accordingly, no prejudice has occurred, and the Court will not overrule the demurrer on this basis. (See e.g., *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].)

b. Plaintiffs’ Objections

In addition to objecting to Wesco’s request for judicial notice, Plaintiffs object to dates and contractors related to Wesco’s bond appearing within Wesco’s memorandum of points and authorities in support of its demurrer. Additionally, Plaintiffs object to references to the contractor related to Wesco appearing in the Goldberg Declaration. Plaintiffs’ objections are noted. However, the Court is aware that in ruling on a demurrer, it cannot consider extrinsic evidence, including declarations. The Court has therefore only considered the Goldberg Declaration to the extent it discusses meet and confer efforts required by statute. Moreover, as noted above, the Court declined to take judicial notice of California Contractors State License Board web page.

c. Legal Standard on Demurrer

In ruling on a demurrer, the court treats it “as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

d. Statute of Limitations

“‘The defense of a statute of limitations may be asserted by general demurrer if the complaint shows on its face that the statute bars the action.’” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) “There is an important qualification, however: ‘In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.’” (*Id.* at pp. 1315-1316.) “In assessing whether plaintiff’s claims against defendant are time-barred, two basic questions drive [the] analysis: (a) What statutes of limitations govern the plaintiff’s claims? (b) When did the plaintiff’s causes of action accrue?” (*Id.* at p. 1316.)

Wesco contends the complaint is time-barred against it because the statute of limitations for recovery against a contractor’s license bond requires an action be filed within two years, pursuant to Business & Professions Code section 7071.11, subdivision (c). (Demurrer, p. 5:11-13.) Wesco asserts that it issued a contractor’s license bond on behalf of JP Builders. (Demurrer, p. 5:26-27.) It further contends that any wrongful action by JP Builders occurred sometime between the date of the contract between JP Builders and Peter and Lina and the date the work was completed, sometime prior to the January 4, 2023 storm. (See Demurrer, p. 7:1-4.) Wesco argues that this time period falls outside of the applicable license period with JP Builders. (Demurrer, p. 7:2-3.) In making this argument, Wesco relies on the exhibit attached to its request for judicial notice, which this Court has denied.

In opposition, Plaintiffs argue that there is no permissible evidence before the Court that establishes that the complaint is time-barred against Wesco, and there are no allegations indicating which contractor Wesco purportedly bonded. (Opposition, p. 5:5-9.)

Based on the allegations of the complaint, which the Court must take as true, the pleading is not time-barred as to Wesco. First, the pleading is devoid of specific dates, aside from stating when the flooding of the Property took place. Next, there are no allegations in the complaint that Wesco bonded either JP Builders, or another named contractor. Finally, the Court cannot rely on the dates in Wesco’s demurrer or in its request for judicial notice. As such, the Court cannot determine that the defect clearly and affirmatively appears on the face of Plaintiffs’ complaint.

Accordingly, the demurrer to the complaint and the third cause of action on the ground they are barred by the statute of limitations is OVERRULED.

e. Second Cause of Action – Defective Construction

Wesco demurs to the second cause of action on the ground it seeks tort damages and a surety cannot be held liable for tort damages given the California Supreme Court's ruling in *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28 (*Cates*). (Demurrer, p. 8:13-18.)

In opposition, Plaintiffs assert that 1) Wesco never raised this argument during meet and confer efforts and 2) *Cates* is factually distinct because the case at hand does not involve a performance bond and there is no cause of action for breach of the covenant of good faith and fair dealing. As to the first argument, as detailed above, the Court declines to overrule the demurrer on meet and confer grounds.

As for *Cates*, neither party elaborates on the arguments with any detail. The complaint itself does not allege liability outside of the contractual obligations of Wesco as a surety. (See Compl., ¶ 51 [“Plaintiffs allege on information and belief that the defective and substandard construction was done willfully *so as to trigger an obligation* on the part of the Surety Defendants to cover their damages.”][emphasis added]; see also Compl., ¶ 33.) Thus, Wesco's liability would arise from contract, rather than tort. Further, there are no allegations that Wesco refuses to pay a claim owed such that imposing tort damages would be necessary. (See *Cates*, *supra*, 21 Cal.4th at p. 68.) Accordingly, the Court is persuaded by Wesco's argument that a surety is liable for contract damages, but not liable in tort. (*Id.* at p. 60 [“we hold that recovery for a surety's breach of the implied covenant of good faith and fair dealing is properly limited to those damages within the contemplation of the parties at the time the performance bond is given or at least reasonably foreseeable by them at that time.”]; see also *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514.)

Based on the foregoing, the demurrer to the second cause of action is SUSTAINED with 15 days leave to amend.

f. Sixth Cause of Action – Professional Negligence

Wesco demurs to the sixth cause of action on the ground it is barred against a surety. (Demurrer, p. 8:23-24.) In opposition, Plaintiffs assert they stipulate that the professional negligence cause of action will be repleaded to omit defendant Wesco. (See Opposition, p. 2:17-18.) Accordingly, the demurrer to the sixth cause of action is SUSTAINED without leave to amend.

IV. Conclusion and Order

The demurrer to the entire complaint and third cause of action on the ground they are time-barred is OVERRULED. The demurrer to the second cause of action is SUSTAINED with 15 days leave to amend. The demurrer to the sixth cause of action is SUSTAINED without leave to amend.

The Court shall prepare the final order.

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