SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-26-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today 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 strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV407607 Hearing: Demurrer	Petra Macias et al vs Augustina Duran Armendariz et al	Continued at request of parties to Feb. 8, 2024 at 9 a.m.
LINE 2	19CV360545 Motion: Summary Judgment/Adjudication	ALLSTATE INSURANCE COMPANY vs DAVID PHAN et al	See Tentative ruling. The Court will prepare the final order.
LINE 3	21CV381458 Motion: Summary Judgment/Adjudication	Tori Moses vs Hyatt Corporation et al	See Tentative ruling. The Court will prepare the final order.
LINE 4	21CV381458 Motion: Summary Judgment/Adjudication	Tori Moses vs Hyatt Corporation et al	See Tentative Ruling. The Court will prepare the final order.
LINE 5	19CV353173 Motion: Compel	JEAN BELTRE vs ROUND TABLE PIZZA, INC. et al	Notice appearing proper and good cause appearing, Defendants David Levens and Pamela Levens' (Defendants) unopposed Motion to Compel Plaintiff to Execute Authorization Requesting Records and/or Directing Temple University Hospital for Production of Documents and Request for Monetary Sanctions in the amount of $1,155 is GRANTED in full. Defendants shall submit the final order.
LINE 6	23CV410157 Motion: Compel	Jane Doe vs Support Systems Homes, Inc. et al	See Tentative Ruling. The Court will prepare the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
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Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 7	22CV403540 Motion: Set Aside Default/Judgment	Mengxin Wu vs Mykleen Corp et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 8	22CV397389 Hearing: Compromise of Minor's Claim	Miguel Alba et al vs Luis Cruz	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is knowingly entered.
LINE 9	22CV397389 Hearing: Compromise of Minor's Claim	Miguel Alba et al vs Luis Cruz	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is knowingly entered.
LINE 10	22CV397389 Hearing: Compromise of Minor's Claim	Miguel Alba et al vs Luis Cruz	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is knowingly entered.
LINE 11	22CV397389 Hearing: Compromise of Minor's Claim	Miguel Alba et al vs Luis Cruz	The GAL and counsel for GAL shall appear at the hearing so that the court can conduct voir dire and determine that the settlement is knowingly entered.
LINE 12			

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Calendar Line 2
Case Name: *Allstate Insurance Co. v. David Chan aka David Phan*
Case No.: 19-CV-360545

Motion for Summary Judgment to the Cross-Complaint by Cross-Defendant Robert Rael

Factual and Procedural Background

The underlying action arises out of a subrogation claim asserted by plaintiff Allstate Insurance Company ("Allstate") against defendant David Chan aka David Phan ("Chan").[1]

According to the complaint, Allstate issued a policy of insurance to Nicole Grave ("Insured") to cover certain damages to the home located at 70 West Fifth Street in Morgan Hill, California. (See Complaint at GN-1.) On January 10, 2017, while this policy was in effect, a tree owned by defendant Chan, fell and landed on the house causing damage to the Insured's home. (Id. at GN-1, Prem. L-1.) Thereafter, Allstate, pursuant to the terms and conditions of the policy, paid certain claim payments for the aforementioned loss to the Insured's home. (Ibid.)

Allstate alleges defendant Chan negligently entrusted, managed, maintained, repaired and proximately caused damages to the Insured's home. (Complaint at GN-1.) Pursuant to the terms and conditions of the aforementioned policy, Allstate is entitled to be subrogated to the rights of its Insured for the sum of the payments made. (Id. at GN-1, Prem. L-1.)

On December 19, 2019, Allstate filed a judicial council form complaint against defendant Chan alleging claims for negligence and premises liability.

On December 11, 2020, defendant Chan filed an answer to the complaint setting forth a general denial and affirmative defenses.

On March 23, 2022, Chan filed a cross-complaint against cross-defendant Robert Rael ("Rael") for equitable indemnity and contribution. Chan alleges that, should he be found liable to Allstate in the complaint, that any damages were caused by the intentional acts, negligence, and/or carelessness of cross-defendant Rael. (See Cross-Complaint at ¶ 7.) Thus, Chan seeks a judgment declaring that Rael is under a duty to contribute and indemnify Chan in proportion to Rael's own comparative responsibility for damages arising from allegations of the complaint. (Id. at Prayer for Relief, No.1.)

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[1] "Subrogation is defined as the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim. By undertaking to indemnify or pay the principal debtor's obligation to the creditor or claimant, the 'subrogee' is equitably subrogated to the claimant (or 'subrogor'), and succeeds to the subrogor's rights against the obligor. [Citation.] In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291-1292.)

On June 30, 2022, cross-defendant Rael filed an answer generally and specifically denying allegations of the cross-complaint and asserting affirmative defenses.

On May 24, 2023, cross-defendant Rael filed the motion presently before the court, a motion for summary judgment to the cross-complaint. Rael filed a request for judicial notice in conjunction with the motion. Cross-complainant Chan filed written opposition. Cross-defendant Rael filed reply papers.

A further case management conference is set for December 19, 2023.[2]

Motion for Summary Judgment

Cross-defendant Rael moves for summary judgment to the cross-complaint on the ground that there are no triable issues of material fact and thus judgment should be entered as a matter of law.

Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the motion, cross-defendant Rael requests judicial notice of the following: (1) Allstate's complaint; (2) Chan's cross-complaint; and (3) Rael's answer to the cross-complaint. (See Request for Judicial Notice at Exs. A-C.)

These exhibits are subject to judicial notice as records of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) The court however declines to take judicial notice of the exhibits as the court must necessarily consider the pleadings on a motion for summary judgment. (See *Snatchko v. Westfiled LLC* (2010) 187 Cal.App.4th 469, 477 [pleadings frame the issues to be resolved on summary judgment].)

Therefore, the request for judicial notice is DENIED.

Legal Standard

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subdivision (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.)

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[2] Chan filed a motion for summary judgment to the complaint set for hearing on January 23, 2024.

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.)

"[S]ummary judgment 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."].)

Equitable Indemnity and Contribution

"Under the equitable indemnity doctrine, defendants are entitled to seek apportionment of loss between the wrongdoers in proportion to their relative culpability so there will be 'equitable *sharing* of loss between multiple tortfeasors.' [Citation.] The purpose of equitable indemnification is to avoid the unfairness, under joint and several liability theory, of holding one defendant liable for the plaintiff's entire loss while allowing another responsible defendant to escape ' "scot free." ' [Citation.] It is an extension of the comparative fault doctrine which allowed loss to be apportioned between plaintiff and defendants according to their respective responsibility for the loss. [Citation.]" (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 426-427.)

A cause of action for equitable indemnity requires: (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is equitably responsible. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 700 (*C.W.*).)

"[A] defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of the damages

through the satisfaction of a judgment or through a payment in settlement." (*Evangelatos v. Super. Ct.* (1988) 44 Cal.3d 1188, 1197-1198.)

Similarly, a claim for contribution stems from a legally recognized right forged from principles of equity and natural justice. (*Borba Farms v. Acheson* (1988) 197 Cal.App.3d 597, 601.) "The right of contribution, although necessarily related to some former transaction or obligation, exists as an entirely separate contract implied by law. [Citation.] In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his share, the one paying possesses a new obligation against the others for their proportion of what he has paid for them. [Citation.]" (*Id*. at p. 602.)

Analysis

As stated above, the issues on summary judgment are framed by the pleadings. The operative cross-complaint includes a single cause of action identified as "Equitable Indemnity and Contribution" alleging the following in relevant part:

> ¶ 7: If the allegations of PLAINTIFF'S complaint are found to be true and PLAINTIFF is found to have been damaged, said damages were proximately caused and contributed to by the intentional acts, negligence and/or carelessness of CROSS-DEFENDANTS, and each of them.
>
> ¶ 8: In the event that CROSS-COMPLAINANT herein incurs liability to PLAINTIFFS, said liability should extend only to the amount of damages which is proportionate to the percentage of negligence or other fault, if any, which is attributable solely to CROSS-COMPLAINANT and no more, pursuant to comparative fault principles. CROSS-DEFENDANTS are obligated to indemnify and hold harmless CROSS-COMPLAINANT from any and all liability, loss, costs, damages and expenses over and above that proportion of CROSS-COMPLAINANT negligence or fault, if any.
>
> ¶ 9: CROSS-COMPLAINANT is also entitled to contribution from CROSS-DEFENDANTS, and each of them, in proportion to the negligence or wrongful conduct of CROSS-DEFENDANTS.

(Cross-Complaint at ¶¶ 7-9.)

On summary judgment, cross-defendant Rael argues Chan has no evidence demonstrating Rael is at fault for the damage caused by the fallen tree. In support, Rael relies in part on discovery responses provided by Chan. For example, Rael propounded Special Interrogatory ("SI") Nos. 1, 3, and 5 to Chan which provide:

> SI No. 1: Identify all facts which support your first cause of action for equitable indemnity and contribution.
>
> SI No. 3: Identify all facts which support your contention that the defendant acted intentionally, negligently or carelessly as set forth in Paragraph 7 of your complaint.

SI No. 5: Identify all facts which support your contention that this defendant has "comparative responsibility for the damages arising from the allegations" in plaintiff's complaint as set forth in your cross-complaint.

(See Rael's Evidence at Appendix No. 4.)

In response to these interrogatories, Chan submitted the following identical answer:

The Subject Tree bordered two properties, straddling Propounding Party and Responding Party's property. Propounding Party was equally responsible for the maintenance of the Subject Tree. Propounding Party failed to maintain the Subject Tree and the land on which the Subject Tree resided. To the extent Responding Party is held liable in this action, Propounding Party should be held equitably and comparatively responsible for his failure to maintain.

(See Rael's Evidence at Appendix No. 4.)

In addition, cross-defendant Rael submits evidence, primarily through his declaration, showing he acted reasonably in the use and maintenance of his property. Such evidence includes the following:

- Rael conducted regular maintenance of the Oak trees on his property.
- Rael only ever used arborists and/or tree contractors to do this work because of the height of the trees.
- Not one of the arborists or tree contractors who performed work at the property either before or after the loss ever informed Rael that there were issues with the Oak trees on the property.
- At no time during the 13 or so years that Rael owned the property did he see signs that the subject Oak tree was suffering from any type of decay or disease.
- There were various tenants at the rental property over the years, none of whom alerted Rael to any problems with or concerns about the Oak trees.
- On or about January 29, 2017, after the tree had been removed and hauled away, Rael received a request from Chan related to having his (Chan's) carrier inspect the property in relation to the damaged fence between the two properties.
- The investigation conducted by Rael's carrier concluded that the older but healthy Oak tree had failed due to high winds.

(See Rael's Separate Statement at Fact Nos. 4-6, 8-9, 18-19; Rael Decl. at ¶¶ 4-5, 8-9; Lowe Decl. at ¶¶ 8-9.)

In opposition, cross-complainant Chan does not dispute the majority of material facts included in the separate statement of the moving party. (See Chan's OPP Separate Statement at Fact Nos. 1-2, 4-19.) Chan disputes only material fact no. 3 as being incomplete but in substance does not offer any evidence that Rael engaged in any intentional, negligent, or careless acts in maintaining the subject tree to support his cross-complaint for equitable

indemnity and contribution. In fact, as the reply points out, Chan, in his opposition, apparently concedes that Rael properly maintained the subject tree:

> Cross-complainant Chan does not dispute the notion that Rael properly maintained the subject tree. In fact, Chan has similarly filed a motion for summary judgment seeking to dispose of Plaintiff's negligence claims against him for many of the same reasons cited in Rael's present motion. **In other words, Chan agrees that both Rael and Chan were not negligent in their co-ownership/co-maintenance of the subject tree and that Plaintiff can submit no meaningful evidence to establish liability against either party**.

(See OPP at p. 4:9-14, emphasis added; Reply at pp. 2:15-3:15.)

Nevertheless, cross-complaint Chan, in opposition, contends the motion for summary judgment is premature. "[A] fundamental prerequisite to an action for partial or total equitable indemnity is an actual monetary loss through payment of a judgment or settlement." (*Christian v. County of Los Angeles* (1986) 176 Cal.App.3d 466, 471.) Similarly, "[i]t is well settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through payment. [Citations.]" (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506.)

According to the cross-complaint, any duty to indemnify will arise "if" Chan is found liable in the underlying action and is compelled to pay damages to Allstate. (See Cross-Complaint at ¶¶ 7-8.) But, as of now, there is no evidence before the court that Chan has been found liable to Allstate or that he has paid any monies pursuant to a settlement or judgment.

The court however does not find this contention to be persuasive as Chan must still demonstrate a showing of fault on the part of cross-defendant Rael to prevail on his cross-complaint for equitable indemnity and contribution. (*C.W., supra,* 43 Cal.App.5th at p. 700 [equitable indemnity requires a showing of fault].) By his own admission, Chan concedes that Rael was not negligent in maintaining the subject tree (i.e. not at fault) and he has not submitted any evidence or supporting argument to the contrary with his opposition. Nor has Chan made any request to continue the hearing to conduct further discovery under Code of Civil Procedure section 437c, subdivision (h) to obtain such evidence.

Chan however requests, in the alternative, that the court continue this motion to be heard with his motion for summary judgment against Allstate in the underlying action on January 23, 2024 or shortly thereafter. (See OPP at p. 8:4-7.) But, as pointed out in the reply papers, "even if the Court were to grant a continuance, Chan still fails to present any evidence – and does not claim that he will present any additional evidence – that could support his claims against Rael." (See Reply at p. 6:1-3.) Thus, the court denies the request for a continuance. And, without any evidence of fault by cross-defendant Rael, there is no basis, as a matter of law, to maintain the cross-complaint for equitable indemnity and contribution. (See *City of South El Monte v. Southern Cal. Joint Powers Ins. Authority* (1995) 38 Cal.App.4th 1629, 1645 ["Summary judgment is properly granted when the evidence in support of the moving party establishes that there is no material issue of fact to be tried."]; see also *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143 ["Summary judgment is

granted when a moving party establishes the right to the entry of judgment as a matter of law."].)

Accordingly, the motion for summary judgment to the cross-complaint is GRANTED.

Disposition

The motion for summary judgment to the cross-complaint is GRANTED.

The court will prepare the Order.

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Calendar Lines 3 and 4
Case Name: *Tori Moses v. Hyatt Corporation, et al.*
Case No.: 21CV381458

I. Factual and Procedural Background

This is an action for negligence and premises liability, among other things, arising from injuries plaintiff Tori Moses ("Plaintiff") sustained while a guest at the Hyatt Centric Mountain View Hotel. (Fourth Amended Complaint, ¶ 1 ("4AC").) Plaintiff alleges claims against several defendants, including Palmetto Hospitality of Mountain View LLC ("Palmetto"), Oto Development, LLC ("Oto"), Lusardi Construction Company ("Lusardi"), and Simmons Glass and Window, Inc. ("Simmons"). (*Id.* at ¶¶ 1, 11-14.) Plaintiff alleges the shower door in her hotel room shattered and exploded onto her, causing severe bodily injuries and other damages. (*Id.* at ¶ 1.) According to Plaintiff, defendants are responsible for her injuries, including by failing to comply with safety standards and exercise ordinary care with respect to the shower door that caused her injuries. (*Id.* at ¶¶ 34-54.)

Defendant/cross-complainant Lusardi filed a cross-complaint against cross-defendant Simmons, asserting the following claims ("Lusardi XC"): (1) equitable/partial/total indemnification; (2) express indemnity; (3) breach of contract; (4) breach of contract re: failure to name as additional insured; (5) breach of express and implied warranties; (6) declaratory relief re: duty to indemnify; (7) declaratory relief re: duty to defend; and (8) declaratory relief. Defendant/cross-complainants Palmetto and Oto (collectively, "Owners") also filed a cross-complaint against cross-defendant Simmons, asserting the same claims as Lusardi. ("Owners' XC.")

As set forth in the cross-complaints, Palmetto was and is the owner of the property where the subject Hyatt Centric hotel was constructed at 405 San Antonio Road, Mountain View ("Hotel"). (Owners' XC, ¶ 6.) Property developer Oto was Palmetto's representative during the construction project. (*Id.* at ¶ 8.) On or about May 24, 2016, Palmetto and Oto entered into a written contract with general contractor Lusardi for the construction of the Hotel. (*Id.* at ¶ 7.) On or about August 7, 2017, Lusardi entered into a written contract with subcontractor Simmons wherein Simmons agreed to supply and install glass shower doors in all the guest rooms in the Hotel. (*Id.* at ¶ 9.)

In the first motion now before the court, Lusardi moves for summary adjudication in favor of its seventh cause of action against Simmons: declaratory relief regarding Simmons' duty to defend. In the second motion now before the court, the Owners also move for summary adjudication in favor of their seventh cause of action against Simmons: declaratory relief regarding Simmons' duty to defend.

II. Legal Standards

A. Summary Adjudication

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

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 v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* 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. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

Furthermore, "a motion for summary adjudication may be made … as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) "A party may seek summary adjudication on whether the cause of action, affirmative defense or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630; Code Civ. Proc., § 437c, subd. (f)(1).)

B. Adjudication of Declaratory Relief Claims

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) A party cannot hide a nondispositive issue in a declaratory relief claim in order to avoid the requirement that a summary adjudication must completely dispose of a cause of action. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 322 (*Hood*).) However, summary adjudication may be granted as to a properly pled cause of action for declaratory relief even if the issues involve overlap with other causes of action. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 845-846 ["*Hood* does not stand for the proposition the trial court cannot grant summary adjudication of a properly pled cause of action for declaratory relief merely because the controversy between the parties spills over into other causes of action"].)

C. Indemnity Agreements Generally

"Parties to a contract, including a construction contract, may define their duties toward one another in the event of a third party claim against one or both arising out of their relationship." (*Crawford v. Weather Shield Mtf. Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*), citing Civ. Code, § 2772.) "They may also assign one party, pursuant to the contract's language, responsibility for the other's legal defense when a third party claim is made against the latter." (*Ibid*.) "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so." (Civ. Code, § 2778, subd. (4).) "[T]he duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778, *is* distinct from, and broader than, the duty expressed in subdivision 3 of the statute to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed." (*Crawford*, *supra*, 44 Cal.4th at p. 564 [emphasis original].)

III. Lusardi's Motion for Summary Adjudication

Lusardi seeks summary adjudication of its seventh cause of action for declaratory relief regarding Simmons' duty to defend. To prevail on this cause of action, an indemnitee must show (1) the existence of a valid indemnification agreement that imposes on the indemnitor a duty to defend, (2) the indemnity embraces the third party's cause of action, and (3) the indemnitee's tender of the defense was denied. (*Crawford*, *supra*, 44 Cal.4th at pp. 553-555.)

A. Lusardi's Evidence

i. *Indemnification Agreement*

Lusardi proffers evidence Simmons entered into a subcontract agreement ("Subcontract") regarding work on the construction project at the Hotel. (Lusardi's Separate Statement of Undisputed Facts ("UMF"), No. 2; Declaration of Kurt Evans ("Evans Decl."), ¶ 3, Ex. B.) The Subcontract contains a section entitled "Indemnification of Contractor," providing as follows in pertinent part:

> SECTION 5—GENERAL MATERIAL SUPPLIER AGREEMENT PROVISIONS [¶]
> C. INDEMNIFICATION OF CONTRACTOR
> To the fullest extent permissible by law, Material Supplier hereby assumes responsibility and liability for any and all damages or injury of any kind or nature whatsoever … arising out of or occurring in connection with Material Supplier's execution of the work performed at the site of construction… Material Supplier shall indemnify and hold the Contractor … harmless from and against any claim … with respect to or arising out of the work and arising by reason of the death or bodily injury to person, injury to property, defects in workmanship or materials arising by reason of Material Supplier's negligent act or omission, regardless of whether such negligence is passive or active. Should any claims for such damages or injury … be made or asserted, Material Supplier agrees to and does hereby assume, on behalf of Contractor … the defense of any action at law or equity which may be brought against Contractor … upon or by reason of such claims …. This indemnification shall apply regardless of any passive negligent act or omission of the indemnitees.

(UMF No. 13; Evans Decl., ¶ 3, Ex. B [emphasis added].)

This evidence is sufficient to demonstrate Simmons agreed to indemnify Lusardi. Further, the indemnification agreement appears valid and enforceable because it does not seek to indemnify Lusardi against third party claims arising from its own *active negligence* or *willful misconduct*. (See Civ. Code, § 2782.05, subd. (a) ["provisions, clauses, covenants, and agreements … that purport to insure or indemnify, including the cost to defend, a general contractor … against liability for claims of death or bodily injury to persons …are void and unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence of willful misconduct of the general contractor"].) Thus, Lusardi has established the existence of a valid indemnity agreement between itself and Simmons.

ii. *Scope of Indemnity Agreement*

Lusardi proffers evidence of the scope of the indemnity agreement. Simmons agreed to assume "responsibility and liability for any and all damages … arising out of or occurring in connection with [Simmons'] execution of the work performed at the site of construction." (UMF No. 13, Evans. Decl., Ex. B, Section 5(C).) Simmons was required to complete all work

relating to the shower doors. (UMF No. 3; Evans Decl., Ex. B, p. 12.) The following specific provisions are included within the Subcontract agreed to by Simmons:

> SECTION 3 – SCOPE
> Subcontractor agrees to furnish … and to perform the work necessary or incidental to complete all SHOWER DOORS work, for the project in strict accordance with the Contract Documents …

(UMF Nos. 3, 11; Evans Decl., Ex. B, p. 12.)

> SECTION 7 – SPECIAL PROVISIONS
> 1. This Subcontract includes all labor, material, and equipment necessary to furnish and install model room shower doors per plans and specifications complete including, but not limited to: Kohler sliding shower doors …

(UMF No. 11; Evans Decl., Ex. B, p. 13.) Thus, Simmons was responsible for supplying all materials and performing all labor necessary for the installation of all glass shower doors at the Hotel. (UMF No. 12; Evans Decl., Ex. B, pp. 12-13.)

Lusardi proffers further evidence relating to Plaintiff's claims. On August 7, 2020, Plaintiff was a guest at the Hotel, staying in room 338. (UMF No. 4; 4AC[3], ¶ 27.) At approximately 10:00 p.m., Plaintiff alleges the shower door in her room exploded and shattered all over her, causing her to sustain cuts to her wrists, hands, fingers, legs and feet. (UMF No. 5; 4AC, ¶ 27.) The incident caused her severe emotional distress, severe bodily injuries, including permanent scars and numbness, and loss of earnings. (UMF Nos. 6, 8, 10; 4AC, ¶¶ 1, 33.) Plaintiff alleges she suffered severe bodily injuries and other damages due to the defendants' alleged negligence, which includes the alleged faulty installation of the glass shower doors. (UMF No. 10; 4AC, ¶ 33.) Further, the 4AC alleges that defendants (including Simmons) were negligent because they failed to properly design, construct, and install the glass shower doors to ensure they were safe for ordinary use. (UMF No. 9; 4AC, ¶ 82.) This evidence is sufficient to show the indemnity agreement embraces the 4AC's allegations.

iii. *Tender of Defense*

Finally, Lusardi proffers evidence it tendered its indemnity and defense to Simmons following Plaintiff's allegations of injuries sustained at the Hotel. On June 18, 2021, Lusardi sent a tender letter to Simmons. (UMF No. 14; Declaration of Gabriella Burden in support of Lusardi's motion ("Burden Decl."), ¶ 3, Ex. C.) On September 2, 2021, Lusardi sent a second tender letter to Simmons. (UMF No. 15; Burden Decl., ¶ 4, Ex. D.) On August 8, 2022, Lusardi sent a third letter to Simmons, again demanding Simmons assume its duty to defend Lusardi. (UMF No. 15; Burden Decl., ¶ 5, Ex. E.) On November 14, 2022, Lusardi re-tendered their defense to Simmons by filing their cross-complaint in this matter. (UMF No. 17; Burden Decl., ¶ 6.) Owners have not received any response to the multiple tender letters to Simmons, and Simmons has failed to assume the defense of Owners. (UMF No. 18; Burden Decl., ¶ 7.)

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[3] Lusardi requests the court take judicial notice of various pleadings in this matter, specifically: Plaintiff's original complaint, her 1st – 4th amended complaints, and Lusardi's cross-complaint against Simmons. These papers are already part of the record in this action, and thus the court need not separately acknowledge their existence by judicial notice. (*Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful, or relevant.) Lusardi's request for judicial notice is DENIED.

This evidence is sufficient to show Lusardi provided written tender of its claim to Simmons, and Simmons has not agreed to defend Lusardi against Plaintiff's claims.

iv. *Conclusion—Lusardi's Burden*

To summarize, Lusardi has proffered sufficient evidence to establish each of the elements of its declaratory relief claim regarding duty to defend against Simmons. Thus, Lusardi meets its initial burden. (Code Civ. Proc., § 437c, subd. (p)(1).)

B. Simmons' Evidence and Arguments

Simmons has the burden to show the existence of a triable issue of one or more material facts as to its duty to defend. (Code Civ. Proc., § 439c, subd. (p)(1).)

i. *UMF Nos. 18-19*

Simmons' opposition disputes only two of Lusardi's UMFs. In UMF No. 18, Lusardi asserts "To date, Simmons has neglected to respond to Lusardi's tenders of defense and has failed to assume Lusardi's defense despite its definite contractual obligation to do so." (UMF No. 18; Burden Decl., ¶ 7.) Simmons responds, "On August 23, 2021, Simmons refused Lusardi's defense by serving its Answer to Lusardi's First Amended Complaint in which it generally denied the allegations set forth therein as set forth in its affirmative defenses." (Simmons Opp. Separate Statement, UMF No. 18; Declaration of Robert Altomare ("Altomare Decl."), ¶ 2.) Simmons' response effectively admits that it has refused to defend Lusardi, which tends to prove rather than disprove the third element concerning whether the indemnitee's tender of the defense was denied. Thus, the response to UMF No. 18 does not establish a triable issue of material fact.

Lusardi's UMF No. 19 states "Lusardi has incurred out of pocket expenses as a result of defending against Plaintiff's claims relating to Simmons' scope of work and will continue to incur losses as this case continues to be litigated." (UMF No. 19; Evans Decl., ¶ 5.) Simmons responds that it is unable to admit or deny this UMF because it has not been provided with Lusardi's legal costs. (Simmons Opp. Separate Statement, UMF No. 19; Altomare Decl., ¶3.) However, while UMF No. 19 may be relevant in determining how much Lusardi should be reimbursed, *if* there is a duty to defend and/or indemnify, it is not relevant to the issue now before the court: whether Simmons owes Lusardi a duty to defend. (See *Crawford*, *supra*, 44 Cal.4th at pp. 553-555.) Thus, the response to UMF No. 19 does not establish a triable issue of material fact.

ii. *Simmons' Legal Arguments*

This leaves Simmons' legal arguments. Simmons disputes whether the first element is met, i.e., whether there is a valid indemnity agreement establishing its duty to defend Lusardi. Simmons argues the indemnity clause in the Subcontract is unenforceable because it violates California Civil Code section 2782, subdivision (a), which provides as follows:

> Except as provided in Section 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promise, or for defects in design furnished by those persons, are against public policy and are void and unenforceable;

> provided, however, that this section shall not affect the validity of any insurance contract, worker's compensation, or agreement issued by an admitted insurer as defined by the Insurance Code.

(Civ. Code, § 2782, subd. (a).)

Simmons contends the Legislature's purpose in enacting this statute "was to insure as a matter of public policy that an indemnitee could not, by contractual language however specific, require indemnity for damages resulting from its own negligence or willful misconduct," quoting and citing *Gonzales v. R.J. Novick Constr. Co. Inc.* (1978) 20 Cal.3d 798 (*Gonzales*)[4]. (Opp., p. 3:18-21.) However, the *Gonzales* court rejected the contention that the indemnity clause at issue was wholly void for not containing an express exception for the indemnitee's sole negligence. (*Gonzales*, *supra*, 20 Cal.3d at p. 809, fn. 8.)

> [Cross-defendant's] contention that the indemnity clause here in question is rendered wholly void by the provisions of section 2782 of the Civil Code – which in general declares void as against public policy all provisions purporting to indemnify the promise against liability for damages arising from his own "sole negligence or willful misconduct" – is clearly without merit. If it had been the intention of the Legislature, in passing section 2782, to nullify all general indemnity clauses not containing an express disclaimer of any right to indemnification for the promisee's sole negligence, we have no doubt that that intention would have been clearly stated. The lawmakers' presumed awareness of the rule … forbidding indemnity under a general indemnity clause when the promisee has been guilty of *any* active negligence (regardless of whatever negligence is attributable to the promisor) further suggests that no such innovation was intended.

(*Ibid*. [emphasis original].)

Simmons argues the entire indemnity clause in the Subcontract is invalid because it contains the following sentence: "This indemnification shall apply regardless of any passive negligent act or omission of the indemnities." (Opp., p. 4:1-10.) However, even if this sentence could be considered unenforceable under Civil Code section 2782, it does not follow that the whole indemnity clause is void. (See, e.g., *Gonzales*, *supra*, 20 Cal.3d at p. 809, fn. 8.) Moreover, the language used suggests an intention to comply with Civil Code section 2782.05, which states that provisions that purport to indemnify a general contractor by a subcontractor against liability "are void and unenforceable *to the extent* the claims arose out of, pertain to, or relate to the *active negligence* or *willful misconduct* of that general contractor." (Civ. Code, § 2782.05, subd. (a) [emphasis added].) The statutory scheme allows for the possibility that indemnity clauses may still be enforceable in part, even if the unenforceable part is stricken

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[4] Simmons does not provide a page number for the quoted language, nor is the court able to locate this passage in the *Gonzales* decision. Simmons may be referring to the following: "We think it manifest that the purpose of the Legislature in passing section 2782, having in view certain language previously uttered by this court in the case of *Goldman v. Ecco-Phoenix Elec. Corp.* (1964) 62 Cal.2d 40, 48-49 [41 Cal.Rptr. 73, 396 P.2d 377], was to insure that an indemnitee would not, by contractual language *however specific*, require indemnity for damages sustained as a result of its *sole* negligence or willful misconduct." (*Gonzales*, *supra*, 20 Cal.3d at p. 809, fn. 8 [emphasis original].)

from the agreement as void. Thus, the court is not persuaded that the indemnification clause contained in the Subcontract is unenforceable under Civil Code section 2782.[5]

Simmons further contends the relief sought by Lusardi violates public policy, relying on *Centex Golden Constr. Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992 (*Centex Golden*) for the proposition that an indemnitee has the burden of proving the plaintiff's claims are connected to the subcontractor's work. (Opp., p. 4.) *Centex Golden* is inapposite because it does not address a subcontractor's duty to defend, but rather says a general contractor may seek *reimbursement* against a subcontractor under an indemnity agreement even where the subcontractor is not found guilty of negligence. (*Centex Golden*, *supra*, 78 Cal.App.4th at pp. 995-996.)

As Lusardi persuasively argues in reply, Simmons confuses its duty to defend with its indemnity obligations. (Reply, p. 3.) Lusardi is seeking summary adjudication of its cause of action for declaratory relief regarding Simmons' duty to defend, not its duty to indemnify. The California Supreme Court has explained, "the duty to defend upon the indemnitee's request … *is* distinct from, and broader than, the duty … to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed." (*Crawford*, *supra*, 44 Cal.4th at pp. 564-565 [indemnitor's duty to defend necessarily arises when a claim is made against the indemnitee, and thus does not depend on whether the conditions of indemnity are, or are not, later established].) In sum, Simmons' legal arguments fail to show there is a triable issue as to the elements of the claim.

Therefore, Simmons has not met its burden to establish a triable issue of material fact with respect to Lusardi's duty to defend claim.

C. Conclusion—Lusardi's Motion

Lusardi's motion for summary adjudication of the seventh cause of action in its cross-complaint is GRANTED.

IV. The Owners' Motion for Summary Adjudication

A. Owners' Evidence

The Owners' seek summary adjudication of their seventh cause of action for declaratory relief regarding Simmons' duty to defend. As discussed above, to meet their initial burden, they must show (1) a valid indemnification agreement, (2) third-party claims within the scope of the indemnity, and (3) the indemnitees' tender of the defense was denied. (*Crawford*, *supra*, 44 Cal.4th at pp. 553-555.)

i. *Indemnification Agreement*

Owners proffer evidence demonstrating general contractor Lusardi entered into a contract with Owners to construct the Hotel, consisting of 167 guest rooms (the "Prime Contract"). (Palmetto & Oto's Separate Statement of Undisputed Facts ("UMF"), No. 1; Declaration of Kurt Evans in support of Palmetto's and Oto's motion ("Evans Decl."), ¶ 2, Ex. A, p. 1.) The Prime Contract contains the following provisions:

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[5] Even assuming, in arguendo, the indemnification clause of the Subcontract could be considered wholly void and unenforceable, Simmons could still be subject to the indemnity clause contained in the prime contract because (as set forth below in *Order*, section IV) the Subcontract specifically incorporates the terms of the prime contract.

8.12

To the fullest extent permitted by applicable law, Contractor agrees to indemnify, defend and hold harmless Owner … for, from and against all claims, demands, causes of action … including, but not limited to any and all claims, demands, causes of action … directly or indirectly arising out of, or caused by, or resulting from … the Work performed hereunder or any part thereof by the Contractor, Subcontractors of any tier, and/or anyone for whom either is responsible…. Contractor's indemnity obligations under Paragraph 8.12 and its subparagraphs do not apply to the extent such Losses and Liabilities are caused by the active negligence, sole fault or willful misconduct of the Indemnitees, or any of them.

(UMF No. 17, Evans Decl., Ex. A, pp. 27-28.)

8.12.2

Owner shall promptly advise Contractor in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply, and Contractor, at Contractor's expense, shall assume on behalf of Owner (and the other Indemnitees) and conduct with due diligence and in good faith the defense thereof with counsel satisfactory to Owner, provided, however, that Owner shall have the right, at its option, to be represented therein by advisory counsel of its own selection and at its own expense.

(Evans Decl., Ex. A, p. 28.)

8.12.3

The Contractor shall indemnify and hold harmless all of the Indemnitees from and against any costs and expenses (including reasonable attorney's fees, costs and expenses of litigation and investigation) incurred by any Indemnitees in enforcing any of the Contractor's defense, indemnity, and hold harmless obligations under this Contract.

(UMF No. 18, Evans Decl., Ex. A, pp.28-29.)

Further, Lusardi and Simmons entered into a Subcontract regarding work on constructing the Hotel. (UMF No. 3; Evans Decl., ¶ 3, Ex. B.) The Subcontract specifically states the Prime Contract is incorporated into the Subcontract:

It is further agreed that the Contract Documents, including the prime contract, plans, specifications, all materials and documents referred to in said Contract Documents, and the Construction Schedule attached hereto as Exhibit "A", are incorporated in this Agreement by this reference, with the same force and effect as if the same were set forth herein, and that Subcontractor is bound by all of said contract Documents insofar as they relate in any way to the work covered by this Agreement.

(UMF No. 15, Evans Decl., Ex. A, p. 1.)

Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, such that wherein said Documents reference is made to Contractor and the work or specification therein pertains to Subcontractor's trade, craft, or type of work then such work or specification shall be interpreted to apply to Subcontractor instead of Contractor.

(UMF No. 16, Evans Decl., Ex. A, p. 1.)

This evidence is sufficient to demonstrate that Simmons agreed to indemnify Owners. (See *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 749 [finding subcontracts properly incorporated by reference the terms of the prime contract].) Further, the indemnification agreement appears valid and enforceable because it does not purport to indemnify Owners against third party claims arising from its own active negligence or willful misconduct. (See Civ. Code, § 2782.05, subd. (a).) Thus, Owners have established the existence of a valid indemnity agreement between itself and Simmons.

ii. ***Scope of Indemnity Agreement***

Owners proffer further evidence of the scope of the indemnity agreement. Through incorporation of Prime Contract's terms into Subcontract, Simmons agreed to indemnify and defend Owners to the "fullest extent permitted by applicable law… against all claims … directly or indirectly arising out of, or caused by, or resulting from (in whole or in part) … the Work performed hereunder or any part thereof by [Simmons]." (UMF No. 17, Evans Decl., Ex. A, pp. 27-28.) Simmons was required to complete all work relating to the shower doors. (UMF No. 4; Evans Decl., Ex. B, p. 12.) The following specific provisions are included within Simmons' scope of work for the construction of the Hotel:

> SECTION 3 – SCOPE
> Subcontractor agrees to furnish … and to perform the work necessary or incidental to complete all SHOWER DOORS work, for the project in strict accordance with the Contract Documents …

(UMF Nos. 4, 13; Evans Decl., Ex. B, p. 12.)

> SECTION 7 – SPECIAL PROVISIONS
> 2. This Subcontract includes all labor, material, and equipment necessary to furnish and install model room shower doors per plans and specifications complete including, but not limited to: Kohler sliding shower doors …

(UMF No. 13; Evans Decl., Ex. B, p. 13.) Accordingly, Simmons was responsible for supplying all materials and performing all labor necessary for the installation of all glass shower doors at the Hotel. (UMF No. 14; Evans Decl., Ex. B, pp. 12-13.)

Owners also proffer evidence relating to Plaintiff's claims in this matter. This is the same evidence proffered by Lusardi as addressed previously, and the court will incorporate by reference its prior description of the 4AC's allegations in relation to the design, construction, and installation of the glass shower doors. (UMF Nos. 6-12; 4AC[6], ¶¶ 1, 27, 33, 82.)

This evidence is sufficient to establish that the 4AC's allegations are embraced by the indemnity.

iii. ***Tender of Defense***

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[6] Owners request the court take judicial notice of pleadings in this matter, specifically: Plaintiff's original complaint, her 1st – 4th amended complaints, and Owners' cross-complaint against Simmons. For the same reasons addressed previously in *Order*, fn. 1, Owners' request for judicial notice is DENIED.

In further support of their motion, Owners proffer evidence they tendered their defense and indemnity to Simmons[7] following Plaintiff's allegations of injuries sustained at the Hotel. On September 30, 2021[8], Owners sent a tender letter to Simmons. (UMF No. 22; Declaration of Gabriella Burden in support of Palmetto and Oto's motion ("Burden Decl."), ¶ 3, Ex. C.) On August 8, 2022, Owners sent another letter to Simmons, again demanding that Simmons assume its duty to defend Owners. (UMF No. 23; Burden Decl., ¶ 4, Ex. E.) On November 14, 2022, Owners re-tendered their defense to Simmons by filing their cross-complaint. (UMF No. 24; Burden Decl., ¶ 5.) Owners have not received any response to the multiple tender letters to Simmons, and Simmons has failed to assume the defense of Owners. (UMF No. 25; Burden Decl., ¶ 6.)

This evidence is sufficient to show Owners provided written tender to Simmons of its claim that Simmons owed a defense to Owners. Simmons concedes this issue by offering no evidence or argument in opposition.

iv. *Conclusion—Owners' Burden*

To summarize, Owners have proffered sufficient evidence to establish each of the elements of its declaratory relief claim regarding duty to defend against Simmons. Thus, Owners meet their initial burden. (Code Civ. Proc., § 437c, subd. (p)(1).)

B. Simmons' Opposition

Simmons has the burden to show the existence of a triable issue of one or more material facts as to its duty defend. (Code Civ. Proc., § 439c, subd. (p)(1).)

Simmons only disputes Owner's UMFs Nos. 25-26, which are analogous to the two it disputes regarding Lusardi's motion (UMF Nos. 18-19). For the same reasons discussed above, Simmons' responses to Owners' UMFs No. 25-26 do not establish a triable issue of material fact.

Simmons argues Plaintiff's claims fall within an exception to the express indemnity provisions. (Opp., pp. 3-4.) This argument challenges whether Owners have established the second element, that Plaintiff's claims are embraced by the indemnity. According to Simmons, the Owners assumed control of the Hotel after its construction and are responsible for maintenance issues. (Opp., pp. 3-4.) Simmons includes evidence in support of this claim, attached to its opposition as part of Mr. Altomare's declaration, and contends there is a triable issue of material fact as to whether Owners' *sole* negligence caused plaintiff's injuries. (*Ibid*.)

Simmons' argument, as the court understands it, is that there is an exception to the duty to defend such that Owners must prove Simmons' negligence before its duty to defend is triggered. (Opp., pp. 3-5.) But this interpretation is at odds with not only the legal authority discussed herein, but also the plain language of the Prime Contract itself. For instance, at ¶ 8.12, the Prime Contract discusses an exception to the *indemnity* obligations in the case of the indemnitees' "active negligence, sole fault or willful misconduct," but makes no mention of an exception to the defense obligations. (Evans Decl., Ex. A, p. 28.) The Prime Contract

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[7] Owners also tendered their defense against Plaintiff's claims to Lusardi under the terms of the Prime Contract, and Lusardi accepted the tender and assumed Owners' defense in this matter. (UMF No. 19, Burden Decl., ¶ 3.)

[8] While both Owners' separate statement and Burden's corresponding declaration indicate Owners' initial tender letter was sent on September 9, 2021, the copy of the letter lodged with the court is dated September 30, 2021.

separately discusses the duty to defend at ¶ 8.12.2, again without mentioning any exception to this duty. (*Ibid*.) Simmons also sets forth no legal authority to support its position that an indemnitee must affirmatively prove their own lack of negligence before the duty to defend can be invoked. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court need not consider points unsupported by legal authority]; see also *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority].)

Simmons further contends the relief sought by Owners violates public policy, relying upon *Centex Golden*, *supra*, 78 Cal.App.4th 992, for the proposition that an indemnitee has the burden of proving the plaintiff's claims are connected to the subcontractor's work. (Opp. at p. 4.) As stated previously, Simmons' reliance on *Centex Golden* is misplaced because the decision addresses a claim for reimbursement rather than a subcontractor's duty to defend. (*Centex Golden*, *supra*, 78 Cal.App.4th at pp. 995-996.) Contrary to Simmons' contentions, Owners have sufficiently shown the 4AC's allegations are embraced by the broad language of the indemnity agreement, and the burden has shifted to Simmons to demonstrate the existence of triable issue of material fact as to this element. (Civ. Code, § 437c, subd. (p)(1).)

In sum, Simmons' arguments in opposition again conflate its duty to defend with its indemnity obligations. (*Crawford*, *supra*, 44 Cal.4th at p. 564-565 [duty to defend is distinct from and broader than duty to indemnify and does not depend on whether the conditions of indemnity are later established].) Therefore, Simmons has not met its burden to establish a triable issue of material fact with respect to Owners' duty to defend claim.

C. Conclusion—Owners' Motion

Accordingly, Owners' motion for summary adjudication of the seventh cause of action in its cross-complaint is GRANTED.

V. Conclusion

Cross-complainant Lusardi Construction Company's motion for summary adjudication of the seventh cause of action in its cross-complaint (i.e., declaratory relief that cross-defendant Simmons owes cross-complainant Lusardi Construction Company a duty to defend) is GRANTED.

The motion by cross-complainants Palmetto Hospitality of Mountain View LLC and Oto Development, LLC, for summary adjudication of the seventh cause of action in its cross-complaint (i.e., declaratory relief that cross-defendant Simmons owes cross-complainants Palmetto Hospitality of Mountain View LLC and Oto Development, LLC, a duty to defend) is GRANTED.

The Court will prepare the final order.

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Calendar Line 6
Case Name: *Doe v. Support Systems Homes, Inc., et al.*
Case No.: 23CV410157

On January 19, 2023, plaintiff Jane Doe filed a complaint against defendants Support Systems Homes, Inc. ("SSH") and Filipos Markolefas ("Markolefas") (collectively, "Defendants"), asserting causes of action for declaratory relief, negligence, improper hiring, retention, supervision and employment, and intentional infliction of emotional distress. On April 25, 2023, SSH moved to strike Plaintiff's usage of Jane Doe as a pseudonym from the complaint, arguing that Plaintiff failed to allege facts demonstrating that she was permitted the use of a pseudonym despite the presumption that judicial proceedings in civil cases are to be open.

After SSH filed the motion, counsel for Plaintiff emailed counsel for Defendants, indicating that he found an additional case supporting the use of a pseudonym and that he believed that Defendants knew the identity of Plaintiff because "[i]f the Defendants did not know the identity of Plaintiff then we would have been asked who she is." (Hooshmand decl. in support of motion to compel further responses to discovery ("Hooshmand decl."), Ex. A.) Plaintiff also then served form interrogatories ("FIs"), special interrogatories ("SIs"), requests for admissions ("RFAs") and requests for production of documents ("RPDs") on SSH. (See Hoshmand decl., ¶ 12, Exs. D-G.) On May 26, 2023, SSH provided responses to the discovery requests, consisting wholly of objections based on the ground that Plaintiff failed to identify the name of the propounding party. (See Hooshmand decl., Exs. H-K.) Upon receipt of SSH's responses, Plaintiff's counsel reached out to SSH's counsel to meet and confer, apparently disagreeing with SSH's position that the plaintiff needed to identify herself, and SSH's counsel noted that it provided argument in support of its position in connection with the motion to strike, and suggested that responses to discovery be postponed until after the hearing on the motion to strike since it was directly related to the merit of its objections. (See Hooshmand decl., Exs. L-N.) Plaintiff's counsel disagreed and filed the instant motion to compel further responses to FIs 1.1, 2.1-2.13, 3.1-3.7, 4.1-4.2, 6.1-6.6, 7.1-7.3, 8.1-8.8, 9.1-9.2, 10.1-10.3, 11.1-11.2, 12.1-12.7, 13.1-13.2, 14.1-14.2, 15.1, 16.1-16.9, 17.1, 50.1-50.6, SIs 1-35, RFAs 1-20, and RPDs 1-29. Plaintiff also seeks $10,708 in monetary sanctions in connection with her motion against SSH and its counsel.

On August 8, 2023, the Court issued a tentative ruling granting the motion to strike, noting that the complaint indeed failed to allege or otherwise demonstrate judicially noticeable facts permitting Plaintiff to use a pseudonym. (See Bradley decl. in opposition to motion to compel ("Bradley decl."), ¶ 5, Ex. 1.) Counsel for Plaintiff contested the tentative ruling, and at the August 9, 2023 hearing, argued that his client would be entering the Safe at Home Program and therefore be entitled to a the use of a pseudonym pursuant to the Code. (See Bradley decl., ¶ 5.) The Court continued the hearing on the motion to allow for the parties to review the new arguments. On August 14, 2023, Plaintiff's counsel for the first time served a Confidential Information Form on SSH's counsel. (See Bradley decl., ¶ 6, Ex. 2; Hooshmand decl. ¶ 6.) After the conclusion of a jury trial in San Joaquin County with which SSH's counsel was engaged, SSH's counsel reviewed Plaintiff's form, agreed to withdraw the motion to strike, asked Plaintiff's counsel to withdraw its motion to compel and offered to produce amended responses without objections by October 13, 2023. (See Bradley decl., ¶ 8, Ex. 3.) Plaintiff's counsel refused, stating that "given the history of this case we cannot have comfort that we will receive actual substantive code compliant responses to the discovery…. I believe

that a formal order requiring code compliant responses without boilerplate objections and without continued delay is the only way that my client will receive full and complete discovery responses." (Hooshmand decl. Ex. G).

Plaintiff's requests for judicial notice

In support of her motion, Plaintiff requests judicial notice of the complaint. The request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

In support of her reply to the opposition, Plaintiff requests judicial notice of the August 15, 2023 minute order, continuing the hearing on the motion to strike to September 15, 2023 with any reply due on September 8, 2023. The request for judicial notice is GRANTED. (Evid. Code § 452, subd. (d).)

Analysis

At the time Plaintiff filed her motion, Plaintiff's counsel was incorrect as to whether Plaintiff had adequately stated facts indicating that she was permitted to use a pseudonym in connection with her complaint. Plaintiff's counsel refused to acknowledge this deficiency until the August 9, 2023 hearing on the motion to strike and the subsequent August 14, 2023 service of the Confidential Information Form.

Given that SSH's counsel has already agreed to provide substantive amended responses without the prior objections and apparently has yet to provide those substantive amended responses, Plaintiff's motion to compel is GRANTED. SSH shall provide verified, code-compliant responses to the discovery requests within 30 calendar days of this order.

Plaintiff, in her memorandum of October 3, 2024, requests monetary sanctions in the amount of $10,708 against SSH and its counsel. Here, SSH acted with substantial justification in opposing the motion. (See Code Civ. Proc. §§ 2030.300, subd. (d) (regarding interrogatories, stating that "the court shall impose a monetary sanction… unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust"); 2031.310, subd. (h) (regarding inspection demands, stating that "the court shall impose a monetary sanction… unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust"); 2033.290, subd. (d) (regarding RFAs, stating that "[t]he court shall impose a monetary sanction… unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust").) As stated above, at the time Plaintiff filed her motion, Plaintiff's counsel was incorrect as to whether Plaintiff had adequately stated facts indicating that she was permitted to use a pseudonym in connection with her complaint—which was the basis for SSH's objections and thus SSH was justified in so objecting. Even after Defendant offered to provide the discovery in exchange for Plaintiff withdrawing this motion, Plaintiff refused. (See Hooshmand decl. Ex. G.) Plaintiff's request for monetary sanctions is DENIED in its entirety.

The Court will prepare the final order.

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Calendar Line 7
Case Name: Mengxin Wu v. Mykleen Corp. et al
Case No.: 22CV403540

Defendants Edward Kang, Woo Ri Dong Hang, and Mykleen Corp. move to set aside the defaults against them, to the extent they are entered.

As of today, only the default against Edward Kang has been entered. It was entered on April 7, 2023. Because no defaults have been entered against the other two defendants, the motion is not ripe. Defendants need only file an answer prior to the defaults being entered to prevent default. As such the Court will address only Defendant Kang's (hereinafter "Defendant") motion to set aside.

Defendant asks the Court to set aside the default, citing CCP § 473(b) for mistake, inadvertence, excusable neglect or surprise. He also asks that it be set aside under § 473.5(a), claiming he did not receive actual notice.

The Court does not find that Defendant has rebutted the presumption that he received actual notice. A process server served him on February 27, 2023 and included a description of him. See Proof of Service, filed April 7, 2023. The proof of service by a process service is granted a rebuttable presumption of correctness. (Evid. Code, § 647; see also *Fernandes v. Singh* (2017) 16 Cal. App. 5th 932, 940). The burden is on Defendant to produce evidence that he was not served. Here, he claims he did not learn of the lawsuit until April and only through the mail, but he never actually asserts that he was not served in February. He claims he has never been at the address where he was allegedly served. This is not sufficient to overcome the presumption. He need not live at the address nor even have a connection to the place where he is personally served.

Defendant also claims the default should be set aside for his neglect or mistake in not responding to the complaint. Defendant admits that he learned of the complaint in April. The default was not in fact processed until July. In those 3 months he failed to file an answer and he provides no reason for failing to do so, other than ignorance. But ignorance is not a basis to set aside a default under § 473. Moreover, self-represented litigants are held to the same standard as attorneys. (*Kobayashi v. Super. Ct. (Han) (*2009) 175 Cal.App.4th 536, 543; see also *McClain v. Kissler* (2019) 39 Cal.App.5th 399, 428, fn. 18 (stating that "clients who represent themselves are held to the same standard of excusable neglect as litigants who are represented by counsel"); see also *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1413 (stating that "when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel"); see also *A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1288 (stating that "the in propria persona litigant is held to the same restrictive rules of procedure as an attorney").)

The motion is DENIED. Plaintiff shall submit the final order.

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