SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20
Honorable Drew C. Takaichi, Presiding (for Hon. Socrates Manoukian)
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: April 25, 2024 TIME: 9:00 A.M.

NOTICE

APPEARANCES IN DEPT. 20 MAY BE IN PERSON OR REMOTELY. IF APPEARING REMOTELY, PLEASE USE DEPT. 20 TEAMS LINK FROM THE COURT WEBSITE: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

To contest a ruling: before 4:00 P.M. today you must notify the: (1) Court by calling (408) 808-6856 and (2) other side that you plan to appear at the hearing to contest the ruling

State and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while on Teams or Zoom

Prevailing party shall prepare the order by e-file, unless stated otherwise below.

The court does not provide official court reporters for civil law and motion hearings. See court website for policy and forms for court reporters at hearing.

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it or adjust your internet settings to *see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted*.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV405188	*Emily Benson vs Board of Trustees of the California State University*	Click or scroll to line 1 for tentative ruling.

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LINE 2	23CV427676	*Debra Maciel vs Julio Valencia et al*	Motion of defendant SI 32, LLC to strike portions of the complaint of plaintiff Debra Maciel is GRANTED. Proof of service of notice of motion is on file. No opposition is filed. No opposition to the motion is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c).
LINE 3	23CV427676	*Debra Maciel vs Julio Valencia et al*	Demurrer of defendant SI 32, LLC to the complaint of plaintiff Debra Maciel is SUSTAINED with 20 days leave to amend. Proof of service of notice of demurrer is on file. No opposition is filed. No opposition to the motion is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c).

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LINE 4	23CV418639	*Andre Wong vs Lumentum Operations LLC*	While the papers evidence certain meet and confer has been conducted, the issues presented in the motion to seal and motion for protective order suggest probable, informal resolution, or significant reduction in the number of contested documents, through further meet and confer and participation of counsel with a neutral. Accordingly, attorneys for the parties shall forthwith participate in Informal Discovery Conference with a Discovery Facilitator stipulated to from the Court's list of discovery neutrals in the Discovery Facilitator Program, Superior Court of California, Santa Clara County. Information and list of neutrals is at the following link: https://www.scscourt.org/court_divisions/civil/adr/civil_adr_dfp.shtml The current motions are continued to Case Management Conference on July 23, 2024 10:00 A.M. in Dept. 20, for setting purposes only if matters remain unresolved. In that event, counsel shall prepare and file a joint statement prior to hearing, not exceeding three pages, listing the unresolved matters.
LINE 5	23CV418639	*Andre Wong vs Lumentum Operations LLC*	Included in line 4 above.

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LINE 6	23CV426357	*Qusay Saeed vs Arch Veterinary Services, Inc.*	The motion of defendant Arch Veterinary Service, Inc.("Defendant") for monetary sanctions and terminating sanctions (striking of complaint) pursuant to Code of Civil Procedure section 128.7 against Plaintiff Qusay Saeed ("Plaintiff") is GRANTED. No opposition to the motion is filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c). Here, Defendant has submitted substantial evidence to support that Plaintiff's complaint was filed primarily for an improper purpose to harass Defendant, that the legal contentions asserted by Plaintiff are not warranted by law or by nonfrivolous argument for extension, modification, or reversal of law. The claims in the complaint are factually frivolous in that they are dependent upon Plaintiff being a licensed veterinarian, a representation Plaintiff made to Defendant to induce Defendant to offer Plaintiff employment, and which the evidence indicates the representation is false, and known to Plaintiff to be false. Accordingly, Plaintiff Qusay Saeed shall pay to Defendant attorneys' fees and costs of $11,735 forthwith as money sanctions, and Plaintiff's complaint filed in this action is stricken as an additional sanction to deter repetition of the conduct of Plaintiff set forth above. Defendant shall prepare the order.
LINE 7	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	The matters set forth in lines 7 through 12 pertain to the same case in which related matters for the same case are set for hearing on May 14, 2024, at **9:00 A.M**. in Dept. 20. The matters in lines 7 through 12 are therefore continued by the Court to May 14, ,2024, at ***10:00 A.M.*** for case management.
LINE 8	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	Continued for case management as set forth in line 7 above.
LINE 9	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	Continued for case management as set forth in line 7 above.

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LINE 10	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	Continued for case management as set forth in line 7 above.
LINE 11	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	Continued for case management as set forth in line 7 above.
LINE 12	20CV372317	*Pomogaibo Kateryna vs Yevgeniy Babichev et al*	Continued for case management as set forth in line 7 above.
LINE 13	21CV376417	*Long Chen et al vs John Ly et al*	Click or scroll to line 13 for tentative ruling.
LINE 14	22CV397799	*Virtsoft, Inc vs Mehrra Jewellers, Inc et al*	Click or scroll to line 14 for tentative ruling.
LINE 15	22CV408432	*Fred Rassaii vs City of San Jose*	Click or scroll to line 15 for tentative ruling.
LINE 16	22CV408432	*Fred Rassaii vs City of San Jose*	Tentative ruling is included in line 15.
LINE 17	23CV416318	*Francine McMahon vs Donna Brown et al*	Motion of plaintiff Francine McMahon for leave to file first amended complaint ("FAC"). Stipulation and order (Hon. Pennypacker) filed 03.15.24 indicates parties wish to participate in ADR prior to hearing on the motion, and order filed 04.17.24 (Hon. Manoukian) infers that hearing today may be for order to settlement conference, pursuant to application of Defendants. The Court understands the parties have been in contact with Attorney-Mediator Laurie Mikkelsen and have tentatively scheduled settlement conferences on 05.23.24 and 05.24.24. The parties are ordered to participate in a settlement conference with Ms. Mikkelson on 5.23.24, with a further settlement conference with Ms. Mikkelsen on 05.24.24, if necessary, at time(s) to be set by Ms. Mikkelsen The motion for leave to file FAC is continued to case management conference on July 23, 2024, at 10:00 A.M. in Dept. 20, for setting only, if the matter is not resolved at the settlement conference.

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LINE 18	23CV422749	*Santa Clara County Office of the Sheriff vs Corey Syverson*	The court finds that the return of firearms set forth in Exhibit A in the petition of Santa Clara County Office of the Sheriff filed September 20, 2023 to Respondent Corey Syverson ("Respondent") would likely endanger the Respondent or others, pursuant to Welfare and Institutions Code section 8102. The firearms shall not be returned or released to Respondent. Respondent's request, response, and objections to the petition, filed October 17, 2023, requests, instead of return of the firearms to Respondent (because he does not wish to obtain possession of the firearms), that Respondent be permitted to sell through (or transfer the firearms to) a licensed firearms dealer pursuant to Welfare and Institutions Code section 8102, subdivision (b)(4) and Penal Code section 33850, subdivision (b). Respondent's request to sell through (or transfer the firearms to) a licensed firearms dealer is granted, as provided in Penal Code section 33850, subdivision (b), and Petitioner Santa Clara County Office of the Sheriff may transfer the firearms to a licensed firearms dealer, provided there is compliance with all applicable requirements for transfer pursuant to Penal Code sections 33850, subdivision (b) et seq.
LINE 19	23CV416159	*Martin Miller, MD vs Lawrence McGlynn, MD et al*	Click or scroll to line 19 for tentative ruling.
LINE 20			
LINE 21			
LINE 22			
LINE 23			
LINE 24			
LINE 25			
LINE 26			

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 27			
LINE 28			
LINE 29			
LINE 30			

Calendar line 1

Case Name: *Emily Benson v. Board of Trustees of the California State University, et al.*

Case No.: 22CV405188

(1) Demurrer to Cross-Complaint

Factual and Procedural Background

Plaintiff Emily Benson ("Benson") was a student at California State University at San Jose ("San Jose State"). (First Amended Complaint ("FAC"), ¶1.) On August 28, 2021, plaintiff Benson attended a football game between San Jose State and Southern Utah University at CEFCU Stadium (also known as "Spartan Stadium"). (*Id*.) While leaning against a railing in the south end zone to take a photograph, the railing gave way. (*Id*.) The railing failed because it was not properly constructed, maintained, inspected, and secured. (*Id*.) Plaintiff Benson fell several feet with her back striking a concrete border at field level below. (*Id*.) Plaintiff Benson required transportation by paramedics to a local trauma center for serious low back injuries that persist to this day. (*Id*.)

On October 4, 2022, plaintiff Benson filed a complaint against defendant Board of Trustees of the California State University ("CSU") asserting a claim for negligence – premises liability.

On November 16, 2022, plaintiff Benson filed the operative FAC against defendant CSU now asserting a single claim for negligence – dangerous condition of public property.

On February 9, 2023, defendant CSU filed an answer to plaintiff Benson's FAC

On October 12, 2023, defendant CSU filed a cross-complaint against cross-defendants Landmark Event Staffing Services, Inc. ("Landmark"); Lexington Insurance Company ("Lexington"); and ("American International Group, Inc. ("AIG"). CSU's cross-complaint alleges it contracted with Landmark to provide security and ushering staff at the time and location of the alleged incident. (Cross-Complaint, ¶¶10 and 12.) Landmark was contractually obligated to (a) keep the aisles clear; (b) direct attendees to their seats; (c) not allow attendees to loiter in the area where plaintiff Benson loitered and took photographs of herself; (d) enforce the applicable student Code of Conduct; and (e) inspect and report safety hazards and take reasonable measures to uphold safety. (Id.)

As part of Landmark's contract with CSU, Landmark had mandatory duties to "obtain all the insurance required in this contract, and such insurance" must be approved by the CSU. (Cross-Complaint, ¶13.) This required a Commercial Form General Liability Insurance (CGL Policy) policy covering Landmark's work, or work to be done by Landmark, and which provided coverage for bodily injury or personal injury for such work. (Id.) This CGL Policy was required to cover and name CSU and all of its agents "as additional insureds." (*Id*.) To the extent Landmark failed to comply with these insurance requirements and CSU is obligated to pay any damages, then Landmark is contractually obligated to pay CSU such damages. (*Id*.)

Landmark obtained a Certificate of Liability Insurance (Certificate) with a CGL Policy of $1 million per occurrence, and $2 million aggregate, with Lexington, which is part of AIG. (Cross-Complaint, ¶15.) This policy covered the date of plaintiff Benson's incident at CSU. (*Id*.) The "Insured" on this Certificate was Landmark and CSU was expressly named "as additional insured per written contract as respects general liability per the attached form." (*Id*.) Attached to the Certificate was an Additional Insured Required by Written Contract Endorsement. (*Id*.) Under this endorsement, CSU has coverage as an additional insured under this policy for bodily injury which arises out of Landmark's work or professional services that it was providing to CSU. (*Id*.)

On June 12, 2023 and again on July 11, 2023, CSU sought coverage as a named additional insured under the insurance policy provided by Lexington and AIG. (Cross-Complaint, ¶18.) To date, Lexington and AIG have failed to respond, or acknowledge its contractual duties, or its duties as an insurer to its insured. (*Id*.)

Based on these allegations, CSU's cross-complaint asserts causes of action for:

(1) Breach of Contract
(2) Breach of Implied Covenant of Good Faith & Fair Dealing [against cross-defendant insurers]
(3) Implied Equitable Indemnity
(4) Equitable Contribution
(5) Declaratory Relief

On January 22, 2024, cross-defendant Lexington filed the motion now before the court, a demurrer to CSU's cross-complaint.

A. Cross-defendant Lexington's demurrer to cross-complainant CSU's cross-complaint is SUSTAINED, in part, and OVERRULED, in part.

1. First cause of action – breach of contract.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

Lexington demurs to CSU's breach of contract cause of action by arguing, initially, that CSU is not a party to the insurance contract here alleged between Landmark and Lexington. CSU alleges only that it is an "additional insured" under the insurance policy between Landmark and Lexington. Lexington relies upon *Henry v. Associated Indem. Corp*. (1990) 217 Cal.App.3d 1405 (*Henry*) where the insured sued not only his insurance company but also sued the insurance company's adjuster for claims including breach of fiduciary duty and breach of contract. As against the adjuster, the insured asserted breach of contract on a third party beneficiary theory "arising out of its claims adjustment agreement with [the insurance company]." (*Henry*, *supra*, 217 Cal.App.3d at pp. 1409 and 1416.) The trial court sustained the adjuster's demurrer to the breach of contract cause of action and the *Henry* court affirmed by explaining:

> With respect to Henry's third party beneficiary contractual theory, we note merely that there is no authority for such a cause of action, and that the Mayflower-Underwriters claims adjustment contract can in no sense be said to have been made for the express benefit of a third person policyholder, such as Henry, as would be required under Civil Code section 1559. [Footnote omitted.] That contract contemplated that adjusting services would be provided for the respective benefit of the insurer and the insured, depending on the facts of the individual claim; it did not contemplate Henry's claim would be successful or impose any new duties to Henry other than those which inhere in the actual contract of insurance. Therefore, the trial court correctly concluded the sixth cause of action was not stated against Underwriters.

(*Id*. at p. 1417.)

The court better understands Lexington to argue that, "[S]omeone who is not a party to [a] contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party." (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566 (*Gantman*).) "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348.) However, under California's third party beneficiary doctrine, a third party—that is, an individual or entity that is not a party to a contract—may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

(*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821 (*Goonewardene*).)

> [The court must] carefully examine[] the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward.

(*Goonewardene*, *supra*, 6 Cal.5th at p. 830.)

Interestingly, the *Goonewardene* court reached its conclusion without knowledge of any of the specific terms of the actual contract and relying only on properly pleaded facts contained in the plaintiff's proposed amended complaint. (See *Goonewardene, supra*, 6 Cal.5th at p. 832—"it is important to note that in this case we do not have before us the specific terms of the actual contract between Altour and ADP. … Because of the present procedural posture of the case—an appeal of a dismissal of the action against ADP after the trial court sustained ADP's demurrer to the 5AC without leave to amend—we must assume the properly pleaded facts contained in the 6AC are true.")

In *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233, the court held, "Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract. [Citation.] However, where, as here, the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (See also *Souza v. Westlands Water Dist*. (2006) 135 Cal.App.4th 879, 891 citing *Prouty*.)

All this being said, the court finds CSU's allegations distinguishable from *Henry*. CSU stands in different shoes than the insured in *Henry* pursuing a breach of contract cause of action against the insurance adjuster. Here, CSU has alleged that it is a named (and thus intended) additional insured. From this one allegation, the court can reasonably infer all of the *Goonewardene* requirements necessary to assert a breach of contract claim as a third party beneficiary, i.e., "(1) that it [CSU] is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties [Landmark and Lexington] is to provide a benefit to the third party [CSU], and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties."

Lexington argues, secondarily, that even if CSU has standing to assert a breach of the insurance agreement between Landmark and Lexington, CSU has not set forth the material terms. If the contract is written, "the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459 (*Otworth*).) Lexington contends CSU has neither attached a copy of the policy/ agreement nor set forth verbatim the material terms.

In opposition, CSU contends Lexington ought to be estopped from asserting this argument since Lexington (and Landmark) failed to respond to CSU's requests for the relevant policy/ agreement. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, §623.) The court is presented with a demurrer for which, as the parties are well aware, the court is confined to the pleadings and judicially-noticed matters. The court is not inclined to turn this demurrer into an evidentiary hearing. In any case, the court does not find Lexington's failure to respond to CSU's request for the relevant policy/ agreement warrants application of estoppel principles.

CSU apparently concedes that if the court does not apply estoppel, then CSU instead asks for leave to amend to incorporate by reference the relevant insurance policy/ agreement.

Accordingly, cross-defendant Lexington's demurrer to the first cause of action in cross-complainant CSU's cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is SUSTAINED with 10 days' leave to amend.

2. Second cause of action - breach of implied covenant of good faith and fair dealing.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also CACI No. 325.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.] The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 349 – 350 (*Guz*).)

Lexington demurs to CSU's second cause of action by again arguing that CSU is not a party or beneficiary of the relevant policy/ agreement.

The general rule is that parties who are not entitled to benefits under the policy cannot maintain a cause of action for an implied covenant. [Citations omitted.] As the Supreme Court explained in *Murphy v. Allstate Ins. Co., supra*, 17 Cal. 3d at page 944, "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. . . ." Claims for bad faith violation of an insurance contract are "strictly tied" to an implied covenant of good faith and fair dealing, which arises out of an underlying contractual relationship. [Citations omitted.] In the absence of such a relationship, no recovery for bad faith may be had. [Citations omitted.] Accordingly, the insurer's duty of good faith and fair dealing is owed only to its insured and any express beneficiary of the policy. [Citations omitted.]

(*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 429-430.)

However, as discussed above, it is the court's opinion that the cross-complaint sufficiently alleges that CSU, as a named additional insured, is a third party beneficiary and is thus owed a duty of good faith and fair dealing.

Lexington also demurs by arguing again that the cross-complaint does not include verbatim the material terms or a copy of the relevant policy/ agreement. The court is not convinced that this is necessary in asserting the breach of an implied covenant which would not be expressly found anywhere in the policy/ agreement's written terms.

Accordingly, cross-defendant Lexington's demurrer to the first cause of action in cross-complainant CSU's cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is OVERRULED.

3. Third cause of action – implied equitable indemnity.

In *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573-574 (*Jocer*), the court explains:

Generally, "indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' " (*Prince v. Pacific Gas & Electric Co*. (2009) 45 Cal.4th 1151, 1157 [90 Cal.Rptr.3d 732, 202 P.3d 1115] (*Prince*), quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 [119 Cal.Rptr. 449, 532 P.2d 97].) There are two basic types of indemnity: express indemnity, which relies on an express contract term providing for indemnification, and equitable indemnity, which embraces "traditional equitable indemnity" and implied contractual indemnity. (*Prince*, at pp. 1157–1159.)

Because the second amended complaint alleges no basis for express indemnity, we limit our analysis to equitable indemnity. Traditional equitable indemnity is "rooted in principles of equity" (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 714 [75 Cal.Rptr.2d 376]), and "requires no contractual relationship between an indemnitor and an indemnitee" (*Prince, supra*, 45 Cal.4th at p. 1158). In contrast, implied contractual indemnity presupposes a contractual relationship that supports a right to indemnification not rooted in an express contract term. (*Prince, supra*, 45 Cal.4th at p. 1159.)

As our Supreme Court has recently explained, although implied contractual indemnity has long been regarded as distinct from both express and equitable indemnity, it is now to be viewed as a form of equitable indemnity. (*Prince, supra*, 45 Cal.4th at p. 1157, fn. 2.) Traditional equitable indemnity and implied contractual indemnity share a key feature that distinguishes them from express indemnity: unlike express indemnity, neither traditional equitable indemnity nor implied contractual indemnity is available "in the absence of a joint legal obligation to the injured party." (*Id*. at pp. 1160–1161.) Under this principle, " ' "there can be no indemnity without liability," ' " that is, the indemnitee and the indemnitor must share liability for the injury. (*Id*. at p. 1165, quoting *Children's Hospital v. Sedgwick* (1996) 45 Cal.App.4th 1780, 1787 [53 Cal.Rptr.2d 725].) Thus, no indemnity may be obtained from an entity that has no pertinent duty to the injured third party (*Prince, supra*, 45 Cal.4th at p. 1159), that is immune from liability (*id*. at pp. 1168–1169), or that has been found not to be responsible for the injury (*Children's Hospital v. Sedgwick, supra*, 45 Cal.App.4th at p. 1787).

(Emphasis added.)

As this court understands, cross-defendant Lexington demurs to CSU's third cause of action for implied equitable indemnity by arguing, essentially, that (as explained in *Jocer*) there can be no indemnity without shared liability on Lexington's part for plaintiff Benson's injury. According to Lexington, it is not liable to plaintiff Benson as a matter of law because Lexington did not owe any pertinent duty to plaintiff Benson. Lexington is alleged only to be Landmark's insurer and owes a contractual duty to Landmark. There are no facts upon which this court could impose a duty upon Lexington to plaintiff Benson.

In opposition, CSU relies on the following legal principles:

Implied contractual indemnity is a form of equitable indemnity, arising from equitable considerations either by contractual language not specifically dealing with indemnification or by the equities of the specific matter. The right to implied contractual indemnity is predicated on the indemnitor's breach of contract. Implied contractual indemnity is applied to contract parties and is designed to apportion loss among contract parties based on the concept that one who enters a contract agrees to perform the work carefully and to discharge foreseeable damages resulting from that breach. As a form of equitable indemnity, the doctrine rests on the

equities apparent from the surrounding circumstances, because contracting parties should share loss in proportion to their breach. An implied contractual indemnity action does not amount to a claim for contribution from a joint tortfeasor because it is founded neither in tort nor on any duty that the indemnitor owes to the injured party. Rather, it is predicated on the indemnitor's breach of duty owing to the indemnitee to properly perform its contractual responsibilities.

(*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp*. (2003) 111 Cal.App.4th 1328, 1350 – 1351; internal punctuation and citations omitted; emphasis added.)

The court is not clear how to reconcile this apparent contradiction except to note that *Jocer* relies on the California Supreme Court decision of *Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151 (*Prince*) which is "binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) And it is in Prince that the California Supreme Court clarified, "Indeed, our recognition that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims' (*Bay Development, supra*, 50 Cal.3d at p. 1033, fn. omitted) corrects any misimpression that joint liability is not a component of such claims." (Prince, supra, 45 Cal.4th at p. 1166.)

As such, the court finds more persuasive Lexington's argument, i.e., that there can be no indemnity without the indemnitor [Lexington] and indemnitee [CSU]'s shared liability for the injury to the third party [plaintiff Benson]. CSU has not, in opposition, addressed the absence of joint liability against Lexington.

Accordingly, cross-defendant Lexington's demurrer to the third cause of action in cross-complainant CSU's cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for implied contractual indemnity is SUSTAINED with 10 days' leave to amend.

4. Fourth cause of action – equitable contribution.

"Equitable contribution (not to be confused with equitable subrogation or equitable indemnity) is a loss sharing procedure by which an insurer that defended and settled a claim against its insured may seek to apportion those costs among coinsurers who refused to settle or defend the claim." (*California Capital Ins. Co. v. Employers Compensation Ins. Co*. (2023) 89 Cal.App.5th 638, 644.)

Lexington acknowledges that equitable contribution arises in non-insurance contexts as well, but even so, contribution is the right to recover from a co-obligor. Lexington repeats its argument above that there is no factual allegation in the cross-complaint which would support any co-obligation by Lexington to plaintiff Benson. As alleged insurer, Lexington's obligation is to Landmark as its insurer and perhaps to CSU, alleged to be an additional insured.

In opposition, CSU affirms that equitable contribution can be sought from a co-obligor. However, the potential co-obligors under the facts alleged would be CSU and Landmark. Lexington, as Landmark's insurer, is not the co-obligor of any resulting liability to plaintiff Benson.

Accordingly, cross-defendant Lexington's demurrer to the fourth cause of action in cross-complainant CSU's cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for equitable contribution is SUSTAINED with 10 days' leave to amend.

5. Fifth cause of action – declaratory relief.

Lexington demurs to CSU's fifth cause of action for declaratory relief by asserting that the declaratory relief cause of action encompasses the same rights raised in the first four causes of action and fails for the same reasons argued with regard to those earlier causes of action. However, in light of the court's ruling with regard to the second cause of action, Lexington has not prevailed as to all the earlier causes of action.

A demurrer does not lie to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action.")

Consequently, cross-defendant Lexington's demurrer to the fifth cause of action in cross-complainant CSU's cross-complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for declaratory relief is OVERRULED.

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Case Name: *Long Chen et al vs John Ly et al*
Case no.: 21CV376417

Motion before the Court

According to the allegations in the motion and declaration of attorney Christopher Dolan ("Dolan"), on October 11, 2023, attorney Aimee Kirby ("Kirby"), an attorney in the firm representing plaintiffs Long Chen, Dan Zhu, Bojian Li and the Estate of Angeline Chen, sent offers for settlement of the instant action to defendant Asian Square, Inc. ("Defendant") pursuant to Code of Civil Procedure section 998. On October 18, 2023, Defendant accepted the offers. Upon discovery of the acceptance, attorney Dolan, lead trial counsel for Plaintiffs in the action, spoke with attorney Kirby and staff, and Plaintiffs, and learned that Plaintiffs had not given informed consent to attorney Kirby to submit the 998 offers, and hence, attorney Kirby had no authority to submit the 998 offers to Defendant. On October 19, 2023, Attorney Dolan notified attorney for Defendant, Kevin Mint ("Mint") of the mistake. Attorney Mint informed attorney Dolan that Defendant considered the accepted offers valid and had already submitted the acceptances for filing with the court. Attorney Dolan then filed declaration re: entering judgment before entry of judgment, indicating that there was no consent or authority, and the judgment should not be granted. On December 6, 2023, judgment was entered ("Judgment"), and Defendant sent checks to Plaintiffs for the settlement sums. Plaintiffs returned the checks to Defendant, uncashed.

On January 18, 2024, plaintiffs Long Chen and Dan Zhu ("Plaintiffs") filed the instant motion to vacate the Judgment entered in their favor. On February 8, 2024, Defendant filed opposition, and on February 9, 2024, Plaintiffs filed reply.

Discussion and Analysis

The evidence supports that attorney Kirby had no authority or consent of Plaintiffs to submit the 998 offers. Upon discovery of the 998 offers and acceptance, lead counsel for Plaintiffs timely notified attorney for Defendant, who had already submitted the acceptances to the court. Plaintiffs promptly filed declaration informing the court that there was no consent or authority, and judgment should not be granted.

Plaintiff submits case decision authority that in criminal or civil cases, while an attorney may bind a client by stipulation or action on procedural matters, there is no implicit authority conferred on an attorney on matters of a client's substantial rights, and actions of the attorney are valid only with the client's authorization or agreement.

Here, while the evidence of Plaintiffs lack of authorization and informed consent for the 998 offers in attorney Dolan's declaration is hearsay, attorney Dolan has sufficient personal knowledge of the circumstances, and the timing of notice to Defendant about the lack of consent and authorization for the offers adds credibility to the assertion.

The opposition focuses "first and foremost" on the policy of promoting settlement, and that the attorney neglect here in submitting the offer is substantive, and not the result of simple

mistake or oversight such as a typographical error. Defendant asserts that relief pursuant to section 473 is afforded only for basic, inadvertent errors.

Defendant also asserts that the authority cited by Plaintiffs to support that an attorney's action concerning a client's substantial rights is valid only with the client's authorization or agreement, is "effectively moot" by a 2020 amendment to Code of Civil Procedure section 664.6. Defendant asserts that the section and amendment provide that an agreement to settle signed only by an attorney who represents a party is nonetheless binding. Defendant does not cite authority that this amendment extends to offers to compromise pursuant to Code of Civil Procedure section 998.

The court is persuaded, pursuant to authority cited by Plaintiffs, that under the particular facts of the instant matter, Plaintiffs are entitled to the relief requested in the motion.

Disposition

The motion of Plaintiffs Long Chen and Dan Zhu ("Plaintiffs") to vacate the December 6, 2023 judgment in favor of Plaintiffs is GRANTED.

The request of Defendant to conduct discovery into the claims of lack of client consent, with limited waiver of the attorney-client privilege as to discussions leading up to mediation and about the 998 offers is DENIED.

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Case Name: *Virsoft, Inc. v. Mehrra Jewellers, Inc., et al*
Case no.: 22CV397799

Motion before the Court

On March 5, 2024, plaintiff Virtsoft, Inc. ("Plaintiff") filed the instant application for set aside of order from hearing on January 23, 2024, granting motion of Defendants Mehrra Jewellers, Inc., Naresh Mehr and Shivam Mehra ("Defendants") for terminating sanctions, pursuant to Code of Civil Procedure section 473, subdivision (b).

On April 12, 2024, Defendants filed opposition. Plaintiff has not filed reply to opposition.

Analysis

Code of Civil Procedures section 473, subdivision (b) in pertinent part here, provides:

> "(b) The court may … relieve a party or his or her legal representatives from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. … the court shall , whenever an application for relief is made … is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk … which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect."

Here, the mistake, inadvertence, surprise, or neglect asserted in support of relief is Plaintiff's attorneys' mistake in not filing written opposition to Defendants' motion which Plaintiff asserts resulted in entry of the court's order at the January 23, 2024 hearing. It is further asserted by Plaintiff that the mistake is the result of other mistakes of attorneys in not scheduling the hearing and due dates for filing opposition on the attorneys' calendars. Further, Plaintiff asserts that Plaintiff's attorneys were unaware of the motion, until the day before the hearing when office staff checked the court website. Plaintiff's attorneys then provided notice of opposition to the court's tentative ruling, and Ryan Penhallegon, attorney for Defendants and Farsheed Shomloo, an associate attorney of Plaintiff's attorney Rattan Dev. S. Dhalilwai, appeared at the hearing on January 23, 2024. Plaintiff asserts that the court stated that it had no choice but to grant the motion because Plaintiff had not filed an opposition.

In opposition, Defendants assert that the motion was granted for substantive reasons, not because of the failure of Plaintiff to file written opposition. The substantive reasons include Plaintiff's failure to comply with a March 28, 2023 minute order pursuant to Defendants' motion to compel further responses to discovery, and failure to comply with minute order of October 19, 2023, granting Defendants' motion to compel further responses to interrogatories.

The opposition does not directly contest the assertion of Plaintiff that the court stated that it had no choice but to grant the motion because Plaintiff had not filed an opposition, and

instead asserts that Plaintiff's counsel appeared and vociferously opposed, and was permitted by the court to argue and oppose the tentative ruling. The inference is that the court heard oral opposition, and the motion was granted based on the merits and not because of the absence of written opposition. The opposition is signed by Defendants' attorney Ryan Penhallegon.

As asserted by Defendants, the statement of the court alleged by Plaintiff to have been made is not supported by evidence. The declaration of attorney Farsheed Shomloo, who was present at the hearing, makes no reference to the alleged statement of the court. Plaintiff also did not file reply or declaration in support of reply evidencing the alleged statement or contesting the assertions made in opposition.

Defendants submit a declaration of attorney Jessica Nwassike, evidencing that substantive grounds existed for the granting of the order. That said, Defendants do not submit a declaration of attorney Ryan Penhallegon, who was present at the hearing, to support the assertion that the court heard oral opposition from attorney Farsheed Shomloo.

The minute order evidences that hearing was held, and attorneys Farsheed Shomloo and Ryan Penhallegon appeared. There is no transcript of the hearing from a court reporter. Order was then entered, and terms of order stated. There is no indication that the court made any other statement.

Here, the moving party -Plaintiff has the burden of proof to show sufficient evidence that the mistake of not filing written opposition, and the mistakes alleged for the failure to file opposition, resulted in the order being entered against Plaintiff. However, the evidence supports that the order was entered for substantive reasons set forth in opposition and supported by declaration of attorney Jessica Nwassike, and not because of the mistake of Plaintiff's attorneys. Plaintiff has failed to submit sufficient evidence to carry Plaintiff's burden of proof.

Disposition

Plaintiff's motion to set aside the order granting terminating sanctions and monetary sanctions pursuant to hearing on January 23, 2024 is DENIED.

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Case Name: *Fred Rassaii vs City of San Jose*
Case no.: 22CV408432

Motions before the Court

There are two motions set for hearing: (1) motion of defendant City of San Jose ("Defendant") for order declaring Plaintiff Fred Rassali ("Plaintiff") a vexatious litigant, filed March 22, 2024, and (2) Plaintiff's motion to vacate judgment issued April 6, 2023, filed January 16, 2024.

Defendant's motion for order declaring Plaintiff a vexatious litigant.

Code of Civil Procedure section 391, subdivision (b) provides alternative definitions of a "vexatious litigant". The motion of Defendant seeks determination that Plaintiff is a vexatious litigant pursuant to subdivisions (b)(2)and b(2) of the section. Subdivision (b)(2) describes as a vexatious litigant a person who:

> "(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in-propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined."

Subdivision (b)(3) describes as a vexatious litigant a person who:

> "(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Here, on December 15, 2022, Plaintiff filed petition to cancel a parking citation issued to Plaintiff by Defendant.

On January 28, 2023, a tentative ruling was adopted as the order of the court, denying the petition, and dismissing the action for lack of subject matter jurisdiction. The minute order reflects that the tentative ruling was subsequently set aside after Plaintiff appeared, albeit late to the hearing.

That said, on April 7, 2023, the court entered judgment on petition to quash parking citation, denying Plaintiff's petition, and entering judgment in favor of Defendant and against Plaintiff ("Judgment").

Additionally, on April 25, 2023, the court granted Defendant's demurrer without leave to amend, dismissed Plaintiff's petition and denied Plaintiff's motion to compel and motion to vacate.

On May 23, 2023, Plaintiff filed ex parte application for the court re-designate the case as "limited civil'.

On May 25, 2023, Plaintiff filed appeal of the Judgment, and on January 3, 2024, the Appellate Division of Santa Clara County Superior Court entered order dismissing Plaintiff's appeal.

On January 16, 2024, Plaintiff filed the instant motion to vacate the same Judgment.

Plaintiff also filed the following: (1) Demand for jury trial on 04.12.24; (2) ex parte application for the court to order sequestration of witness on 04.15.24, and (3) ex parte application for order for defendant to disclose identity of person who issued the citation on 04.18.24.

Plaintiff's opposition to Defendant's current motion does not contest Defendant's assertion that the Plaintiff's current motion to vacate and ex parte application seek the same relief as Plaintiff's petition, which has been denied and judgment has been entered in favor of Defendant. Instead, the opposition discusses the history and circumstances of the issuance of the parking citation by Defendant; why citation should not have been issued; Defendant's decision not to dismiss the citation and instead enforce it based on asserted falsehoods; and criticism of the court in its consideration of evidence and rulings.

Analysis

The Judgment is clear and unambiguous, ending the lawsuit in favor of Defendant. The dismissal of Plaintiff's appeal of the Judgment concludes the matter.

Nonetheless, Plaintiff filed the instant motion on January 16, 2024 to set-aside the Judgment, evidencing Plaintiff's intent to continue litigation of the action and disregard of the Judgment and dismissal of Plaintiff's appeal of the Judgment. Plaintiff's opposition to the instant motion further evidences an intent to relitigate the issues that have been determined by the Judgment. The filing of the motion to set-aside the judgment is therefore frivolous and meritless.

The motion and current ex parte application of Plaintiff further evidence a course of action that is frivolous, unproductive and meritless, serving to delay closure of the action and to cause expenditure of time and expense by defendant and expenditure of court resources.

The evidence supports granting Defendant's motion for order designating Plaintiff a vexatious litigant and denying Plaintiff's motion to vacate the Judgment.

Disposition

Defendant's motion is GRANTED and the court determines that Plaintiff is a vexatious litigant pursuant to Code of Civil Procedure section 391, subdivisions (b)(2) and (b)(3).

Defendant's submitted evidence of court filings by Plaintiff, and facts, circumstances relating to those filings, is persuasive that there is reasonable probability that further actions of Plaintiff against Defendant in this case will continue, and Defendant will continue to incur time and expense in defending against such action, unless a pre filing order is issued. Accordingly, the request to issue a pre filing order against Plaintiff Fred Rassali is GRANTED.

The motion to vacate the Judgment entered on April 6, 2023 is DENIED.

Defendant shall prepare the order.

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Case Name: *Martin Miller, MD vs Lawrence McGlynn, MD et al*
Case no.: 23CV416159

Background

On May 12, 2023, plaintiff Martin Miller, M.D. ("Plaintiff"), filed complaint against defendants Stanford Health Care and Lawrence McGlynn, M.D. ("Defendants") alleging seven causes of action for negligence, invasion of privacy – intrusion into private affairs, invasion of privacy – public disclosure of private facts, breach of written contract, violation of medical disclosure laws, negligent hiring, supervision, and retention of employee, and punitive damages.

On September 8, 2023, Defendants filed demurrer to the complaint and motion to strike portions of the complaint. Plaintiff did not file opposition. On January 16, 2024, the demurrer was sustained with 20 days leave to amend, and the motion to strike was granted.

On March 5, 2024, Plaintiff filed the instant motion and application for leave to file first amended complaint ("FAC"). On March 26, 2024, Defendants filed opposition. Plaintiff did not file reply.

On April 5, 2024, Defendants filed ex parte application for order of dismissal with prejudice. On April 8, 2024, the court (Hon. Manoukian) granted order shortening time for hearing and set the application for dismissal to be heard with Plaintiff's motion for leave to file FAC. Hearing on the two motions/applications is set for today, April 25, 2024. Plaintiff has not filed opposition to Defendants' application for order of dismissal. On April 18, 2024, Defendants filed notice of non-opposition and reply.

Summary of contentions and discussion

Defendants assert that March 6, 2024 was the last day for Plaintiff to file an amended pleading pursuant to the order sustaining demurrer and granting 20 days leave to amend. Defendants assert that Plaintiff has not filed an amended complaint, and a motion for leave to file FAC is not an amended pleading. Plaintiff has not filed opposition to contest these assertions.

Defendants' application for order for dismissal and opposition to Plaintiff's motion for leave to file FAC have substantially similar citations to authority, evidence, and argument. Defendants assert that the motion for leave to file FAC fails to show any substantive changes to the allegations of the previous complaint, but instead seeks to add a new claim for intentional infliction of emotional distress ("IIED"). Defendants assert that Plaintiff fails to state a cause of action, persuasively arguing that the facts do not support all elements of a cause of action for IIED, notably, extreme or outrageous conduct of Defendants. Defendants additionally cite authority to support the assertion that the new claim is barred by the litigation privilege because the conduct complained of by Plaintiff, Defendant McGlynn's conversation with law enforcement, is protected by the privilege. Defendants further cite authority and submit facts to show that the new claim is barred by the applicable three-year statute of limitations, which Defendants assert expired on February 3, 2022. Finally, Defendants present

evidence from verified responses of Plaintiff to interrogatories that are inconsistent with and/or raise questions of credibility of Plaintiff's assertion in the motion for leave to file FAC that injuries to support the new claim manifested in December 2023.

For these reasons, Defendants argue that the motion for leave to file FAC lacks good faith and is an abuse of the court's process. Defendants contend that a grant of the motion is not in the furtherance of justice.

Motion for leave to file FAC

Plaintiff urges the court to consider the policy in favor of liberal allowance of amendments. Plaintiff asserts that trial has not been set, the motion was timely brought and that the proposed new claim relates only to facts already previously pled, and therefore, a grant of leave will not result in unreasonable delay or in prejudice to Defendants.

Plaintiff's counsel's declaration in support of the motion states that counsel misunderstood the timeline associated with some of the causes of action, and that the date of Defendants' tortious actions is to be determined. Counsel asserts that the new proposed cause of action for intentional infliction of emotional distress was not pled earlier because Plaintiff's injuries did not manifest until December 2023, and counsel only became aware recently of such injuries. That said, Plaintiff's verified responses to interrogatories include facts alleged as wrongdoing of the Defendants that are the basis of the lawsuit, all of which occurred no later than 2020.

Plaintiff did not file opposition to the motion to dismiss or reply to opposition for leave to file FAC to contest the above-described authority, evidence and argument of Defendants submitted to support dismissal of the action and to deny the motion for leave. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c).

The policy of law is in favor of liberal allowance of amendments. However, there are limits.

Here, Plaintiff was afforded 20 days to file an amended pleading when Defendants' demurrer to Plaintiff's complaint was sustained.

Plaintiff failed to file an amended complaint, and Defendants are entitled to file the instant application for order for dismissal. Considering verified responses of Plaintiff to interrogatories, there are concerns of credibility about Plaintiff's assertion that Plaintiff's injuries relating to the new claim did not manifest until December 2023 and those injuries were not known to Plaintiff's attorney until recently.

These considerations and the fact that no opposition is filed by Plaintiffs contesting the evidence and authority of Defendants that Plaintiff cannot state a viable cause of action for IIED, that the motion for leave to amend to add the new cause of action lacks merit and good faith, is persuasive that a grant of leave to amend under these facts and circumstances is not in furtherance of justice.

Plaintiff's motion for leave to file FAC is therefore, DENIED.

Defendants' application for order of dismissal

As discussed, Plaintiff failed to file opposition to Defendants' application to dismiss with prejudice. The application sets forth evidence, authority, and argument to support the relief requested. A failure to oppose a motion may be deemed a consent to the granting of the motion. Cal.Rules of Court, Rule 8.54 (c).

The application to dismiss is GRANTED; the case is dismissed with prejudice.

Disposition

Plaintiff's motion for leave to file FAC is DENIED.

Defendants' application for order of dismissal of action, with prejudice, is GRANTED.

Defendants shall prepare the order.

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