SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 will call the cases of those who appear in person first. If you 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. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to 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. Go to the Court's website at www.scscourt.org to make the reservation.

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.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV394810 Hearing: Demurrer	Stan Habr et al vs Avalon Transportation, LLC et al	Notice appearing proper and good cause appearing, the unopposed demurrer by Defendant Riddle regarding counts 10, 11, 12, and 13 is GRANTED WITHOUT LEAVE TO AMEND. While leave to amend should generally be given, here no leave is given because (1) Plaintiff has failed to oppose the motion; and (2) Plaintiff has failed to provide any showing that the complaint could be amended. The request for judicial notice is denied as not necessary to the holding of the Court. Defendant Riddle shall submit the final order.
LINE 2	22CV408993 Hearing: Demurrer	JOSEPH DOE 7DC et al vs DOE 1 et al	See Tentative Ruling. Court will issue the final order.
LINE 3	22CV408993 Hearing: Demurrer	JOSEPH DOE 7DC et al vs DOE 1 et al	See Tentative Ruling. Court will issue the final order.
LINE 4	22CV396209 Motion: Summary Judgment/Adjudication	Matthew Wesley vs Marc Poirier et al	See Tentative Ruling. Court will issue the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.)

LINE 5	22CV408303 Motion: Compel	THERESA FOSTER vs RLJ LODGING TRUST, L.P. et al	Notice appearing proper and good cause appearing, the Defendant's unopposed motion to compel responses to interrogatories set one is GRANTED. Plaintiff shall provide code-complaint responses without objections and shall pay sanctions to Defendant's counsel in the amount of $700. Discovery and sanctions shall be provided within 20 days of receipt of the final order. Defendant shall submit the final order.
LINE 6	23CV425919 Motion: Compel	Louis Versman vs EDWARD KARPMAN et al	Notice appearing proper and good cause appearing, the Defendant's unopposed motion to compel responses to form interrogatories set one, custom interrogatories set one, RFP set one, and to deem admitted admissions is GRANTED. Plaintiff shall provide code-complaint responses without objections and shall pay sanctions to Defendant's counsel in the amount of $520 (2 hours + filing fee). Discovery and sanctions shall be provided within 20 days of receipt of the final order. Defendant shall submit the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.)

LINE 7	24CV430362 Hearing: protective order	Prem Gupta vs Costco Wholesale Corporation	Defendant moves this court to enter a protective order to protect dissemination of proprietary information, confidential business information and records, and commercially sensitive information. Plaintiff objects. Defendant claims that Plaintiff seeks policies, procedures, guidelines, employee agreements, manuals, and training materials which are proprietary. In support of this claim Defendant presents Plaintiff's request for production of documents, Ex. D attached to Decl. of Litman-Cleper. A close review of Ex. D shows that in fact Plaintiff has not requested any policies, procedures, guidelines, employee agreements, manuals, or training materials. Because Defendant fails to show that Plaintiff has requested any material it claims is proprietary, the motion is DENIED. The Court will issue the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.)

LINE 8	23CV418803 Motion: Set Aside	First Financial Investment Fund III, LLC vs Patricia Montanez	Defendant asks that the default and default judgment be set aside and vacated, pursuant to CCP 473(b) for excusable neglect. Defendant underwent surgery for cancer the day after receiving notice of the complaint. She continued to feel badly and overwhelmed for more than 30 days after the surgery. Less than 60 days after receiving the complaint, Defendant sought legal counsel. She timely filed her motion for set aside. She filed a proposed answer with the motion. Plaintiff opposes the motion arguing that defendant has failed to include a meritorious defense with her papers. Section 473(b) no longer requires the inclusion of an affidavit or declaration of merits. Because the court finds the reasons proffered by Defendant to constitute excusable neglect for failing to timely file an answer, the motion to set aside and vacate the default and judgment is GRANTED. Requests for sanctions and attorney's fees by either side are DENIED. The Court finds it unnecessary to rule on the evidentiary objections. Defendant shall file her answer within 10 days of receipt of the final order. Defendant shall submit the final order within 10 days of the hearing.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(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: 08-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.)

LINE 9	23CV427675 Hearing: Compromise of Minor's Claim	Tamara Nicolao vs Ahmad Ghaffarian et al	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 reasonable and knowing.
LINE 10	23CV427675 Hearing: Compromise of Minor's Claim	Tamara Nicolao vs Ahmad Ghaffarian et al	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 reasonable and knowing.
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Lines 2-3
Case Name: *Doe 7DC et al. v. Doe 1 et al.*
Case No.: 22CV408993

I. Background

Plaintiff Joseph Doe 7DC ("7DC") and Joseph Doe 7DD ("7DD") (collectively, "Plaintiffs") bring this action against Does 1-100 for recovery of damages suffered as a result of childhood sexual assault.

A. Parties

7DC was born in 1980 and 7DD was born in 1982. (SAC, ¶¶ 1, 2.) Plaintiffs were minors at the time of the childhood sexual assault. (SAC, ¶ 4.) Plaintiffs were church members and participated in youth programs and ministry at defendant Doe 4 ("Doe 4"), a local conference, who was doing business as defendant Doe 1 ("Doe 1"), a church. (SAC, ¶ 5.) Doe 1 and Doe 4 are believed to be owned, operated, controlled, and under the jurisdiction of defendant Doe 2 ("Doe 2"), a union conference. (*Ibid*.) Additionally, Plaintiffs were members of defendant Doe 5 ("Doe 5"), a religious youth club and were students of defendant Doe 6 ("Doe 6"), a school. (*Ibid*.) Does 1-6 are referred to collectively as "Church Defendants."

Defendant Doe 7 ("Doe 7" or "Abuser Church Leader") was an employee of Church Defendants. (SAC, ¶ 28.) During Church Defendants' hours of operation and sanctioned activities, Doe 7 committed acts of childhood sexual assault against Plaintiffs. (*Ibid*.) After a law enforcement investigation, Doe 7 was arrested, charged, prosecuted, and found guilty of the childhood sexual assault of eight minors. (SAC, ¶ 29.)

B. Facts

In or around 1993, 1994, and 1995, Doe 7, in his capacity as an employee of Church Defendants, committed childhood sexual assaults against Plaintiffs. (SAC, ¶ 31.) These assaults against Plaintiffs took place during school, school sanctioned events such as fieldtrips, at church sanctioned events such as bible study and afterschool care, at religious meetings, and events such as Bike-a-Thons and camping trips, sponsored by Does 1, 2, 4, and 6. (SAC, ¶ 32, subds. (a)-(d).)

C. Procedural

On March 7, 2024, this Court (Hon. Rosen) sustained Doe 2's demurrer to 7DC's first amended complaint, with 20 days leave to amend. The Court also ordered 7DC and 7DD to consolidate their separate cases.[1] On March 26, 2024, Plaintiffs together filed a Second Amended Complaint ("SAC") against the Doe defendants, asserting the following causes of action:

1) Negligence: Negligent Supervision, Investigation, and/or Retention of an Employee [against Does 1, 2, 4, 5, and 6];
2) Negligence: Negligent Supervision of Plaintiffs [against Does 1, 2, 4, 5, and 6];
3) Childhood Sexual Abuse [against Doe 7]; and

[1] Case No. 22CV408993 was consolidated with Case No. 22CV409017.

4) Intentional Infliction of Emotional Distress [against Doe 7].

On May 3, 2024, Doe 2 and Doe 4 (dba Doe 1) filed separate demurrers to the SAC. Plaintiffs oppose both motions and demurring defendants filed replies.

II. Legal Standard on Demurrer

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

III. Doe 2's Demurrer

Doe 2 demurs to the first and second causes of action on the ground they fail to state facts sufficient to constitute a cause of action.

A. Request for Judicial Notice[2]

In support of its demurrer, Doe 2 requests the Court take judicial notice of the prior version of Code of Civil Procedure section 340.1 in effect at the time of filing the initial pleadings in 2022. The request is GRANTED. (See Evid. Code, § 451, subd. (a).)

B. Analysis

Doe 2 demurs to the first and second causes of action on the grounds they 1) fail to state facts sufficient to revive the statute of limitations under Code of Civil Procedure section 340.1, subdivisions (a)(2) and (c); and 2) fail to state facts sufficient to support a legal duty as no special relationship is established by the SAC.

Statute of Limitations

As it previously argued in its prior demurrer, Doe 2 again contends that Plaintiffs have failed to demonstrate Doe 2's knowledge of the childhood sexual misconduct to satisfy the notice requirement of section 340.1, subdivisions (a)(2) and (c). (See Demurrer, p. 7:15-19.) The Court held that the allegations of the first amended complaint were conclusory and therefore insufficient as there were no allegations about when the abuse occurred or how Doe 2 knew or had reason to known of prior conduct of Doe 7 prior to the sexual assault.

At the time Plaintiffs filed their initial complaints, in 2022, an action by the victim of childhood sexual abuse against persons or entities that may be legally responsible for the perpetrator's acts (e.g., the perpetrator's employer under respondeat superior) "shall not be commenced on or after the plaintiff's 40th birthday unless the person or *entity knew or had reason to know, or was otherwise*

[2] On its own motion, the Court takes judicial notice of its prior March 7, 2024 Order. (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file]; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"].)

on notice, ***of any misconduct*** that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard. Nothing in this subdivision shall be construed to constitute a substantive change in negligence law." (Former section 340.1, subd. (c) [emphasis added].)[3]

In opposition, Plaintiffs argue Paragraphs 5, 27, 28, 32, and 40 of the SAC sufficiently allege facts to support that Doe 2 knew or had reason to know of any misconduct that creates a risk of childhood sexual assault. (Opposition, p. 4:6-8.) Paragraph 5 of the SAC indicates that Plaintiffs were minor church members who participated in Church Defendants' programs and that Church Defendants stood *in loco parentis* with Plaintiffs. (SAC, ¶ 5.) Paragraph 27 indicates Church Defendants failed to properly train its employees, volunteers, agents, and/or servants in several different ways. (SAC, ¶ 27.) Paragraph 28 explains that Doe 7, Plaintiffs' abuser, was an employee, volunteer, agent, and/or servant of the Church Defendants, who committed childhood sexual assault against Plaintiffs. (SAC, ¶ 28.) Paragraph 28 further alleges that "[i]t was known" by Church Defendants that Doe 7 was alone with minors, engaged in social relationships with minors, engaged in "overnights" with minors" and that such conduct was an "obvious 'red flag' of childhood sexual assault in those environments." (*Ibid*.) Paragraph 32 alleges when and where Doe 7 committed abuse against minors, including during school and church hours and during school and church-sponsored events. (SAC, ¶ 32, subds. (a)-(d).) Finally, Paragraph 40 alleges Church Defendants "knew or had reason to know of ABUSER CHURCH LEADER's dangerous and exploitive propensities . . . [and] knew, or had reason to know, that ABUSER CHURCH LEADER was acting inappropriately with minors in the care and custody of [Church Defendants']." (SAC, ¶ 40.)

While the Court sympathizes with Plaintiffs' situation and the fact that these events occurred decades ago, Plaintiffs must plead allegations sufficiently to put Doe 2 on notice. Here, allegations of "red flag" behavior and the fact that Doe 7's misconduct took place during either school or church hours, or sponsored events is insufficient to allege Doe 2 either had knowledge of, reason to know, or was otherwise on notice of any misconduct related to Doe 7.

In this case, there are no allegations of Doe 7's prior misconduct or actual notice of Doe 7's conduct that would put Doe 2 on notice of the abuse of Plaintiffs. Further, the allegations that Church Defendants had notice of Doe 7's behavior are still conclusory. (See e.g., *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5 ["a pleading that [does] no more than assert boilerplate allegations that defendants knew or were on notice of the perpetrator's past unlawful sexual conduct would not be sufficient nor would allegations of information and belief that merely asserted the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"]; *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077, 1097-1098 [sexual molestation by coaches was reasonably foreseeable to the governing body, even though they had no knowledge of prior sexual misconduct by a specific coach because plaintiff alleged the governing body "regularly received complaints from athletes or their parents regarding improper sexual conduct by coaches" and it was aware "that female taekwondo athletes…were frequently victims of sexual molestation by their coaches]; see also *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1132, 1135 [youth soccer association could reasonably foresee minors might be sexually abused by their

[3] Plaintiffs raise concerns that Doe 2 is applying the incorrect version of section 340.1. The Court here applies the version of the code section that was applicable at the time the initial pleadings were filed.

coaches where the associations "were aware that sexual predators were drawn to their organization in order to exploit children and that there had been prior incidents of sexual abuse of children in their programs."] ["*US Youth Soccer*"].) Unlike in *Brown* for *US Youth Soccer*, here, there are no allegations that there were prior complaints about Doe7 made to Doe2 or that there had been prior incidents in the program known to Doe2.

Accordingly, the demurrer may be sustained for failure to demonstrate Doe 2's knowledge of the childhood sexual misconduct to satisfy the notice requirement of section 340.1. The demurrer to the first and second causes of action is SUSTAINED without leave to amend.

Given that the Court has sustained the demurrer without leave to amend, it need not address Doe 2's remaining arguments.

IV. Doe 4's (dba Doe 1) Demurrer

Doe 4 demurs to the first and second causes of action on the ground they fail to state facts sufficient to constitute a cause of action.

A. Request for Judicial Notice

Doe 4 requests judicial notice of the 2022 version of Code of Civil Procedure section 340.1. The request is GRANTED. (See Evid. Code § 451, subd. (a).)

B. Analysis

Doe 4's notice of demurrer raises the same arguments as Doe 2 above. However, the memorandum of points and authorities in support of the demurrer only addresses the first argument that the first two causes of action fail because they do not state facts sufficient to revive the statute of limitations under Code of Civil Procedure section 340.1, subdivisions (a)(2) and (c). As explained in more detail above, the Court is persuaded by the argument that SAC does not sufficiently allege Doe 4's knowledge of the sexual misconduct to satisfy the notice requirements of section 340.1. For this reason, the demurrer to the first and second causes of action is SUSTAINED without leave to amend.

V. Leave to Amend

As to both demurrers, the Court denies leave to amend. The pleading party "bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, the Plaintiffs "must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [its] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The Plaintiffs "must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the Court has already afforded Plaintiffs an opportunity to amend and they have been unable to state a valid claim to overcome a pleading challenge on demurrer. Further, Plaintiffs have not explained how any further amendments will change the legal effect of their pleading. As such, leave to amend is denied. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App5th 1125, 1145 ["The

onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

VI. Conclusion and Order

Doe 2 and Doe 4's demurrers to the SAC for failure to allege sufficient facts are SUSTAINED without leave to amend.

- oo0oo -

Calendar Line 4
Case Name: *Wesley v. Poirier, et al.*
Case No.: 22CV396209

I. Background

A. Factual

According to the allegations in the operative complaint, Plaintiff Matthew J. Wesley ("Plaintiff") is a licensed building contractor. (Complaint, ¶ 1.) Defendants Marc E. Poirier and Ann E. Poirier, individually and as trustees under an agreement of revocable trust dated 6-10-87 ("Defendants") are the owners of real property located at 18830 Crystal Drive in Morgan Hill ("the property"). (*Id*., ¶¶ 2, 4.) In or around May 2021, Defendants contacted Plaintiff and they entered into a contract to remodel Defendants' kitchen and reframe the ceiling over the kitchen area for a total price of $159,972. (*Id*., ¶ 5.)

On July 28, 2021, the parties entered into a revised contract ("the contract"), which indicated that the updated price of $169,872 was an estimate and changes may arise, resulting in additional costs. (Complaint, ¶ 6.) The estimated time for completion was two months but the revised contract indicated that delays could occur due to "back ordered materials, weather and/or City inspections". (*Id*., ¶ 6(F).)

Work on the property began on August 15, 2021. (Complaint, ¶ 7.) The project was completed on December 15, 2021. (*Id*., ¶ 22.) At that point, Defendants had paid Plaintiff a total of $77,110. (*Ibid*.) After a "change order", (see id., ¶ 11), the total price had been increased to $187,285. (*Id*., ¶ 22.) Accordingly, Plaintiff requested a final payment from Defendants of $110,175. (*Ibid*.) By December 19, 2021, Plaintiff had addressed all of Defendants' concerns regarding the work and the project was fully completed. (*Id*., ¶ 23.) On January 5, 2022, Defendants' designer requested additional work, which was also completed. (*Id*., ¶¶ 25-26.)

According to Defendants' answer, Defendants cancelled the contract via written notice to Plaintiff. (Answer, p. 17:4-5.)

B. Procedural

On March 23, 2022, Plaintiff initiated this action by filing the still operative complaint alleging causes of action for (1) foreclosure on mechanic's lien, (2) failure to pay contractor's progress payments (Civ. Code, § 8800), (3) breach of written contract, (4) breach of oral contract (alleged in the alternative), and (5) common count for labor and services provided.

On June 20, 2022, Defendants filed an answer raising the following affirmative defenses: (1) the complaint fails to state a cause of action; (2) Plaintiff's consideration for the contract failed; (3) Plaintiff was an unlicensed contractor; (4) the contract is a home solicitation contract under Civil Code section 1689.5, it did not include the required notice to Defendants under Civil Code section 1689.7, Defendants cancelled the contract, and Plaintiff did not request his goods back within 20 days of the notice of cancellation; (5) Defendants are entitled to an offset because they made payments and Plaintiff caused damage to their home; and (6) Plaintiff's claims are barred by the doctrine of estoppel.

Also on June 20, 2022, Defendants filed a cross-complaint, alleging causes of action for (1) violation of the Home Solicitation Sales Act, (2) unlicensed contractor, (3) negligence, (4) fraud, and (5) unfair competition.

II. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, Defendants moves for summary judgment, or, in the alternative, summary adjudication, as to Plaintiff's operative Complaint, and all causes of action therein.

A. Evidentiary Objections

Defendants object to portions of the Declaration of David S. Saldutti in Support of Opposition to Defendants/Cross-Complainants Marc and Ann Poirier's Motion for Summary Judgment/Adjudication. The court declines to rule on these objections as they are immaterial to the outcome of the motion. (See Code Civ. Proc., § 437c, subd. (q).)

B. Defendants' Request for Judicial Notice

Defendants request judicial notice of the complaint in *Wesley v. Tulua*, Santa Clara County Superior Court docket number 22CV39617, under Evidence Code section 452, subdivision (d). The unopposed request for judicial notice is GRANTED.

C. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

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 of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 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. 843.)

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.)

D. Merits of the Motion

Defendants seek summary judgment or, alternatively, summary adjudication as to all causes of action in the complaint and as to their third and fourth affirmative defenses raised in their answer, and first and second counts in their cross-complaint. But, they separate their memorandum of points and authorities into discussion of three issues.[4] Accordingly, the court will address these issues in the order Defendants have raised them.

i. Failure to Comply With Civil Code section 1689.7

Defendants contend that all of Plaintiff's causes of action fail because Plaintiff is not entitled to compensation for his work due to his failure to comply with Civil Code section 1689.7 ("section 1689.7"). Defendants assert that this argument applies to all counts in the complaint.

Defendants assert that the contract between themselves and Plaintiff is a home solicitation contract under Civil Code section 1689.5.[5] Section 1689.7 provides for either a three-day or five-day notice of cancellation provision, which must be present in a home solicitation contract, informing the buyer that they may cancel the contract within either three or five days of signing. (See, generally, § 1689.7.)[6] The exact content of the notice varies depending on whether the buyer is a senior citizen and whether the contract is one written pursuant to sections 7151.2 and 7159.10 of the Business and Professions Code. Instead of

---

[4] Defendants frame these issues as issues of duty. (See Code Civ. Proc., § 437c, subd. (f)(1) ["A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty . . . ."].)

[5] Plaintiff does not dispute this. Notably, it has been held that "the mere fact that the seller appears at the buyer's home in response to a phone call from the buyer is insufficient to remove a contract from the statute's ambit." (*Weatherall Aluminum Products Co. v. Scott* (1977) 71 Cal.App.3d 245, 248 (*Weatherall*).)

[6] Defendants also rely on Business and Professions Code section 7159, subdivision (e)(6), which requires the three- or five-day notice provision under section 1689.7 for a home improvement contract. Plaintiff does not dispute that this provision also applies.

indicating the exact provision Defendants contend applies, they quote nearly the entirety of section 1689.7 in their memorandum of points and authorities. (Points and Authorities in Support of Motion for Summary Judgment, Summary Adjudication etc., p.6:6-10:18.)[7]

Nonetheless, it appears that Defendants are arguing that the following language was required to be inserted into the contract:

> Five-Day Right to Cancel
> You, the buyer, have the right to cancel this contract within five business days. You may cancel by e-mailing, mailing, faxing; or delivering a written notice to the contractor at the contractor's place of business by midnight of the fifth business day after you received a signed and dated copy of the contract that includes this notice. Include your name, your address, and the date you received the signed copy of the contract and this notice. If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For your part, you must make available to the contractor at your residence, in substantially as good condition as you received it, any goods delivered to you under this contract or sale. Or, you may, if you wish, comply with the contractor's instructions on how to return the goods at the contractor's expense and risk. If you do make the goods available to the contractor and the contractor does not pick them up within 20 days of the date of your notice of cancellation, you may keep them without any further obligation. If you fail to make the goods available to the contractor, or if you agree to return the goods to the contractor and fail to do so, then you remain liable for performance of all obligations under the contract.

Defendants are asserting that they are senior citizens and, therefore, the five-day notice provision was required to be inserted into the contract. (See Memo., p. 10:24-25.) Plaintiffs provide evidence that they are senior citizens within the meaning of the statute. (See Amended Declaration of Marc Poirier in Support of Motion ("Poirier Decl."), ¶¶ 3, 4 [listing ages of both Defendants as over age 65 in 2021]; Civ. Code, § 1689.5, subd. (f) [" 'Senior citizen' means an individual who is 65 years of age or older."].)

Notably, both versions of the contract attached to Marc Poirier's declaration state, "**RIGHT TO RECISSION**: You the buyer may cancel this transaction prior to the third business day from the date of this transaction." (Poirier Decl., Exs. A, B.) Because the correct notice provision was not included in the contract, Defendants assert that they may keep the goods and the value of Plaintiff's services provided without paying the remainder of the contract price and that they are entitled to reimbursement for the payments they have already provided to Plaintiff.

Defendants rely on Civil Code section 1689.10 ("section 1689.10"), which states, "Except as provided in Sections 1689.6 to 1689.11, inclusive, within 10 days after a home solicitation contract or offer has been canceled, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness." (§ 1689.10,

---

[7] The Motion for Summary Judgment, Summary Adjudication etc. will be referred to as "Motion". The Points and Authorities in Support of Motion for Summary Judgment, Summary Adjudication etc. will be referred to as "Memo".

subd. (a).) It further provides, "Until the seller has complied with the obligations imposed by Sections 1689.7 to 1689.11, inclusive, the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods for any recovery to which he is entitled." (§ 1689.10, subd. (c).)

Defendants also rely on Civil Code section 1689.11 ("section 1689.11"), which states, "Except as provided in subdivision (c) of Section 1689.10, within 20 days after a home solicitation contract or offer has been canceled, the buyer, upon demand, must tender to the seller any goods delivered by the seller pursuant to the sale or offer, but he is not obligated to tender at any place other than his own address. If the seller fails to demand possession of goods within 20 days after cancellation, the goods become the property of the buyer without obligation to pay for them." (§ 1689.11, subd. (a).) It also provides, "If the seller has performed any services pursuant to a home solicitation contract or offer prior to its cancellation, the seller is entitled to no compensation. If the seller's services result in the alteration of property of the buyer, the seller shall restore the property to substantially as good condition as it was at the time the services were rendered." (§ 1689.11, subd. (c).)

Plaintiff, on the other hand, contends that the contract is valid and enforceable and he is entitled to compensation even if the section 1689.7 notice was not provided in the contract. He points to *Arya Group v. Cher* (2000) 77 Cal.App.4th 610 (*Arya*), wherein the Court of Appeal determined that a breach of contract cause of action survived a demurrer alleging that the oral construction contract at issue in that case violated Business and Professions Code section 7194, which requires certain construction contracts to be in writing. (*Id*. at pp. 613-614, 618.)

Arya did not involve a violation of Civil Code section 1689.7. However, its reasoning is compelling in the context of the instant case. In that case, Arya was a construction company hired by respondent Cher to construct a home on certain real property in Malibu. (*Id*. at p. 612.) Cher promised to pay Arya for its services and in fact did pay a portion of the contract price for some of the services Arya performed but she then terminated the contract leaving a balance of some $400,000 still owing. (*Id*. at pp. 612-613.)

The *Arya* court reasoned that, in compelling cases, even illegal contracts may be enforced when a party may be unjustly enriched as a result of failure to compensate the other party for the value of its work because this would avoid a disproportionately harsh penalty for the plaintiff. (*Arya*, *supra*, 77 Cal.App.4th at pp. 615, 618.) In determining whether a plaintiff may be entitled to relief, the court considered the pleaded facts "that Cher is a highly sophisticated homeowner with previous involvement in residential construction projects, that her legal representatives assisted her in negotiating the Malibu construction project agreement with Arya, that Arya had already completed a substantial amount of the work it contracted to perform when Cher terminated the parties' agreement, and that Cher would be unjustly enriched if she were not required to compensate Arya for the reasonable value of its work." (*Id.* at pp. 615-616.)

There are three published cases discussing the failure to provide proper notice under section 1689.7. Defendants rely on *Weatherall*, *supra*, 71 Cal.App.3d 415, which involved a contract which did not contain the required notice under section 1689.7. In that case, the plaintiff showed defendants a sample of an "insulated wall system" on February 5, 1974 and after some back and forth, the parties entered into a contract whereby the plaintiff would install the wall system, defendants would pay a $100 deposit and the balance due after the deposit

would be $1,650. (*Id.* at p. 247.) The plaintiff installed the wall system on February 20, 1974 but the work was not to defendants' liking, no accommodation was reached, and defendants did not pay the remainder of the balance due. (*Ibid*.) The defendants cancelled the contract via written notice on May 12, 1975 after consulting with counsel and after the plaintiff's lawsuit had been filed. (*Ibid*.)

The *Weatherall* court upheld the trial court's order granting the defendants' motion for summary judgment finding, that the "plaintiff not having demanded tender of goods delivered to defendants within 20 days after cancellation of the contract, said goods became the property of defendants without obligation to pay for them. (Civ. Code, § 1689.11, subd. (a).) Nor are defendants obliged to pay for services performed by plaintiff prior to cancellation. (Civ. Code, § 1689.11, subd. (c).)" (*Weatherall*, *supra*, 71 Cal.App.3d at p. 248.) The court explained that "[i]t was undoubtedly the Legislature's purpose in enacting the statute to protect consumers against the types of pressures that typically can arise when a salesman appears at a buyer's home." (Ibid.) It further reasoned that "[i]f this result appears to deal harshly with merchants who have fully performed under their contracts, it seems clear to this court that the message which the Legislature has attempted to convey by enactment of section 1689.5 et seq. of the Civil Code is 'Caveat Vendor.' Merchants, put on notice by the statute, can easily and inexpensively protect themselves, however, by including a right to cancel provision and an accompanying notice of cancellation as a matter of course in all contracts signed outside their trade premises." (*Id*. at p. 249.)

Defendants contend that this case is more similar to *Beley v. Municipal Court* (1979) 100 Cal.App.3d 5 (*Beley*), which also involved a written contract missing the section 1689.7 notice. In that case, on June 10, 1977, the parties entered into a contract for remodeling of the buyer's home for a total price of $11,689. (*Id.* at p. 7.) The work was not completed on time and the buyer cancelled the contract on November 10, 1977. (*Ibid*.) The contractor sued the buyer for the remaining $3,000 due under the contract alleging breach of contract, common count for services performed, and account stated. (*Ibid*.) The Court of Appeal held that the buyer was not entitled to the writ relief sought, namely a complete dismissal of all of the seller's claims. (*Id*. at p. 10.)

The *Beley* court reasoned "[a]lthough the statute gives Buyer a right to avoid the written contract, there was nothing illegal or immoral about the contract itself or the nature of the services and materials to be furnished under it. [Citation.] Therefore, even though Seller could not recover on the express building contract, Seller is entitled to recovery on quantum meruit for the reasonable value of the improvements Buyer has received. [Citation.]" (*Beley*, *supra*, 100 Cal.App.3d at p. 8.) The court distinguished *Weatherall* explaining, "There is no indication in that opinion that the seller in that case raised an equitable quasi contractual theory for the reasonable value of benefits conferred, as distinguished from an action on the contract." (*Id*. at p. 9.) The court further explained that legislative purpose behind the provision of section 1689.11, subdivision (c) indicating that the seller can recover no compensation for work completed was to prevent the seller from providing services and collecting compensation prior to the cancellation period via a tactic of starting some of the work in order to prevent the buyer from feeling he could cancel the transaction. (*Ibid*.)

Defendants contend that *Beley* is an outlier and limited to the specific facts of that case. For that proposition, they rely on the final published case on the subject, *Louis Luskin & Sons v. Samovitz* (1985) 166 Cal.App.3d 533 (*Luskin*). In *Luskin*, a plumber prepared a contract to

replace a sewer line. (*Id.* at p. 535.) The contract did not contain the section 1689.7 notice provision. (*Ibid*.) Mrs. Samovitz signed the contract but her husband, Dr. Samovitz discussed the price with the plumber, informed him that he wanted to seek other estimates, and asked him not to begin work at that time. (*Ibid*.) Nonetheless, the plumber began working, digging a large trench down the Samovitzes' driveway. (*Ibid*.) The Samovitzes did not ask the plumber to stop the work but they paid him only $2,500 and not the contract price of $7,000. (*Ibid*.) The plumber appealed the judgment for the Samowitzes contending that he was entitled to recover under a quantum meruit theory. (*Id.* at pp. 535-536.)

Agreeing with the *Weatherall* court, the *Luskin* court concluded that the plumber was not entitled to compensation under a breach of contract theory. (*Luskin*, *supra*, 166 Cal.App.3d at pp. 536-537.) The court also relied on the fact that the plumber had exerted pressure on Ms. Samowitz and the fact that the plumber began work before Dr. Samowitz had signed the contract. (*Id.* at p. 537.)

Distinguishing *Beley*, the *Luskin* court also determined that quantum meruit was unavailable to the plumber. The court explained, "Luskin began work on replacing the pipe the day after the contract was signed, a Saturday, even though there was no emergency and Dr. Samovitz was emphatic that he wanted to obtain additional estimates and that the work was not to begin until and unless he specifically authorized it. Before the three-day cancellation period had expired, Luskin had done substantial work on the project -- tearing up approximately 70 feet of the Samovitz' cement driveway and excavating it to a substantial depth. This attempt to pressure the Samovitz' by part performance within the three-day cancellation period was precisely the conduct section 1689.11 was intended to prevent." (*Luskin*, *supra*, 166 Cal.App.3d at p. 538.)

As Defendants point out, the *Luskin* court also stated, "*Beley* did not hold that as a general rule the seller can recover on quantum meruit even if he has proceeded in violation of the home solicitation statute. To the contrary, the court in *Beley* recognized such a rule would defeat the purposes of the statute, especially section 1689.11. (*Beley*, *supra*, 100 Cal.App.3d at p. 9.) The court merely found section 1689.11 was not intended to apply to the unusual facts of the case before it." (*Luskin*, *supra*, 166 Cal.App.3d at pp. 537-538.)

Here, however, contrary to Defendants' arguments, the circumstances presented in *Beley* are present in this case. Plaintiff has provided evidence that the kitchen was functional by Thanksgiving of 2021. (Declaration of David S. Saldutti in Support of Opposition to Defendants/Cross-Complainants Marc and Ann Poirier's Motion for Summary Judgment/Adjudication ("Saldutti Decl."), Ex. C (Marc Poirier's deposition testimony), 60:4-6.) Marc Poirier also testified that Plaintiff fixed the issues with the kitchen that Defendants had emailed him about. (*Id*., p. 66:16-21.) It is undisputed that Defendants paid Plaintiff $77,110. (Plaintiff/Cross-Complainant Matthew J. Wesley's Response to Defendants/Cross-Complainants Marc and Ann Poirier's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Response to Separate Statement"), ¶ 19.)

Unlike in *Luskin*, here, Defendants point to no high pressure sales tactics on the part of Plaintiff. They do not assert that he began the work before the cancellation period had ended. Unlike in *Weatherall*, Plaintiff does assert equitable quasi contract theories. Accordingly, neither *Luskin* nor *Weatherall* controls as it is *Beley* that is most on point. The court finds that Plaintiff is not barred from asserting a quantum meruit theory as a matter of law.

Additionally, the court finds that Plaintiff is not barred from asserting a breach of contract claim. Notably, all three of the above cases discussing the section 1689.7 were cases in which the notice was entirely omitted from the agreement. Here, by Defendants' own evidence, both versions of the written contract included language indicating that Defendants' had three days in which to cancel the contract. (Poirier Decl., Exs. A, B.) For this reason, this case is distinguishable from *Weatherall* and *Luskin*, which both held that the plaintiff could not recover under a breach of contract theory. Defendants assert that the language is incorrect and that the language is in eight point font rather than 12 point font as required by the statute. However, the provision is initialed on both versions of the contract indicating that it was not overlooked by the Poiriers. As in *Arya*, a breach of contract case, here, substantial work was performed before the contract was cancelled, as discussed above, and Defendants would be unjustly enriched if they were allowed to keep the value of the work performed by Plaintiff without compensating him. Although there is no evidence that Defendants were more sophisticated than other buyers as in Arya, they were at least informed that they had the right to cancel the contract.

The motion is DENIED as to the failure to provide notice issue.

ii. Unlicensed Contractor

Defendants also argue that Plaintiff cannot recover on any cause of action and that their third affirmative defense will succeed because Plaintiff was not a licensed contractor for part of the time he worked on Defendants' home. Plaintiff contends that he was licensed at all relevant times.

Business and Professions Code section 7031, subdivision (a), on which Defendants rely, provides, "Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that they were a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person . . . ." Additionally, [e]xcept as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." (Bus. & Prof. Code, § 7031, subd. (b).)

Defendants contend that Plaintiff was considered to be unlicensed on two separate theories. First, they assert that he failed to provide worker's compensation insurance for his employees. Second, they argue that use of unlicensed subcontractors also prevents Plaintiff from recovery under Business and Professions Code section 7031.

With respect to Defendants' first theory, "[t]he failure of a licensee to obtain or maintain workers' compensation insurance coverage, if required under this chapter, shall result in the automatic suspension of the license by operation of law in accordance with the provisions of this section . . . ." (Bus. & Prof. Code, § 7125.2.) "The license suspension imposed by this section is effective upon the earlier of either of the following: [¶] (1) On the date that the relevant workers' compensation insurance coverage lapses. [¶] (2) On the date that

workers' compensation coverage is required to be obtained." (Bus. & Prof. Code, § 7125.2, subd. (a).)

Defendants assert that Plaintiff began work on their home on August 15 or 16 of 2021. They contend that Plaintiff initially obtained worker's compensation insurance from the State Compensation Insurance Fund ("SCIF") for the period of September 30, 2020 to September 30, 2021. However, they maintain that that policy was cancelled effective July 7, 2021 due to failure to provide payroll records and pay a required premium. In support, they provide a letter from SCIF, dated June 21, 2024, indicating that Plaintiff's workers' compensation insurance policy was cancelled effective July 7, 2021. (Declaration of James Roberts in Support of Motion for Summary Judgment, and Summary Adjudication, etc. ("Roberts Decl."), Ex. E-2, p. 262.)

Although he acknowledges the June 21, 2024 letter from SCIF, Plaintiff contends that he never received a notice of cancellation from the Contractors State License Board ("CSLB") until October 4, 2021 informing him of his pending license suspension, which would occur in 45 days if he did not provide proof of insurance. (See Saldutti Decl., Ex. I.)[8] Plaintiff appears to assert that this letter would have triggered cancellation of his license he had not responded within 45 days with proof of insurance but he contends that he submitted proof of a new insurance policy in effect from October 18, 2021 to October 18, 2022 on October 20, 2021. (Saldutti Decl., Ex. I.)

Business and Professions Code section 7125.2, subdivision (b) provides, "A licensee who is subject to suspension under paragraph (1) of subdivision (a) shall be provided a notice by the registrar [of contractors] that includes all of the following: [¶] (1) The reason for the license suspension and the effective date. [¶] (2) A statement informing the licensee that a pending suspension will be posted to the license record for not more than 45 days prior to the posting of any license suspension periods required under this article. [¶] (3) The procedures required to reinstate the license." (*Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1121.) Notably, the registrar mentioned in Business and Professions Code section 7125.2, subdivision (b) is the registrar of contractors of the CSLB. (See, generally, Bus. & Prof. Code, § 7011.) Thus, to the extent it is the notice that triggers the suspension of Plaintiff's license, only the October 4, 2021 letter from the CSLB would trigger the suspension.

But, Plaintiff cites to no authority indicating that the notice is a triggering event beginning the suspension. Instead, it appears that it is the lapse in worker's compensation insurance itself that begins an automatic suspension. (See Bus. & Prof. Code, § 7125.2, subd. (a)(1) [effective date of suspension of license is the date the workers' compensation insurance policy lapses]; *Wright v. Issak*, *supra*, 149 Cal.App.4th at p. 1122.)

Plaintiff also contends that he was in substantial compliance with the licensing requirements. (See Bus. & Prof. Code, § 7031, subd. (e) ["the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure

[8] Exhibit I is a collection of documents from the CSLB. The pages are not numbered.

requirements upon learning of the failure"]; see also *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 434.)

Plaintiff has not met his burden to show a that there is a disputed issue as to whether or not he was in substantial compliance. Here, Defendants have shown that CSIF provided notice in June 2021 that Plaintiff's worker's compensation insurance policy would be cancelled on July 7, 2021. (Roberts Decl., Ex. E-2, p. 260.) Plaintiff did not act to reinstate the insurance policy before that time and the policy was cancelled. (*Id.*, Ex. A-3 (Deposition testimony of Ferrante Insurance Services person most knowledgeable Sean Lapierre, p. 22:13-18.) Plaintiff's evidence shows that Plaintiff did not obtain new worker's compensation insurance until October 2021. Plaintiff does not contend that he did not receive the letter from SCIF informing him of the pending cancellation, nor does he assert that he took any action in response to that letter. Accordingly, the court finds no disputed fact to support Plaintiff;s claim that he substantially complied with the licensing requirements.

The motion is GRANTED as to the entirety of the complaint. (See Bus. & Prof. Code, § 7031, subd. (a) ["no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action"].)

Further, Business and Professions Code section 7031, subdivision (b) provides, "Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." It is undisputed that Defendants paid Plaintiffs a total of $77,110. (See Response to Separate Statement, ¶ 19.) Accordingly, Defendants are also entitled to summary adjudication of their second cause of action in the cross-complaint. The motion for summary adjudication is GRANTED as to the second cause of action in the cross-complaint.

iii. Oral Contract

Defendants' last contention is that Plaintiff pleads that the written contracts were valid and enforceable, that all work was done pursuant to the written contract, and that all change ders became part of the written contract. Accordingly, they argue, he cannot allege the existence of an oral contract. Plaintiff counters that Defendants have not met their burden on the first step of the summary judgment analysis with respect to this issue.

The fourth cause of action pleads breach of oral contract, specifically the change order, in the alternative. (See Complaint, ¶¶ 47-51.) As Defendants contend, the complaint states that all work performed for Defendants was done pursuant to a written contract and that the change order became part of the written contract. (*Id*., ¶¶ 48-49.) However, it also indicates that Defendants never signed a change order for the additional work. (*Id*., ¶ 48.)

In support of the motion, Defendants provide evidence that the parties never entered into an oral contract. (Poirier Decl., ¶ 10.) The court finds this sufficient to meet Defendants' burden at the first step of the summary judgment analysis. In opposition, Plaintiff relies on portions of the verified complaint, portions of his document production, and Marc Poirier's deposition testimony. Code of Civil Procedure section 437c, subdivision (p)(2) provides, "The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts

showing that a triable issue of material fact exists as to the cause of action or a defense thereto." Accordingly, the complaint cannot be used to support Plaintiff's argument.

The portion of the document production Plaintiff relies on is a written change order. (See Saldutti Decl., Ex. E, p.39-40.) The portion of Mr. Poirier's deposition testimony Plaintiff relies on makes no mention of any oral contract or any facts that could reasonably be considered to establish the existence of an oral contract. (See Saldutti Decl., Ex. C, p. 37:19-38:13.) Instead, it simply discusses the written change order. (*Ibid*.) Plaintiff makes no attempt to explain how these items suggest the existence of any oral contract. Accordingly, Plaintiff has not met his burden of establishing a triable issue of material fact as to the existence of an oral contract.

Summary adjudication is GRANTED as to the fourth cause of action.

III. Conclusion

The motion for summary judgment is GRANTED as to the entirety of the complaint. The motion for summary adjudication is GRANTED as to the second and fourth causes of action in the cross-complaint.

The Court will prepare the Final Order.

- oo0oo -