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: 10/29/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (10/28/2024) 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	22CV405977	Sun Communications, Inc. vs PMG Builders, Inc. et al	Hearing: Motion to Strike the Complaint and Answer to the Cross-Complaint of Plaintiff/Cross-Defendant Sun Communications Inc. by Defendant/Cross-complainant PMG BUILDERS, INC. and Defendant BUSINESS ALLIANCE INSURANCE COMPANY [**Per Ex Parte Order dated 9/20/24**] Unopposed and GRANTED WITH 10 DAYS LEAVE TO AMEND. Plaintiff and Cross Defendant Sun Communications, Inc. ("Plaintiff" or "Sun" is a corporation. A corporation may only appear through counsel. On July 2, 2024, this court permitted Sun's counsel to withdraw. Since that time Sun has been and remains an unrepresented entity. Sun's complaint and answer to the cross-complaint are stricken with 10 days leave to amend. The court will prepare the order.

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LINE 2	23CV423260	Zaki Jones vs SAN JOSE/EVERGREEN COMMUNITY COLLEGE DISTRICT et al	Hearing: Demurrer scheduled online for Defendant Evergreen College Unopposed and SUSTANED WITHOUT LEAVE TO AMEND. This is the second demurrer and Plaintiff has again failed to file an opposition to the demurrer. Moving party to prepare order for signature by court.
LINE 3	24CV432453	JOHN COOPER vs OUSMANE CABA et al	Hearing: Motion to Strike Plaintiff's First Amended Complaint by Defendant PRICEWATERHOUSECOOPERS LLP Ctrl Click (or scroll down) on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 4	24CV432453	JOHN COOPER vs OUSMANE CABA et al	Hearing: Demurrer scheduled online for Defendant PRICEWATERHOUSECOOPERS LLP Ctrl Click (or scroll down) on Lines 3-4 for tentative ruling. The court will prepare the order.
LINE 5	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Motion: Summary Judgment/Adjudication by Def Albert Yeong Ctrl Click (or scroll down) on Line 5 for tentative ruling. The court will prepare the order.
LINE 6	21CV389915	Richardvon Pey vs OTO DEVELOPMENT, LLC	Motion: Compel Plt's further responses to requests for production of documents, set one; and monetary sanctions by Defendant OTO DEVELOPMENT, LLC Ctrl Click (or scroll down) on Line 6 for tentative ruling. The court will prepare the order.

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DATE: 10/29/2024 TIME: 9:00 A.M.

LINE 7	23CV424848	CREDITORS ADJUSTMENT BUREAU, INC., vs MIRACLE PLUS, INC.	Motion: Plaintiff Creditors Adjustment Bureau, Inc. ("Plaintiff")'s motion to compel responses to second set of special interrogates propounded by Plaintiff to Defendant Miracle Plus, Inc. dba Miracle Maintenance ("Defendant") and for monetary sanctions Unopposed and GRANTED. Defendant to provide code-compliant verified responses, without objections, to second set of special interrogates propounded by Plaintiff to Defendant within 15 days of this order. Defendant to pay monetary sanctions of $1,560 to Plaintiff within 15 days of this order. The request for monetary sanctions against Defendant's counsel is DENIED. Defendant filed a notice of dissolution and withdrawal of its attorney Stephan A. Barber and JRG Attorneys at Law on 9/19/2024. Moving party to prepare order for signature by court.
LINE 8	23CV424848	CREDITORS ADJUSTMENT BUREAU, INC., vs MIRACLE PLUS, INC.	Motion: Plaintiff Creditors Adjustment Bureau, Inc. ("Plaintiff")'s motion to compel responses to second set of demand for production of documents propounded by Plaintiff to Defendant Miracle Plus, Inc. dba Miracle Maintenance ("Defendant") and for monetary sanctions Unopposed and GRANTED. Defendant to provide code-compliant verified responses, without objections, to second set of demand for production of documents propounded by Plaintiff to Defendant within 15 days of this order. Defendant to pay monetary sanctions of $1,560 to Plaintiff within 15 days of this order. The request for monetary sanctions against Defendant's counsel is DENIED. Defendant filed a notice of dissolution and withdrawal of its attorney Stephan A. Barber and JRG Attorneys at Law on 9/19/2024. Moving party to prepare order for signature by court.
LINE 9	22CV395975	Jean-Luc Kayigire vs Bryan Shisler et al	Motion: Set Aside Default/Judgment by Defendants Bryan Shisler and Pro-Auto Showroom Ctrl Click (or scroll down on Line 9 for tentative ruling. The court will prepare the order.

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DATE: 10/29/2024 TIME: 9:00 A.M.

LINE 10	24CV443680	ALEJANDRO ZALDIVAR HERNANDEZ vs FORD MOTOR COMPANY et al	Hearing: Motion hearings to Compel Arbitration and to Stay Action by Defendant GALPIN FORD OFF CALENDAR. [Request for dismissal without prejudice of defendant GALPIN FORD filed on 10/16/2024.]
LINE 11	24CV445907	Jin Yin vs Hiu Yip et al	Hearing: Pro Hac Vice Counsel Renewal as to Xiaoyin Cao by Plaintiff Jin Yin Unopposed and GRANTED. Moving party to submit order for signature by court.
LINE 12	23CV423331	Mabel Kwarteng vs Security Industry Specialist et al	Hearing: Motion to compel Arbitration and Stay court proceedings by Defendant Security Industry Specialist Unopposed and GRANTED. Moving party to prepare order for signature by court.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3-4
Case Name: *John William Cooper v. Abdoulaye Caba et al.*
Case No.: 24CV432453

I. Factual and Procedural Background

Plaintiff John Williams Cooper ("Cooper") brings this action against defendants PricewaterhouseCoopers, LLP ("PwC") and Abdoulaye Caba ("Caba") (collectively, "Defendants").

According to the allegations of the first amended complaint ("FAC"), Caba is a partner, owner, and managerial employee of PwC. (FAC, ¶ 14.) On June 2, 2023, Caba attended a PwC event where he consumed alcohol at lunch with his fellow PwC partners/owners. (FAC, ¶¶ 2, 5.) After the lunch, Caba went to bars and nightclubs and continued to drink with fellow partners/owners of PwC. (FAC, ¶ 6.)

After drinking all night, Caba attempted to drive home on the early morning of June 3, 2023. (FAC, ¶ 7.) Caba's blood alcohol was twice the legal limit. (*Ibid*.) At this same time, Cooper was driving home from work when he was struck from behind by Caba's Tesla, which was traveling at approximately 100 miles per hour. (FAC, ¶ 10.) Cooper was nearly killed and sustained catastrophic and lifelong injuries. (FAC, ¶ 11.)

On July 18, 2024, Cooper filed his FAC, asserting the following causes of actions:
(1) Negligence [against Defendants]; and
(2) Negligent Hiring/Supervision/Retention [against PwC].

On September 5, 2024, PwC filed a demurrer and motion to strike portions of the FAC. Cooper opposes both motions. PwC filed two replies.

II. Demurrer

PwC demurs to the second cause of action on the ground it fails to state facts sufficient to constitute a cause of action, pursuant to Code of Civil Procedure section 430.10, subdivision (e).

a. Legal Standard

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 (*Blank*).) "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.)

b. Negligent Hiring, Supervision, and Retention

"California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital*

Cities (1996) 50 Cal.App.4th 1038, 1054.) "Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Ibid*.; see also *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207 (*Federico*).)

In support of its demurrer, PwC argues that the alleged negligent hiring and supervision must relate to the work and capacity for which an individual is hired. PwC contends the second cause of action is devoid of factual allegations that Caba possessed improper qualities that made him unsuitable for his role as a financial statement auditor. (Demurrer, p. 5:12-16.) Moreover, it asserts, Caba was not hired as a driver or in a similar capacity where driving was a core requirement of his employment. (*Id.* at p. 5:16-18.) Finally, PwC argues that there are no facts PwC had knowledge of Caba's alleged propensities or risks associated with overconsumption of alcohol and driving, or that he had such propensities to begin with. (*Id.* at p. 6:3-4, 14-15.)

In opposition, Plaintiff sets forth the following arguments: (1) Caba posed a "particular risk" to public, and PwC failed to supervise him in connection with company event; (2) the FAC need only allege the ultimate facts and (3) the FAC alleges PwC knew, or should have known, that Caba presented a risk to others and that risk actually materialized. The Court is not persuaded.

As PwC cites in its demurrer, "[a]n employer is not charged with guaranteeing the safety of anyone his employee might incidentally meet while on the job against injuries inflicted independent of the performance of work-related functions. . . . [L]iability for negligence can be imposed only when the employer knows, or should know, that the employee, because of past behavior or other factors, is unfit for the specific tasks to be performed." (*Federico, supra,* 59 Cal.App.4th at p. 1215.) Here, FAC alleges that PwC knew or reasonably should have known of Caba's "dangerous propensities, including those as an intoxicated driver of a vehicle." (FAC, ¶ 39.) The FAC contains no facts to support the conclusory allegation that anyone at PwC was aware that Caba had a propensity to drink and drive at the time he was hired or at any other point while working for PwC. (See *Blank*, *supra*, 39 Cal.3d at p. 318; see also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 ["To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act."]; see also Reply p. 5:27-28.)

Moreover, there are no allegations in the pleading that indicate Caba was working at the time of the subject incident such that PwC would know that Caba was unfit to perform specific tasks in his role at PwC. Specifically, there are no allegations that Caba was hired to drive a vehicle or even that attending the PwC luncheons was a requirement in Caba's role at PwC. (See *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339-1340 ["Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship."].)

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

III. Motion to Strike

PwC moves to strike five portions of the FAC pursuant to Code of Civil Procedure section 436.

a. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

b. Portions of the FAC

PwC moves to strike the following from the FAC:

(1) **Paragraph 1** in its entirety, stating "[t]his case arises out of Defendant PWC's long history of mixing company sponsored events with the overconsumption of alcohol. Predictably, this is not the only instance in which such an irresponsible combination resulted in catastrophic injuries." (FAC; Page 1, Lines 24-26; Paragraph 1.)

(2) **Paragraph 27** in its entirety, stating "[o]n or about January 1, 2024, Defendant Caba pled no contest to the aforementioned charges. (Santa Clara County Criminal Case No. C2309913)." (FAC; Page 5, lines 7-8; Paragraph 27);

(3) **Portion of Paragraph 7**, last sentence, stating "[d]riving under such circumstances was a conscious disregard for the safety of others." (FAC; Page 2, lines 18- 19; Paragraph 7.)

(4) **Portion of Paragraph 20**, stating "[a]nd that such actions constitute a conscious disregard for the safety of others." (FAC; Page 4, lines 15-16; Paragraph 20.); and

(5) **Prayer for Relief**, Item 3, stating "[f]or exemplary/punitive damages (*Taylor v. Superior Court* (1979) 24 Cal.3d 890; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 88)." (FAC; Page 7, Lines 14-15; Item 3.)

c. Analysis

The motion to strike Item No. 1 is GRANTED without leave to amend. The Court finds that this allegation is irrelevant to the current case. In opposition, Cooper argues that Paragraph 1 is relevant to show whether PwC knew or should have known of the particular risk Caba posed to others if allowed to drive after overconsuming alcohol at a company event. (Opposition, p. 4:20-22.) This argument is not persuasive given that the first paragraph does not involve Caba and there is nothing to indicate that anyone involved in the prior incident was responsible for hiring, supervising, or retaining Cooper.

The motion to strike Item No. 2 is GRANTED without leave to amend. PwC argues that Paragraph 27, referencing Caba's plea of no contest in the criminal matter is in violation of

Evidence Code section 1153. Evidence Code section 1153 states: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals." Here, on a pleading motion, there is no evidence being considered, moreover, there are no allegations of a withdrawn guilty plea or an offer to plead guilty. (See e.g., *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1052 ["While defendant's no contest pleas are not conclusive, they are admissible as party admissions[.]"].) In any event, the Court does not find that this allegation is relevant to either claim against PwC.

The motion to strike Item Nos. 3-5 is GRANTED with 15 days leave to amend. PwC moves to strike portions of Paragraph 7, 20, and the prayer for punitive damages on the ground Cooper's punitive damages allegations are not pled with the requisite specificity. (See Motion, p. 11:18-19.) As noted above, the Court sustained the demurrer with 15 days leave to amend as to the second cause of action. Thus, the Court need only focus on the negligence cause of action in assessing Cooper's claim for punitive damages.

"[T]o state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294." (*Turman, supra,* 191 Cal.App.4th at p. 63.) The statutory elements include allegations defendant has been guilty of oppression, fraud, or malice. (*Ibid*.) Malice is conduct intended by defendant to cause injury to plaintiff or despicable conduct which is carried on by defendant with a willful and conscious disregard of the rights or safety of others. (*Ibid*.; Cal. Civ. Code, § 3294, subd. (c).) Oppression is despicable conduct that subjects plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights. (Cal. Civ. Code, § 3294, subd. (c)(2).) "Fraud is an intentional misrepresentation, deceit, or concealment of a material fact known to defendant with the intention of depriving plaintiff of property or legal rights or otherwise causing injury." (*Id.* at subd. (c)(3).) Simply pleading the terms malice, oppression or fraud by themselves is insufficient to support a claim for punitive damages; a plaintiff must allege sufficient facts supporting the existence of malice, oppression, or fraud. (*Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.)

"When the defendant is a corporation . . . the oppression, fraud, or malice must be perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of the corporation." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164; see also Cal. Civ. Code, § 3294, subd. (b).) The purpose of this requirement is to "limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.) Here, the FAC is devoid of allegations that any PwC officer, director, or managing agent perpetrated, authorized, or knowingly ratified oppressive, fraudulent, or malicious conduct. Additionally, the Court finds persuasive PwC's argument that there are no allegations that PwC acted intentionally to injure Cooper. (See Motion, p. 13:8-9.)

Finally, the Court is persuaded that neither *Taylor v. Superior Court of Los Angeles County* (1979) 24 Cal.3d 890 (*Taylor*) nor *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 88 (*Dawes*) support Cooper's claim for punitive damages based on a conscious and deliberate disregard of the interests of others such that PwC's conduct was willful or wanton. (See FAC, Prayer for Relief, 3.) In *Taylor*, an intoxicated driver caused an accident, injuring another driver. (*Taylor*, *supra*, 24 Cal.3d at p. 893.) The allegations included defendant's other drunk driving accidents, arrests, and incidents, including the allegation that the defendant had

recently completed a term of probation for a drunk driving conviction. (*Ibid.*) In *Dawes*, the intoxicated defendant drove at a high speed and ran a stop sign, while zigzagging through traffic, in the middle of the afternoon, and in locations of high pedestrian and vehicle traffic, resulting in a crash injuring the plaintiff. (*Dawes, supra*, 111 Cal.App.3d at p. 88.) The appellate court concluded that, from these allegations, "the factfinder could reasonably find that [the intoxicated driver] acted with 'malice' -- with a conscious disregard of safety and the probable injury of others as a result of his conduct." (*Id.* at pp. 88-89.) Notably, after both *Taylor* and *Dawes* were decided, the punitive damages statute was amended. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "As amended . . . the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found. [Citations.]" (*Ibid*.) As PwC notes in its reply, *Taylor* and *Dawes* are largely inapposite given that PwC is Caba's employer and not the driver of the vehicle. (See Reply, p. 8:2-4.)

In opposition, Plaintiff contends that any argument made by PwC that it cannot be subject to punitive damages for a nonintentional tort is wrong because California courts have held that under some circumstances, punitive damages may be recoverable for unintentional torts based on vicarious liability. (See Opposition, p. 9:3-10, citing *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1261 (*CRST*).) Here, however, it appears that both the first and second causes of action are based on direct liability. The first cause of action alleges that PwC breached *its* duty to use reasonable care when holding work-related events and providing alcohol to employees. (FAC, ¶ 32.) Additionally, the second cause of action for negligent supervision is one of direct liability. Thus, *CRST* is not helpful here. (See e.g., *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1174 [""Something more than the mere commission of a tort is always required for punitive damages.""".)

Based on the foregoing, the motion to strike is GRANTED in part without leave to amend, GRANTED in part with 15 days leave to amend, and DENIED in part.

IV. Conclusion and Order

The demurrer to the second cause of action is SUSTAINED with 15 days leave to amend. The motion to strike Item Nos. 1-2 is GRANTED without leave to amend. The motion to strike Item No. 2 is DENIED. The motion to strike Item Nos. 3-5 is GRANTED with 15 days leave to amend.

The Court shall prepare the final order.

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Calendar Line 5

Case Name: *Giuliani Construction and Restoration, Inc. v. Rancho Homeowner's Association, et al.*
Case No.: 21-CV-383107

Motion for Summary Judgment, or in the Alternative, Summary Adjudication to the Complaint by Defendant Albert Yeong

Factual and Procedural Background

Plaintiff Giuliani Construction and Restoration, Inc. ("GCR") is a licensed general contractor. (Complaint at ¶ 1.) Defendant Rancho Homeowners Association ("HOA") is a homeowner's association comprised of eight condominium units, designated A through H, within a single building located at 95 Rancho Drive in San Jose ("Property"). (Id. at ¶ 3.) Defendant Albert Yeong ("Yeong") resides at Unit F of the Property and is a member of defendant HOA. (Id. at ¶ 5.)

In 2018, the Property suffered damage caused by a water leak. (Complaint at ¶ 8.) The leak originated in one of the units at the Property but damaged a substantial portion of the building. (Ibid.) In March 2018, defendant HOA, by and through its Chief Executive Officer Sergio Gonzalez, contracted with plaintiff GCR to repair the water damage as it related to the structure of the building but not the interior of the individual condominium units ("Project"). (Id. at ¶¶ 4, 9.) Defendant HOA made payments to plaintiff GCR through September 2020, but ceased all further payments thereafter leaving the amount of $95,000 due and owing for work performed. (Id. at ¶ 10.)

Some individual owners of units at the Property entered into separate contracts with plaintiff GCR for the interior. (Complaint at ¶ 11.) Defendant Yeong was one such owner who contracted with plaintiff GCR for work on the interior of unit F ("Yeong Contract"). (Id. at ¶ 12.) More than one year after completion of the Project, defendant Yeong made allegations against plaintiff GCR for defective work. (Ibid.) However, defendant Yeong has refused and presently refuses to allow plaintiff GCR to meaningfully assess the allegations in the manner and form requested by plaintiff GCR. (Ibid.) Defendant Yeong has also made statements to defendant HOA to prevent HOA from making payments to plaintiff GCR. (Ibid.)

On May 27, 2021, plaintiff GCR filed the operative complaint against defendants HOA and Yeong alleging causes of action for:

(1) Breach of Contract [against defendant HOA];
(2) Common Counts [against defendant HOA];
(3) Quantum Meruit [against defendant HOA];
(4) Prompt Payment Penalties [against defendant HOA];
(5) Intentional Interference with Contractual Relations [against defendant Yeong];
(6) Breach of Implied Covenant of Good Faith and Fair Dealing [against defendant Yeong]; and
(7) Declaratory Relief [against defendant Yeong].

On August 23, 2021, defendant Yeong filed an answer setting forth a general denial and affirmative defenses.[1]

On September 8, 2021, defendant HOA filed an answer also asserting a general denial and affirmative defenses.

On July 24, 2024, defendant Yeong filed the motion presently before the court, a motion for summary judgment or, in the alternative, summary adjudication to the complaint. Plaintiff GCR filed written opposition. Yeong filed reply papers. Both sides filed evidentiary objections.

Trial is scheduled for January 13, 2025.[2]

Motion for Summary Judgment, or in the Alternative, Summary Adjudication

Defendant Yeong moves for an order of summary judgment to the complaint as there are no triable issues of material fact. In the alternative, Yeong moves for summary adjudication with respect to the fifth, sixth, and seventh causes of action.

Plaintiff GCR's Evidentiary Objections

In opposition, plaintiff GCR objects to defendant Yeong's declaration at paragraph 22 which states: "In August 2023, Giuliani apparently settled its lawsuit against the HOA." (See Plaintiff GCR's Evidentiary Objections.) GCR objects on grounds of lack of foundation and lack of personal knowledge. The court however declines to rule on the objection as it is not material to the outcome of the motion for reasons explained below. (See Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

Defendant Yeong's Evidentiary Objections

In reply, defendant Yeong submitted objections to evidence presented in the opposition. The court SUSTAINS the objection to the declaration of Anthony Giuliani ("Giuliani") at page 3, lines 5-6 on hearsay grounds. The court declines to address the objections to the declaration of Jonathan Robb ("Robb") at Exhibit F, pages 1-2 as it is not material to the outcome of the motion for reasons articulated below. The court OVERRULES the remaining objections in their entirety.

Legal Standard

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[1] The parties have also filed cross-complaints in this action which are not the subject of the instant motion for summary judgment or, in the alternative, summary adjudication.

[2] Plaintiff GCR filed a motion to continue the trial set for hearing on November 14, 2024 (advanced from December 10, 2024 by *ex parte* order).

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.)

A triable issue of material fact exists "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." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. [Citation.] 'A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment.' [Citation.]" (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630.)

"[S]ummary judgment (or summary adjudication) is a drastic remedy and should be used with caution. [Citation.] Because summary judgment is a drastic procedure all doubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion. [Citations.]" (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 660; see *Kernan v. Regents of University of California* (2022) 83 Cal.App.5th 675, 684 ["The drastic remedy of summary judgment may not be granted unless reasonable minds can draw only one conclusion from the evidence."].)

Fifth Cause of Action: Intentional Interference with Contractual Relations

"[I]n California, the law is settled that 'a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract.' [Citation.] To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce

a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.] To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action. [Citation.]" (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

As a preliminary matter, on summary judgment, "the pleadings frame the issues to be resolved. ' "The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute." [Citation.] "The function of the pleadings in a motion for summary judgment [adjudication] is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." [Citations.]' [Citations.]" (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 477 (*Snatchko*).)

Thus, "[t]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493; see *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182 ["We do not require [defendant] to negate elements of causes of action plaintiffs never pleaded."].)

In addition, "[a] plaintiff may not avoid summary judgment by producing evidence to support claims outside the issues framed by the pleadings." (*Snatchko, supra*, 187 Cal.App.4th at p. 477.) Rather, "[a] plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90 (*Knapp*).)

According to the complaint, the fifth cause of action for intentional interference with contractual relations arises from a contract entered into between plaintiff GCR and the HOA for construction services (the "HOA Contract"). (Complaint at ¶ 14.) Pursuant to the HOA Contract, GCR agreed to furnish certain labor, materials, equipment and machinery necessary to complete demolition and reconstruction work for the HOA, in exchange for payment. (Ibid.)

Defendant Yeong allegedly knew about the HOA Contract and prevented performance of the contract or made performance more difficult by: (1) reporting alleged defects to the HOA to compel their repair that were not under the scope of work of the HOA Contract; (2) by demanding payment be withheld or refusing to consent to pay plaintiff GCR for HOA Contract; and (3) by refusing site access to GCR to assess alleged defects. (Complaint at ¶¶ 33-35.)

On summary judgment, defendant Yeong argues plaintiff GCR has no evidence establishing that he intentionally interfered with the HOA Contract.

<u>No Evidence of Interference</u>

As a threshold matter, defendant Yeong contends there is undisputed evidence demonstrating no interference to establish the fifth cause of action. In support, Yeong directs the court to deposition excerpts from Giuliani, GCR's person most knowledgeable where he testified as follows:

> Q: Was there any interference with the project by the HOA or by any owners of the units?
>
> Mr. Barton: Objection; vague as to "interference."
>
> A: No.
>
> …
>
> Q: Did my client, Mr. Albert Yeong, ever interfere with Giuliani Construction's work in Unit F or any of the other units?
>
> A: Not to my knowledge.

(Yeong's Separate Statement of Undisputed Facts ["SSUF"] at Nos. 22-23 to the 5th COA; Norby Decl. at ¶ 11, Ex. U [Giuliani Depo at pp. 21:3-7, 44:14-17].)

The court however does not find this evidence to be persuasive as the focus of the fifth cause of action refers specifically to interference with the HOA Contract. The cited deposition testimony appears to be broader as it includes interference during the course of the project or construction.[3] Thus, such evidence does not weigh in favor of summary judgment or summary adjudication.

Reporting Alleged Defects to the HOA

The complaint alleges in part that defendant Yeong interfered with performance of the HOA Contract by reporting alleged defects to the HOA to compel their repair that were not under the scope of work of the HOA Contract. (Complaint at ¶ 35.)

Defendant Yeong contests this allegation by submitting plaintiff GCR's response to special interrogatory number ("SI") four which asks the following: "Please DESCRIBE the alleged defects that DEFENDANT YEONG reported to the HOA that were under the scope of work of the HOA Contract, as stated in YOUR Complaint at paragraph 35." (See Norby Decl. at ¶ 3, Ex. M.) GCR's response to SI No. 4 included objections and a reference to its response to SI No. 1. (Ibid.) GCR's response to SI No. 1 however did not answer the question posed in SI No. 4 and thus fails to establish evidence in support of this allegation. (See *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 587-588 [a defendant may meet its initial burden on summary judgment by showing, "through factually devoid discovery responses[,] that the plaintiff does not possess and cannot reasonably obtain needed evidence"]; see also *Bayramoglu v. Nationstar Mortgage LLC* (2020) 51 Cal.App.5th 726, 733 ["A plaintiff's 'factually devoid' discovery responses may be used to shift the burden of production onto the

[3] Defendant Yeong also cites to Giuliani's deposition testimony at pages 19:19-21 and 20:3-10. But, these portions are unavailing as they do not directly address the claim for interference with contractual relations.

plaintiff when the 'logical inference' is that the plaintiff possesses no facts to support his or her claims."].) Defendant Yeong also submits undisputed evidence that he reported defects to the HOA including items that *were* under the scope of work of the HOA Contract. (Yeong's SSUF at No. 15 to the 5th COA.) Plaintiff GCR appears to concede this issue as it fails to address this allegation with any supporting evidence in opposition to the motion. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Refusing to Pay Plaintiff GCR for the HOA Contract

The complaint also alleges that defendant Yeong interfered with performance of the HOA Contract by demanding payment be withheld or refusing to consent to pay plaintiff GCR for the HOA Contract. (Complaint at ¶ 35.)

Defendant Yeong challenges this allegation with his declaration, signed under penalty of perjury, in support of the motion where he states: "I never told Rancho HOA not to pay Giuliani Construction. I never demanded that payment be withheld, nor did Rancho HOA ever ask for my consent to pay Giuliani Construction." (Yeong's SSUF at Nos. 18-19 to the 5th COA [Yeong Decl. at ¶ 23].) Yeong meets his initial burden with this evidence and thus shifts the burden to plaintiff GCR to raise a triable issue of material fact.

In opposition, plaintiff GCR disputes this evidence in part with a declaration from Giuliani where he indicates: "In March/April 2021, I was informed by individuals at Giuliani that they were having difficulty accessing Mr. Yeong's unit for a possible inspection." (See Plaintiff GCR's Disputed Facts at Nos. 18-19 [Giuliani Decl. at ¶ 13].) Such evidence however constitutes hearsay and is therefore inadmissible. (See Defendant Yeong's Evidentiary Objections; see also *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1026-1027, overruled on another ground in *Regents of University of California v. Super. Ct.* (2018) 4 Cal.5th 60 ["Evidence containing hearsay is not admissible evidence and will not raise a triable issue defeating summary judgment."].) Nor does the evidence specifically address the subject allegation regarding refusal to make payment and thus fails to raise a triable issue of fact.

Plaintiff GCR relies also on a declaration from Robb who was formerly counsel of record for GCR until December 2023. (Robb Decl. at ¶ 1.) GCR directs the court to paragraphs 4-10 of the Robb Declaration along with Exhibits A-F. But, this evidence also fails to specifically consider the allegation regarding refusal to make payment and therefore fails to raise a triable issue of fact.

Refusing Site Access to Plaintiff GCR

Finally, the complaint alleges that defendant Yeong interfered with performance of the HOA Contract by refusing site access to GCR to assess the alleged defects of his unit. (Complaint at ¶ 35.)

Defendant Yeong contests this allegation with his declaration where he states: "I never refused access to my unit." (Yeong's SSUF at No. 21 to the 5th COA [Yeong Decl. at ¶¶ 19-20, 23].) In fact, Yeong indicated he was open to having an inspection and that he was eager to provide GCR with access so they could begin the repair work. (Yeong Decl. at ¶ 20.) Yeong meets his initial burden with this evidence and thus shifts the burden to plaintiff GCR to raise a triable issue of material fact.

In opposition, plaintiff GCR again disputes this evidence in part with a declaration from Giuliani where he states: "In March/April 2021, I was informed by individuals at Giuliani that they were having difficulty accessing Mr. Yeong's unit for a possible inspection." (See Plaintiff GCR's Disputed Facts at No. 21 [Giuliani Decl. at ¶ 13].) As stated above, this evidence is hearsay and inadmissible. Furthermore, the cited evidence does not affirmatively demonstrate that Yeong *refused site access* to plaintiff GCR and thus fails to raise a triable issue of fact.

Plaintiff GCR relies also on paragraphs 4-10 along with Exhibits A-F from the Robb declaration. (See Plaintiff GCR's Disputed Fact at No. 21; Plaintiff GCR's Additional Facts at Nos. 12-19.) The Robb declaration sets forth the following timeline of events:

- On January 11, 2021, I (Robb) received a letter from the law firm of Parker Stansbury sent on behalf of defendant Yeong which set forth 17 alleged defects with defendant Yeong's property, and a request they be addressed. A true and correct copy of the letter is attached as Exhibit A;

- Upon receipt of the letter, it was unclear if Parker Stansbury represented Mr. Yeong, or they simply consulted with him. In response, on January 28, 2021, I drafted a detailed letter stating the need to walk the property to assess the claimed defects, as well as a complete list of issues. A true and correct copy of the letter is attached as Exhibit B;

- In response to my letter of January 28, 2021, on February 9, 2021, I received a responsive letter stating that Parker Stansbury had only consulted with Mr. Yeong and did not represent him. The letter indicated that my January 28, 2021 letter, which included the request to walk the property, had been forwarded to Mr. Yeong. A true and correct copy of the letter is attached as Exhibit C;

- After receiving the February 9th letter which stated my prior letter was forwarded to Mr. Yeong, I did not receive any communication from him regarding a response to my January 28th letter, nor Giuliani's request to walk the property;

- In March 2021, I learned that Mr. Yeong had filed a complaint against Giuliani Construction with the Contractor's State License Board (CLSB). On behalf of Giuliani Construction, I prepared a response. My responsive letter highlighted the prior letter of January 28, 2021, and the need to walk the property, as well as the need for a response from Mr. Yeong. A true and correct copy of the letter is attached as Exhibit D;

- On or about March 15, 2021, Giuliani Construction received a letter from a claims examiner at Tokio Marine (surety bond company for Giuliani) stating that Mr. Yeong was making complaints about the claimed ongoing defects in his unit. I prepared a response on behalf of Giuliani and again highlighted my January 28th letter responding to the claims and the need for a unit inspection. A true and correct copy of the letter is attached as Exhibit E;

- After not hearing anything further from Mr. Yeong, I communicated this issue to counsel for the HOA and expressed the need for access. A true and correct copy of the relevant email correspondence is attached as Exhibit F. (Robb Decl. at ¶¶ 4-10.)

Based on this evidence, plaintiff GCR asserts defendant Yeong was aware of the need for GCR to conduct a site inspection and refused access to GCR as he never responded to the request. But, it is not entirely clear from this evidence if Yeong actually received these letters. For example, there is no deposition testimony or interrogatory responses from Yeong demonstrating he had knowledge of these letters. Nor is there evidence that GCR communicated directly with Yeong by phone, email or other means to inform him about the need for a site inspection.

Nevertheless, plaintiff GCR's responsive letters to Yeong's complaints to the CLSB and the claims examiner presumably put Yeong on notice of GCR's need for a site inspection. Thus, the court may reasonably infer that, at a minimum: (1) such letters were forwarded to defendant Yeong in response to those actions; (2) Yeong had notice of GCR's need for a site inspection; and (3) Yeong deliberately refused to allow GCR to access his unit. (See *Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 522 [a reasonable inference may create a triable issue of fact foreclosing summary judgment]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283 ["summary judgment should not be granted unless the evidence cannot support any reasonable inference for plaintiff"].) And, if such evidence were credited by the trier of fact, plaintiff GCR may prevail on its claim for intentional interference with contractual relations. While Yeong denies there was any contact with GRC's attorney or that he received a request for a site inspection (see Norby Decl. at Ex. J ["As a clarification, Giuliani's attorney never contacted me about anything, let alone requesting for an inspection."]), that demonstrates only a conflict in the evidence which must be resolved by the trier of fact at trial, not on a motion for summary judgment or summary adjudication. (See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879-880 [there is no weighing of evidence on a motion for summary judgment]; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840 ["The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true."]; see also *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1110, fn. 1 ["A summary judgment simply cannot be defended with a credibility argument."].)

Damages

Even if there is evidence of interference, defendant Yeong contends plaintiff GRC does not possess and cannot reasonably obtain evidence of damages in support of this cause of action. (See Yeong's SSUF at No. 24 to the 5th COA.) The court has reviewed the evidence in support of this material fact and concludes that Yeong has not met his initial burden in disposing of GCR's claim for damages in connection with the fifth cause of action.

Regardless, plaintiff GCR has submitted evidence of damages to raise a triable issue of fact to support the intentional interference cause of action. (See Plaintiff GCR's Disputed Fact at No. 24 [Giuliani Decl. at ¶¶ 14-15].)

Therefore, the motion for summary judgment is DENIED. The motion for summary adjudication to the fifth cause of action is DENIED.

Sixth Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing

"[E]very contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.)

"The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation." (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031.) "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690.) "In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153.)

"In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." (*Rosenfeld v. JPMorgan Chase Bank, N.A.* (N.D. Cal. 2010) 732 F. Supp.2d 952, 968; CACI No. 325.)

According to the complaint, the breach of implied covenant of good faith and fair dealing claim arises in connection with the Yeong Contract. (Complaint at ¶ 39.) Plaintiff GCR alleges defendant Yeong unfairly deprived GCR of the benefits under the Yeong Contract by refusing site access to investigate Yeong's allegations of defects and potentially make repairs and separately by making false claims against GCR to the HOA and thereby causing the HOA to refuse to issue payments due and owing to GCR. (Id. at ¶ 41.)

Defendant Yeong argues there is no viable claim for breach of the implied covenant of good faith and fair dealing as there is no evidence that Plaintiff was deprived of the benefits under the Yeong Contract or that it suffered damages. (See Motion at p. 19:18-27.) In particular, Yeong asserts there is no evidence he refused site access to plaintiff GCR to inspect his unit. (Yeong's SSUF at No. 4 to the 6th COA.) The court however has already considered and rejected this argument for reasons stated above in connection with the discussion of the fifth cause of action. (See Plaintiff GCR's Disputed Fact at No. 4.) Similarly, the court also rejects Yeong's argument with respect to damages for reasons articulated above. (See Plaintiff

GCR's Disputed Fact at No. 7.) Having raised a triable issue of fact, the court finds that summary adjudication is not warranted.[4]

Consequently, the motion for summary adjudication to the sixth cause of action is DENIED.

Seventh Cause of Action: Declaratory Relief

Code of Civil Procedure section 1060, which governs actions for declaratory relief, provides: "Any person interested under a written instrument …, or under a contract, or who desires a declaration of his or her rights or duties with respect to another …may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action … for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract."

"Summary judgment is appropriate in a declaratory relief action when only legal issues are presented for the court's determination. [Citation.] The defendant's burden in a declaratory relief action 'is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief.' [Citation.]" (*California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 185.)

The complaint at paragraph 44 summarizes the claim for declaratory relief as follows:

> "Plaintiff is informed and believes and, on that basis, alleges that an actual controversy has arisen and now exists between Plaintiff and Yeong relative to their respective rights and duties as to whether GCR performed untimely or defective work at Yeong's property, or otherwise breached the contract between them. Yeong has made those allegations to agencies and sureties which may cause prejudice to GCR." (Complaint at ¶ 44.)

On summary adjudication defendant Yeong argues there is no actual controversy to support declaratory relief as plaintiff GCR seeks to redress past wrongs. (See Yeong's SSUF at Nos. 3, 5, 6.) On this issue, the Sixth Appellate District recently stated:

> "It is well established that the ' "[d]eclaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." [Citations.]' [Citation.] Accordingly, 'complaining of past acts' by the defendant does not constitute an actual controversy ' "*relating to the legal rights and duties of the respective parties*" within the meaning of Code of Civil Procedure

[4] The court declines to consider whether Yeong made false claims against GCR to the HOA which caused the HOA to refuse to issue payments to GCR as a triable issue of fact exists on whether Yeong refused site access to his unit. (See *Gleason v. Klamer* (1980) 103 Cal.App.3d 782 [appellate court reversed trial court's order granting summary judgment because there was a single triable issue of fact].)

section 1060.' [Citation.]" (*City of Gilroy v. Super. Ct.* (2023) 96 Cal.App.5th 818, 834.)

Here, plaintiff GCR seeks a declaration of rights and duties with respect to whether it performed untimely or defective work at Yeong's property or otherwise breached the contract between them. (Complaint at ¶ 44.) Such allegations however refer to past wrongs and thus, as a matter of law, do not constitute a proper subject of declaratory relief.

In opposition, plaintiff GCR contends the declaratory relief claim is adequate as it seeks a determination of future harm including, complaints by defendant Yeong to the CSLB and the bond surety. (See OPP at p. 10:7-13; Plaintiff GRC's Additional Facts at Nos. 16-17.) In short, GCR asserts a determination by the court is needed as to the scope of GRC's obligations relative to the alleged defects claimed by Yeong. (See OPP at p. 10:15-17.)

But, as stated above, motions for summary judgment and summary adjudication are framed by the pleadings. The issues raised here in opposition are not incorporated as facts in support of the seventh cause of action. Stated another way, the declaratory relief claim does not include allegations regarding complaints made by Yeong to the CLSB and bond surety. Instead, the seventh cause of action appears confined to the Yeong Contract and whether GCR performed untimely or defective work at Yeong's property. To the extent that plaintiff GCR intended to rely on these unpleaded theories, its remedy was to seek leave to amend the complaint before the hearing on this motion. (*Knapp, supra,* 123 Cal.App.4th at p. 90.) No such motion to amend is before the court and this court cannot rely on an unpleaded theory to defeat the instant motion for summary adjudication to the declaratory relief claim. (See *Whelihan v. Espinoza* (2003) 110 Cal.App.4th 1566, 1576 ["a party cannot successfully resist summary judgment on a theory not pleaded"]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258, fn. 7 ["To allow an issue that has not been pled to be raised in opposition to a motion for summary judgment in the absence of an amended pleading, allows nothing more than a moving target."]; see also *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1353 [plaintiff whose complaint alleged negligence but not a theory of negligence per se and who did not seek to amend complaint to include such allegations cannot defeat summary judgment by raising a theory of negligence per se].)

Accordingly, the motion for summary adjudication to the seventh cause of action is GRANTED.

Disposition

The motion for summary judgment to the complaint is DENIED.

The motion for summary adjudication to the fifth and sixth causes of action is DENIED.

The motion for summary adjudication to the seventh cause of action is GRANTED.

The court will prepare the Order.

- oo0oo -

Calendar Line 6
Case Name: *Richardvon Pey vs OTO DEVELOPMENT, LLC, et al.*
Case No.: 21CV389915

Defendant Oto Development, LLC ("Defendant")'s motion pursuant to Code of Civil Procedure ("CCP")[5] sections 2031.310 and 2031.320 for an order to compel plaintiff Richardvon Pey ("Plaintiff") to compel further responses (and responsive documents) in response to Defendants' Request for Production, Set One ("RPD") Nos. 1-24, and for monetary sanctions, is GRANTED IN PART.

Discussion

A party may move to compel a further response to a demand for production of documents if the demanding party deems that the statement of compliance with the demand is incomplete; the representation of inability to comply is inadequate, incomplete, or evasive; or an objection in the response is without merit or too general. (§ 2031.310, subd. (a).) The motion must set forth specific facts showing good cause justifying the discovery sought by the demand. (§ 2031.310, subd. (b)(1).)

"The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (§ 2031.310, subd. (b)(2).) "A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (§ 2016.040.)

Discovery Requirements

A party to litigation may obtain discovery by inspecting and copying documents and tangible things in the possession, custody, or control of any other party to the action. (§ 2031.010, subd. (a).)

A party to whom a document demand has been directed "shall respond separately to each item or category of item by any of the following: [¶] (1) A statement that the party will comply with the particular demand … . [¶] (2) A representation that the party lacks the ability to comply with the demand … . [¶] [or] (3) An objection to the particular demand … ." (§ 2031.210, subd. (a).)

The first paragraph of the response must identify the responding party, the set number, and the identity of the demanding party. (§ 2031.210, subd. (b).)

[*1358]

"Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand … ." (§ 2031.210, subd. (c).)

[5] Unspecified statutory references are to the CCP.

> The responding party's response to a production demand must be verified unless it contains only objections. (§ 2031.250.)
>
> Section 2031.280 prescribes the form in which items must be produced. As recently amended, it requires that a document "be identified with the specific request number to which the documents respond." (*Id.*, subd. (a).) This replaces the prior requirement that documents "either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand." (Former § 2031.280, subd. (a).)
>
> There is no requirement that a response identify a document with the specific request to which the document applies.
>
> There is no requirement that a document production be verified, nor that documents be Bates labeled.

(*Pollock v. Superior Court* (2023) 93 Cal.App.5th 1348, 1357-1358.)

RPD Nos. 4,5 and 8-24

Plaintiff's amended response to RPD Nos. 4, 5, and 8 -24 state:

> Plaintiff renews all of the objections and privileges made in his original response to this request. Subject to and without waiving said objections and privileges, Plaintiff presently responds as follows:
> Plaintiff intends to retrieve many documents in support from Defendant. Discovery is ongoing.

Plaintiff's amended response to RPD Nos. 4, 5, and 8-24 were *not* code compliant. (CCP § 2031.230.) However, Plaintiff's second amended response to RPD Nos. 4, 5, and 8-24 (verified and served on or about 10/21/2024 attached to the opposition papers) state:

> Plaintiff incorporates and renews all of the previous responses, objections and privileges made to this request in his original and first amended response. In addition to those previous responses, and subject to and without waiving said objections and privileges, Plaintiff presently responds as follows:
>
> To the extent Plaintiff has any documents responsive to these requests, they have been produced in Plaintiff's document production bates stamped "Plaintiff Pey 001 to 049". Plaintiff has no additional documents responsive to these requests in his possession, custody or control. Plaintiff has made a reasonable and good-faith inquiry to all persons and organizations related to these matters and has not discovered further documents, photos, videos or other tangible/tangible things responsive to this request. Plaintiff is unable to admit or deny if any documents responsive to this request exist or ever existed, however, Plaintiff believes that there are documents in Defendants control that are responsive, but Plaintiff is unable to provide any specific despription [(sic.) description].

Defendant's motion to compel further response (and responsive documents) to RPD Nos. 4, 5, and 8-24 is DENIED as MOOT. Plaintiff's second amended response to RPD Nos. 4, 5, and 8-24 is code compliant. (§ 2031.230.) However, Plaintiff refused to provide this second amended response despite Defendant's good faith meet and confer efforts until almost a month *after* this motion to compel was filed and served.

RPD Nos. 1-3 and 6-7

Plaintiff's initial response to RPD Nos. 1-3 and 6-7 state in part:

Without waiving said objections or Plaintiff's rights thereunder, Plaintiff responds as follows: Plaintiff will comply with this demand, and all documents in the demanded category that are in the possession, custody or control of Plaintiff will be included in the production.

This initial response to these requests was code compliant. (§ 2031.230.) However, Plaintiff's amended response to RPD Nos. 1-3, and 6- 7 state:

> Plaintiff renews all of the objections and privileges made in his original response to this request. Subject to and without waiving said objections and privileges, Plaintiff presently responds as follows:
> Plaintiff produces all medical records, various government complaints and a Declaration of a co-worker who declares to the events Plaintiff complains of at OTO. Plaintiff intents to retrieve many documents in support from Defendant. Discovery is ongoing.

Plaintiff's amended response to RPD Nos. 1-3 and 6-7 is *not* code compliant. (§ 2031.230.) It did *not* incorporate the language from Plaintiff's initial response that "Plaintiff will comply with this demand, and all documents in the demanded category that are in the possession, custody or control of Plaintiff will be included in the production." Plaintiff's second amended response (served and verified on 10/21/2024 attached to the opposition papers) did *not* include RPD Nos. 1-3 and 6-7.

Defendant's motion to compel Plaintiff's further response (and responsive documents) to RPD Nos. 1-3 and 6-7 is GRANTED. Plaintiff shall serve a code-compliant verified further response to RPD Nos. 1-3 and 6-7 confirming that all responsive documents in Plaintiff's possession, custody or control have been produced within 15 days of this order. If there are any responsive documents to RPD Nos. 1-3 and 6-7 in Plaintiff's possession, custody or control (that have not already been produced by Plaintiff), they must be produced within 15 days of this order.

Untimely Opposition

Defendant's request in its reply to strike (or not consider) the Plaintiff's untimely opposition (filed on 10/21/2024 and served on 10/22/2024 [per proof of personal service filed on 10/22/2024]) is DENIED. Plaintiff's opposition was untimely, but Defendant was able to address the arguments raised on the merits in its reply. Accordingly, the court exercised its discretion to consider both the opposition and reply papers.

Monetary Sanctions

Sanctions Requirements

A party or attorney may be sanctioned for misusing the discovery process. (§ 2023.030.)

Misuse of the discovery process includes, as pertinent here, "[u]sing a discovery method in a manner that does not comply with its specified procedures" (§ 2023.010, subd. (b)) and unsuccessfully opposing a motion to compel without substantial justification (*id.*, subd. (h))
.
To avoid sanctions, an unsuccessful opponent to a motion to compel may show "substantial justification" for his or her position—i.e., a rational basis to conclude that the party's failure to fulfill its discovery obligations was justified. (*Foothill Properties v. Lyon/Copley Corona Associates.* (1996) 46 Cal.App.4th 1542, 1557 (*Foothill Properties*).) Substantial justification is justification that is "clearly reasonable because it is well grounded in both law and fact." (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1434.)

(*Pollock v. Superior Court* (2023) 93 Cal.App.5th 1348, 1358.)

Defendant's request for monetary sanctions in the amount of $10,651 is GRANTED IN PART. Plaintiff and Plaintiff's counsel Anthony M. Rubio of Rubio Law (jointly and severally) shall pay Defendant the reasonable amount of $3,500 within 15 days of this order.

This was a relatively simple discovery motion. The number of hours and rates charged by Defendant's counsel were not supported by sufficient detail to justify the $10,651 amount requested for such a simple motion. However, Defendant did need to incur a reasonable amount of attorney's fees to bring this motion, and the opposition raised arguments that justified a reply. The court finds that 10 hours at $350 per hour is reasonable for a total of $3,500 for this motion.

Plaintiff's argument that the motion was untimely is unpersuasive.
Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the demand.

(§ 2031.310, subd. (c).)

Any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days, but the extension shall not apply to extend the time for filing any of the following:

(i) A notice of intention to move for new trial.
(ii) A notice of intention to move to vacate judgment under Section 663a.
(iii) A notice of appeal.

(§ 1010.6, subd. (a)(3)(B).)

The POS states Plaintiff's amended verified responses were e-served on 8/5/2024. (See POS on PDF page 125 of 127 to Decl. Kelsey F. Morris (filed 9/16/2024).) However, the Final Audit Report for the Pey Amed. Resp. to RPD dated 2024-08-06 shows the document was created, e-signed, and completed by Anthony M. Rubio on 2024-08-06 between 2:15:51 AM GMT and 2:18:39 AM GMT on 8/6/2024. Defendant's counsel states Plaintiff's amended responses were served on 8/6/2024. (See Decl, Morris (filed 9/16/2024) ¶ 12.) Plaintiff's opposition states it was served on the same date 8/6/2024. (See Opp. p. 3.) The court finds that it was e-served on 8/6/2024.

8/6/2024 is day 219 in 2024. 219 plus 45 days is day 264 which is Friday 9/20/2024. Defendant's reply is correct that since the Amended Verified Response to RPD was e-served 2 court days are added (§ 1010.6(a)(3)(B).) Plaintiff's opposition failed to include these 2 court days. This motion was timely filed on Monday 9/16/2024 when you include these 2 court days under section 1010.6(a)(3)(B). According, service of the motion on Monday 9/23/2024 was timely, even though the POS was not filed until 10/1/2024.

Conclusion and Order

Defendant's motion pursuant to CCP sections 2031.310 and 2031.320 for an order to compel Plaintiff to compel further responses (and responsive documents) in response to Defendants' Request for Production, Set One ("RPD") Nos. 1-24 is GRANTED IN PART.

Defendant's motion to compel Plaintiff's further response (and responsive documents) to RPD Nos. 4, 5, and 8-24 is DENIED as MOOT.

Defendant's motion to compel Plaintiff's further response (and responsive documents) to RPD Nos. 1-3 and 6-7 is GRANTED. Plaintiff shall serve a code-compliant verified further response to RPD Nos. 1-3 and 6-7 confirming that all responsive documents in Plaintiff's possession, custody or control have been produced within 15 days of this order. If there are any responsive documents to RPD Nos. 1-3 and 6-7 in Plaintiff's possession, custody or control (that have not already been produced by Plaintiff), they must be produced within 15 days of this order.

Defendant's request for monetary sanctions in the amount of $10,651 is GRANTED IN PART. Plaintiff and Plaintiff's counsel Anthony M. Rubio of Rubio Law (jointly and severally) shall pay Defendant the reasonable amount of $3,500 within 15 days of this order.

The court will prepare the order.

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Calendar line 9
Case Name: Jean-Luc Kayuigire vs Bryan Shisler et al.
Case No.: 22CV395975

Defendants Bryan Shisler and Pro-Auto Showroom (collectively "Defendants")' motion for an order requesting that the default [and] default judgment be set aside on grounds of inadvertence, surprise, mistake, or excusable neglect under Code of Civil Procedure ("CCP") section 473(b) is DENIED.

Defendants' alternative request that the court grant this relief based on the court's equitable power to vacate a default is DENIED.

Defendants' alternative request that the court grant this relief upon attorney fault is DENIED.

Plaintiff's request for attorney's fees and costs is DENIED.

Background

According to the proof of service of summons (filed 4/12/2022) defendant Bryan Shisler, an individual was **personally served** on **3/22/2022** by delivering copies of the summons and complaint by a registered process server.
According to the proof of service of summons (filed 4/12/2022) defendant Pro-Auto Showroom, a California Corporation by delivering copies of the summons and complaint **by personal service** on **3/29/2022**, Brian Shisler, Person Authorized to Accept Service of Process by the same registered process server.

Plaintiff's request to enter default was rejected by the clerk several times.

Plaintiff's request to enter Defendants' default was entered by the clerk on **8/31/2023**, over a year *after* Defendants were personally served on 3/22/2022.

There are clerk rejection letters in the court file dated 11/14/2024 returning Answer[s] because the Default was entered on defendant on 8/31/2024.

On 3/25/2024 Defendants filed a motion to set aside or vacate the default entered 8/31/2024 [and] default judgment [which had not yet been entered] on the grounds of inadvertence, surprise, mistake or excusable neglect (CCP § 473(b)) or in the alternative based on the court's equitable power to vacate a default. Plaintiff opposed the motion. Both sides argued the motion on 5/21/2024, it was submitted and DENIED by written order dated 5/21/2024 (filed 5/24/2024).

On 8/21/2024 this court entered a default judgment against Defendants for damages of $55,000, prejudgment interest at the rate of 10% of $2,500, attorney's fees of $2,500, costs of $732.51 for a total of $60,732.51.

On 9/9/2024, Defendants filed the present motion to set aside the default [entered 8/31/2022] and default judgment [entered 8/21/2024], on the grounds of inadvertence, surprise, mistake or excusable neglect (CCP § 473(b)) and in the alternative, upon attorney fault. It is also, in the alternative, based on the court's equitable power to vacate a default.

Discussion

The language in the supporting declaration of Bryan Shisler filed 9/2/2024 appears almost identical to his prior declaration filed 3/25/2024, except it deletes the former paragraph 9 language ["It has been less than six months since my default was taken] and renumbers the remaining paragraphs so that his declaration now has 22 paragraphs instead of 23. They were signed on different dates.

The language of the supporting declaration of Defendants' attorney Micke Chapjpars, Esq., appears almost identical to his prior declaration filed 3/25/2023, except the date of the proposed Answer in Exhibit A and he has added paragraphs 4-7. They were signed on different dates.

The declaration of Bryan Shisler filed 9/9/2024 misstates the date he was served according to the POS as March 29, 2023. However, the POS states Bryan Shisler was served a year earlier on March 29**, 2022.** This discrepancy was pointed out in the opposition to the prior motion and in the court's prior order dated 5/21/2024 (filed 5/24/2024.)

In his declaration filed 9/9/2024, Mr. Shisler can't recall the date [the summons and complaint] was received but he "has a vague recollection" that he "received this package of documents" and he claims "I did not know what action I needed to take." (¶4.) "At the time I received the complaint I did not have the money I needed to hire an attorney, and I did not know how to act." (¶ 6.) "Due to my workload, business issues, and personal issues I neglected to take action. I was overwhelmed by other problems, and I now know that I was defaulted because I failed to answer the complaint on time." (¶ 7.) "I retained my current attorney on another matter, and, when I received notice my default had been taken, I retained my current attorney to responds in this matter." (¶ 8.) "By the time I had engaged an attorney, my default had already been taken." (¶ 9.)

The declaration by Defendants' counsel Mike Chappers, Esq. filed 9/9/2024 (Decl. Chappers) is very vague. Paragraph 2 states the *unpersuasive* legal conclusion that "Defendant failed to respond to this lawsuit due to 'inadvertence, surprise, mistake, or excusable neglect." Paragraph 3 attaches Defendants' proposed Answer [a general denial with 49 affirmative defenses] that is dated September 9, 2024.

The new paragraphs 4 to 7 in Mike Chappers declaration filed 9/9/2024 state:

> "When I was retained by Defendant, I saw that default documents were filed and rejected. Believing that no default had been entered, I filed an answer." (Decl. Chappers, ¶ 4.) "I failed to monitor the docket and did not see that the answer I filed was rejected." (*Id*., ¶ 5.) "When I saw that the Answer was rejected later, I filed the original Motion to Vacate. This was rejected in part as untimely. Thus, the rejection of the original Motion to Vacate may have been due to attorney fault of may have been rejected on the merits." (*Id*., ¶ 6.) "The default judgment has not been entered, and, thus, I am filing a Motion to Vacate Default Judgement." (*Id*., ¶ 7.)[6]

[6] This statement was incorrect, the default judgment against Defendants was signed by the court and filed on 8/21/2024. However, Defendants' counsel may not have known it had been entered because there is no notice of entry of judgment nor proof of service of the default judgment in the court's file.

The 6-month period for *discretionary relief* under CCP section 473(b) runs from the date the clerk entered the original default [on 8/31/2022], *not* the date the default judgment was entered [on 8/21/2024]. Thus, the almost one-year delay between entry of the default on 8/31/222 and entry of the judgment on 8/21/2024 will *not* extend Defendants' time to seek *discretionary relief* under CCP section 473(b). (See *Weil & Brown, supra*, ¶ 5:366, p. 5-110; *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.Appo.,3d 965, 970; *Kramer v. Traditional Escrow, Inc.* (220) 56 Cal.App.5th 13, 39.) Otherwise, setting aside the judgment could be an idle act; i.e., the default would still be in effect and would permit immediate entry of another default judgment. (See *Weil & Brown, supra*, ¶ 5:367, pp. 5-110 to 5-111; *Rutan v. Summit Sports, Inc., supra*, 173 Cal.App.3d at p. 970; *Kramer v. Traditional Escrow, Inc., supra*, 56 Cal.App.5th at p. 39.)

This motion for *discretionary relief* under CCP section 473(b) is *untimely* and DENIED. The application for *discretionary relief* under CCP section 473(b) must be made "within a reasonable time" and "in no case exceeding six months" after entry of the default" [on 8/31/2022]. (CCP § 473(b).) This time limit is jurisdictional in the sense that the court has no power to grant relief after this time regardless of whether an "attorney affidavit of fault" is filed or how reasonable the excuse for the delay. (CCP § 473(b); *Austin v. Los Angeles Unified School Dist*. (2016) 244 Cal.App.4th 918, 928; *Davis v. Thayer* (1980) 113 Cal.App.3d 982, 901; *Jimenez v. Chavez* (2023) 97 Cal.App.5th 50, 54*; Weil & Brown, supra*, ¶ 5:365, p. 5-110.) The court previously found that "Defendant's failure to file this motion within 6 months of entry of their default on 8/31/2023 was inexcusable." (See Order After Hearing dated 5/21/2024 (filed 5/24/2024) p. 2.)[7]

Furthermore, this court previously denied Defendants' motion for *discretionary relie*f from default under CCP section 473(b) or in the alternative based on the Court's equitable power by written order dated 5/21/2024 (filed on 5/24/2024). The clerk's proof of service filed 5/24/2024 shows that it was *served by mail on counsel of record* for *both* Plaintiff and Defendants on 5/24/2024. The present motion filed on 9/9/2024 failed to comply with all the requirements of CCP section 1008 including showing that it was based on "new or different facts, circumstances, or law" and it failed to provide an explanation for not having presented the new or different information earlier. Accordingly, the motion for discretionary relief under CCP 473(b) to set aside the default based on the court's equitable power is denied on this ground as well.

However, the motion filed 9/9/2024 was the *initial* motion for relief based on an attorney's affidavit [or declaration] of fault. An initial motion for relief under CCP section 473 need *not* satisfy the CCP section 1008 requirements. (See Weil & Brown, supra, ¶ 5:414.5, p. 5-121*; Gee v Estate of Jewett* (2016) 6 Cal.App.5th 477, 487 [*initia*l motion for relief under § 473 need *not* satisfy § 1008 requirements].)

Furthermore, this motion is timely under the six-month period for *mandatory relief* under CCP section 473 under an attorney affidavit [or declaration] of fault because it runs from e*ntry of the default judgment* [on 8/21/2024], *not* the original default [on 8/31/2023.].

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[7] Defendants (and their counsel) are obviously aware that it has been more than six months since their default has been taken because they deleted the language "It has been less than six months since my default" from paragraph 9 of Bryan Shisler's supporting declaration filed 3/25/2024, and renumbered the remaining paragraphs for his declaration filed 9/9/2024.

(*Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297; Weil & Brown, supra, ¶ 5:305.1, p. 5-93.) However, "[t]he motion must state that it seeks *mandatory relief* under CCP [section] 473. If it refers only to discretionary relief, the court need not set aside the default even if the motion is accompanied by an affidavit [or declaration] indicating the attorney was at fault." (*Weil & Brown, supra,* ¶5:304, p. 5-92, citing *Luri v. Greenwald* (2003 107 Cal.App.4th 1119, 1125.)

Mr. Chappers declaration does not state the DATE when he was retained or the DATE he saw that default documents were filed and rejected. However, the declaration of defendant Bryan Shishler (filed on 9/19/2024) admits "when I received notice that *my default had been taken*, I retained my current attorney to respond in this matter." (Decl. Brian Shisler, ¶ 7 [emphasis added].) Defendant Brian Shisler also admits "By the time I had engaged an attorney, *my default had already been taken*. *(Id*., ¶ 8 [emphasis added].) Since Defendants' default "had already been taken" [on 8/31/2023], by the time Defendants engaged their attorney, their attorney was NOT responsible for the default having been entered.

Here, since the attorney had not been engaged by Defendants to defend this matter until *afte*r the default "had already been taken", Defendant's attorney "could not possibly have caused the default." (*Bailey v. Citibank, N.A.* (2021) 66 Cal.App5th 335, 349-350 [in house attorney was not engaged to act as attorney until 2 months after defendant failed to timely respond and thus "could not possibly have caused the default"]; *Rogalski v Nabers Cadillac* (1992)11 Cal.App.4th 816, 821 fn.5; see also *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906; 912; Weil & Brown, *Cal. Prac. Guide: Civil Proc. Before Trial* (The Rutter Group 2024) ¶ 5:302.2, p. 5-91 ("*Weil & Brown*".)

> Where the default (i.e. the failure to respond) was *not* the attorney's fault, an attorney "affidavit of fault" relating to the subsequent default judgment does not compel relief. There is no policy favoring "neglectful clients who allow their default to be entered simply because that neglect is compounded by attorney neglect in permitting the judgement to be perfected."

(*Weil & Brown, supra,* ¶5:303, pp. 5-92 to 5-92, citing *Cisneros v. Veve, supra*, 37 Cal.App.4th 906, 911.)

In *Cisneros v. Vueve*, the "Attorney was hired to represent Defendant whose default had already been entered. Attorney forgot about the matter and did nothing for over 6 months. By the time Attorney moved to set aside the default, a default judgment had been entered. Attorney's affidavit of default did not compel relief from the judgment (or the default). (*Weil & Brown, supra,* citing *Cisneros v. Vueve, supra*, 37 Cal.App.4th at p. 908.)

Here, paragraph 6 of the declaration of Mike Chappers, Esq. (filed on 9/9/2024) makes clear that his declaration of fault related to the *untimely filing* of the original motion to vacate [that was filed on 3/25/2024]: "When I saw that the Answer was rejected later, I filed the original Motion to Vacate. This was rejected in part as untimely. Thus, the rejection of the original Motion to Vacate may have been due to attorney fault of may have been rejected on the merits." (*Id.*, ¶ 6.)

Furthermore, an attorney's affidavit of fault does *not* provide relief for *late filings*. (See *Weil & Brown, supra,* ¶¶5:300.25 to 5:300.28 at p. 5-90.) For example,

Attorney's affidavit of fault does *not* prevent dismissal of an action based on the running of the statute of limitations or entitle a party from other time limitations on fling claims. (*Life Sav. Bank v. Wihelm* (200) 84 Cal.App.4th 174, 178.)

Attorney's affidavit of fault does *not* entitle party to relief from claim filing requirement under the Government Claims Act or excuse late filing of a claim. (*Tacket v. City of Huntington Beach* (1994) 22 Cal.jApp.4th 60, 64-65.)

Attorney's affidavit of fault does *not* entitle a party from relief from the time limit on filing a costs bill after judgment. *(Douglas v. Willis* (1994) 27 Cal.App.4th 287, 291.)

Attorney's affidavit of fault does *not* prevent a discretionary dismissal based on plaintiff's failure to file an amended complaint within the time allowed by the court. *(Leader v. Health Indus. of America, Inc.* (2001) 89 Cal.App.4th 603, 619.)

For all the forgoing reasons, the request for mandatory relief under CCP section 473 is DENIED.

Plaintiff's request for fees and costs

Plaintiff's request for fees and costs is DENIED. Plaintiff failed to state any statutory basis (or cite any cases) for this request in its opposition papers.

Conclusion and Order

Defendants' motion for an order requesting that the default [and] default judgment be set aside on grounds of inadvertence, surprise, mistake, or excusable neglect under CCP section 473(b) is DENIED.

Defendants' alternative request that the court grant this relief based on the court's equitable power to vacate a default is DENIED.

Defendants' alternative request that the court grant this relief upon attorney fault is DENIED.

Plaintiff's request for attorney's fees and costs is DENIED.

The court will prepare the order.

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