SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: January 11, 2024 TIME: 9:00 A.M.

FOR ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
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https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV389246	Cahalan Properties, LLC vs STTS Apartments, LLC et al	Defendant STTS Apartments, LLC's Motion for judgment on the pleadings is GRANTED WITH 20 DAYS LEAVE TO AMEND. Please scroll down to line 1 for full tentative ruling. Court to prepare formal order.
2	23CV420936	Marcela Ruelas vs Chung Nguyen	Defendant's Demurrer withdrawn by January 3, 2024 notice.
3	23CV422611	Senen Trinidad vs Aida Lopez Alban et al	Defendant Aida Miranda's Motion to Strike Pursuant to Code of Civil Procedure § 425.16 (ANTI-SLAPP) is CONTINUED to February 29, 2024 at 9 a.m. in Department 6. The Court was unable to locate proof of service of an amended notice of motion with the January 11, 2024 hearing date. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion (as well as the hearing on Defendant's Demurrer, which is currently set to be heard on January 16) to February 29, 2024 at 9 a.m. in Department 6. Defendant is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion and overruling Defendant's demurrer without prejudice at the next hearing.
4	23CV411340	Thanh Cong Investments LLC vs Thien Pham	Plaintiff's Motion for (1) an order reopening time to make a motion for judgment on the pleadings and (2) judgment on the pleadings in its favor and against Defendant Thien Pham, an individual DBA My Photo Studio is GRANTED. A notice of motion with this hearing date and time was served on Defendant by U.S. Mail on December 6, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Further, Defendant admits all the allegations in the complaint and that the balance of unpaid rent is $16,145.95, representing $18,445.95 less Defendant's security deposit. Moving party to prepare form of order and judgment.
5	20CV361184	Zurich American Insurance Company vs James River Insurance Company	James River Insurance Company's Motion for Summary Judgment is GRANTED. Please scroll down to lines 5-6 for full tentative ruling. Court to prepare formal order.
6	20CV361184	Zurich American Insurance Company vs James River Insurance Company	Zurich American Insurance Company's Motion for Summary Judgment or in the alternative Summary Adjudication is DENIED. Please scroll down to lines 5-6 for full tentative ruling. Court to prepare formal order.

7	23CV410646	Hsin-ti Liu et al vs FORD MOTOR COMPANY, a Delaware Corporation et al	Plaintiff's motion for summary judgment is CONTINUED to May 7, 2024 at 9 a.m. in Department 6. The Court was unable to locate proof of service of an amended notice of motion with the January 11, 2024 hearing date. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion to May 7, 2024 at 9 a.m. in Department 6. Moving party is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion without prejudice at the next hearing.
8	22CV398160	Roger Swanson et al vs Drew Parrish et al.	This motion is off calendar. The court believes this motion to compel was addressed in its December 21, 2023 order granting Defendants' motions to compel and for sanctions.
9	22CV403544	Denise Ramirez vs Brenda Hogue et al	Defendants' Brenda Lynn Hogue and Steven Hogue Motion to Compel Plaintiff Denise Ramirez Hernandez to (1) Answer Form and Special Interrogatories (Set One) and (2) Pay Costs and Sanctions in the Amount of $554.00 for each motion is GRANTED. Amended notices of motion with this hearing date and time was served by electronic mail on October 3, 2023. No oppositions were filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant these motions. Defendants served this discovery on July 3, 2023. Plaintiff failed to respond on the August 8, 2023 due date or at any time thereafter. Where, as here, a responding party fails to timely respond to Interrogatories, absent a demonstration that the failure to respond was due to mistake, inadvertence, or excusable neglect and responses have since been served, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §2030.290(a).) Here, Plaintiff made no such effort or showing. Plaintiff is therefore ordered to serve code-compliant responses without objections and to pay Defendants $1,108 (two motions x $554.00) in attorneys' fees and costs within 20 days of service of this final order. Court to prepare formal order.

10	22CV403544	Denise Ramirez vs Brenda Hogue et al	Defendants' Brenda Lynn Hogue and Steven Hogue Motion to Compel Plaintiff Denise Ramirez Hernandez to (1) Respond to Demand for Production (Set One) and (2) Pay Costs and Sanctions in the Amount of $554.00 is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on October 3, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant these motions. Defendants served this discovery on July 3, 2023. Plaintiff failed to respond on the August 8, 2023 due date or at any time thereafter. A party responding to a request for production must serve a response within 30 days. (Code of Civ. Pro. § 2031.260.) Failure to serve a response waives all objections, including objections based on privilege or work product. (Code of Civ. Pro. § 2031.300(a).) Plaintiff is therefore ordered to serve code-compliant responses without objections and to pay Defendants $554.00 in attorneys' fees and costs within 20 days of service of this final order. Court to prepare formal order.
11	22CV409001	Michelle Ronolo vs FCA US, LLC et al	The parties continued Plaintiff's Motion to Compel Further Responses to Plaintiff's Requests for Production of Documents (Set One) to January 11, 2023 pursuant to stipulation dated October 3, 2023, which stipulation the Court granted by order dated October 6, 2023, in order to allow additional time to continue their settlement discussions. No further briefing or status regarding this motion to compel is apparent from the court's docket. The Court therefore CONTINUES the hearing on this motion to compel to February 27, 2024 at 9 a.m. in Department 6, the same date as an already scheduled case management conference. Moving party is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion without prejudice at the next hearing.
12	23CV416765	Yicheng Ji vs Tesla Motors, Inc.	Tesla Corporation's Motion to Compel Arbitration is DENIED WITHOUT PREJUDICE. Tesla's Motion first came on for hearing before the Court on November 28, 2023. The Court ordered Tesla "to serve an amended notice of motion with the January 11, 2024 hearing date and time. If there is no proof of service demonstrating such service by the next court date, the Court will deny this motion without prejudice." Despite this order, the Court is still unable to locate any proof of service with this date and time. Accordingly, Tesla's motion is denied without prejudice. Court to prepare formal order.

13	23CV418843	Caroline Kim vs Momoko Kikuchi et al	Defendants' Motion to Compel Plaintiff's Response to Form Interrogatories (Set One), Specially Prepared Interrogatories (Set One) and Demand for Identification and Inspection of Documents (Set One) is GRANTED. An amended notice of motion with this hearing date and time was served by electronic mail on December 19, 2023. No opposition was filed. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Defendants served this discovery on September 22, 2023; Plaintiff failed to respond. Defendants granted an extension to November 15, 2023 for responses; still no responses were served. As of the motion to compel, and apparently the date of this ruling, no responses have ever been served. Accordingly, all objections are waived, and Plaintiff is ordered to serve code-compliant responses without objections and to pay Defendants $592.00 in attorney fees within 20 days of service of this final order. Court to prepare formal order.
14	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Defendants' motions to quash service of summons for lack of personal jurisdiction are CONTINUED to February 20, 2024 to join with a third motion to quash set on that same date. No further notice of these two motions is necessary; all three motions to quash will be heard on February 20, 2024 at 9 a.m. in Department 6.
15	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Defendants' motions to quash service of summons for lack of personal jurisdiction are CONTINUED to February 20, 2024 to join with a third motion to quash set on that same date. No further notice of these two motions is necessary; all three motions to quash will be heard on February 20, 2024 at 9 a.m. in Department 6.
16	20CV374553	CONNECT BY AMERICAN FAMILY vs ALDO ARAUJO HERNANDEZ	Plaintiff Connect by American Family's Motion to Vacate Dismissal, Enforce Settlement, and Enter Judgment is GRANTED. Although an amended notice of motion with this hearing date and time does not appear to have been served, the parties' stipulation does not require a noticed motion. (See February 2021 Stipulation at ¶ 11 ("Defendant expressly waives any and all rights Defendant may have in regard to notice and opportunity to be heard as set forth in the case of Rooney v. Vermont Investment, 10 Cal. 3d 351") and ¶ 15 ("Judgment in accordance with this Stipulation may be entered by a Commissioner of this Court without the necessity of a noticed Motion").) According to the Declaration of Lee M. Mendelson, Defendant made some payments but defaulted with a remaining amount of $11, 245.70 principal; $3,105.66 interest; $1,437.37 attorney's fees; $462.00 costs, for a total judgment of $16,250.73. Moving party to prepare formal order.

17	21CV378926	Alexander Aguilar vs CACH, LLC et al	Defendants' Mandarich Law Group, LLP and Christopher D. Mandarich's Motion for Attorneys' Fees is GRANTED. An amended notice of motion with this hearing date and time was served by electronic mail on September 26, 2023. No opposition was filed. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Defendants prevailed on their anti-SLAPP motion at the trial court and on appeal. They are therefore entitled to attorney's fees and costs pursuant to Code of Civil Procedure section 425.16(c). The Court finds the amount of time spent on the appeal and preparing this fee motion, billable rate, and the $1,528,14 costs reasonable. The Court accordingly orders Plaintiff to pay Defendants $15,098.14 in fees and costs. Moving party to prepare formal order and judgment.
18	22CV398488	Discover Bank vs Aaron Prodigalidad	Plaintiff's Motion to Amend Judgment is GRANTED. Plaintiff to submit form of amended judgment.
19	23CV411340	Thanh Cong Investments LLC vs Thien Pham	Defendant's Motion to Dismiss Application for Default Judgment is OFF CALENDAR. Default was rejected several times and not entered because Defendant answered the complaint, which answer Plaintiff acknowledges. This ruling will be reflected in the minutes.

Calendar Line 1
Case Name: *Cahalan Properties LLC v. STTS Apartments LLC, et.al.*
Case No.: 21CV389246

Before the Court is Defendant's, STTS Apartments LLC, motion for judgment on the pleadings as to Plaintiff's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Factual Background

This action arises from a dispute over real property encroachment. According to the FAC, Cahalan owns the real property located at 5750 Santa Theresa Boulevard in San Jose ("CP Property"). Defendant owns the real property and improvements located at 6059 Cahalan Avenue in San Jose ("STTS Property"). CP Property and STTS Property are adjacent to each other, and together they project the appearance of a single shopping center. Both properties are subject to a recorded Reciprocal Easement Agreement and Declaration of Restriction ("REA"). (FAC ¶¶ 1, 2, 5; Ex. A.)

On June 14, 2016, both properties were severely damaged by fire and demolished. After the fire, Defendant reconstructed its building in such a way that its foundation encroaches 1.95 feet over the property line and onto CP Property. (FAC ¶¶ 6, 7.) Defendant had engineering drawings and surveys indicating the location of the true property line but used and built on a portion of an existing foundation on CP Property without Plaintiff's notice and permission. (FAC ¶ 7.)

Consequently, Plaintiff filed suit on October 1, 2021, and filed its operative first amended complaint on June 1, 2022, asserting: (1) trespass, (2) nuisance, (3) declaratory and injunctive relief, and (4) breach of contract.

II. Legal Standard

A motion for judgment under Code of Civil Procedure section 438(c) performs the same function as a general demurrer and attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. (See *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064; *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452; *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1767-1768.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a

reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The Court may grant leave to amend to remedy any defects identified by a motion for judgment on the pleadings. (Civ. Code Proc. § 438(h).) "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) For the Court to grant leave to amend after a general demurrer or motion for judgment on the pleadings, however, the plaintiff must "show a reasonable possibility of curing the defect in the complaint by amendment." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.) The plaintiff bears "the burden of proving that an amendment would cure the defect." (Id.)

III. Judicial Notice

Defendant asks the Court to take judicial notice of the following excerpts from the deposition of Ranjit Manroa, who Plaintiff designated as its person most knowledgeable:

> Q: Did you agree with him?
>
> A: Well, his foundation came into my side.
>
> Q: Did you believe at the time of this e-mail in 2020 that there was an encroachment on your property?
>
> A: In 2020? There was an encroachment? Well, encroachment, find it out when we had a survey.
>
> Q: No, no. You just said that in 2020 his foundation came onto your property.
>
> A: That's what we noticed.
>
> Q: So you knew in 2020 or at least you believed that there was an encroachment of the STTS foundation onto your property. Right?
>
> A: We saw his foundation on my property, yes. (Manroa Depo., 108:4-16)
>
> . . .
>
> Q: Actually let me ask you two questions. Is your property finished now? You're up and the construction is complete?

A: It's complete. But we have not done yet final from City. (Manroa Depo., 122:3-7.)

The Court may take judicial notice of the pleading party's deposition testimony and other discovery responses "to the extent they contain statements of the [party] or his agent which are inconsistent with the allegations of the pleading before the court", and "where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477-478.)

Mr. Manroa's above-quoted testimony does not meet these requirements. The testimony does not contradict the FAC's allegations. And, the testimony regarding completion is both muddled by the further questions on this topic on page 122, and not relevant to Plaintiff's claim, which does not center on Defendant's encroachments to complete construction, but rather what Defendant constructed.

Accordingly, Defendant's Request for Judicial Notice is DENIED.

IV. Analysis

Defendant seeks judgment on the pleadings for Plaintiff's first cause of action for trespass, second cause of action for nuisance, and third cause of action for declaratory and injunctive relief.

A. First Cause of Action for Trespass

"The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm." (*Ralphs Grocery Co. v. Victory Consultants, Inc*. (2017) 17 Cal.App.5th 245, 262.) "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." (*Civic Western Corp. v. Zila Industries, Inc*. (1977) 66 Cal.App.3d 1, 16.) "The cause of action for trespass affords protection for a possessory, not necessarily an ownership interest." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218.)

Defendant contends it is entitled to judgment on the pleadings for this claim because (1) under the truthful pleading doctrine, the REA's language should take precedence over the FAC allegations, (2) the REA divests Plaintiff of its exclusive possessory right over the CP Property, and (3) article IV,

section C, expressly gives Defendant an easement to enter the CP Property for reconstruction, thus Plaintiff cannot plead lack of consent.

Plaintiff argues (1) the REA's operative terms are ambiguous and its proper interpretation is a material fact that requires evidentiary resolution, (2) the REA does not give Defendant the right to build a permanent encroaching structure interfering with its business operation, and (3) the ambiguity in the REA does not allow precedence of its language over the allegations in the FAC. The Court is not persuaded.

Article IV, section C, titled "Encroachment Easement," states:

> "Each party with respect to its property, hereby grants in favor of its property, nonexclusive easements in, to, over, under and across its property for the construction, reconstruction, erection, removal and maintenance on, to, over, under and across its property as shall be reasonably required in connection with the construction of any buildings and/or improvements upon the entire property and in connection with the development and operation of the shopping center. The exercise of any such easements shall not result in damage or injury to the buildings or other improvements situated in the shopping center and shall not unreasonably interfere with the business operations conducted by any other occupant in the shopping center".
>
> (FAC ¶ 28; Ex. A p. 5)

The interpretation of this language is a legal question to be decided by the Court. (See, *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 17.) "CC&Rs are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties." (*Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 817; see *Narhrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380-381.) The CC&R language should be interpreted in its ordinary and popular sense unless a contrary intent is shown. (*Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 829.) CC&R language is considered ambiguous when it can have more than one reasonable interpretation. (*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal. App. 4th 1441, 1448; *Southern Cal. Edison Co. v. Superior Court* (1995)

37 Cal. App. 4th 839, 848.) However, if the CC&R language is clear and explicit, it governs. ”When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is ‘reasonably susceptible’ to the interpretation urged by the party. If it is not, the case is over.” (*Southern Cal. Edison Co. v. Superior Court*, 37 Cal. App. 4th at 847.)

In ordinary and popular language, REA Article IV, section C expressly and unambiguously grants each owner a non-exclusive encroachment easement over, under, and across the property of the other for any structure that is reasonably required for the construction of any building connected to the development and operation of the shopping center. Plaintiff improperly reads this language in isolation. Article IV, section F clearly defines dominant estate as the property so benefited from the easement and the servient estate to be the property upon which such easement is located. The scope of this encroachment easement is also restricted by its effect and interference with the business operations of the servient property. Section F further defines the scope of easements stating that each easement granted pursuant to article IV is expressly for the benefit of the shopping center.

While Plaintiff contends ambiguity of language in this section, it does not provide a reasonable alternative understanding or interpretation. Plaintiff merely argues that the proper language should have been “each party grants to the other party non-exclusive easements in their respective properties” instead of “each party grants in favor of its own property non-exclusive easement.” Even re-drafting the language according to Plaintiff’s proposal does not change the clear meaning and the express intent of this section i.e., granting an encroachment easement in, to, over, across each property for the stated purposes.

The REA’s recitals also contain language inconsistent with the FAC’s allegations regarding lack of consent. Specifically, the recitals reflect Plaintiff’s consent for Defendant to enter Plaintiff’s property for the stated purposes. While the “allegations [of a complaint] must be accepted as true for purposes of demurrer,” the “facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence. [Citation.]” (*Brakke v. Economic Concepts, Inc.*, (2013) 213 Cal. App. 4th 761, 767-768; See, *Stella v. Asset Mgmt Consultants Inc.,* (2017) 8 CA 5th 181, 193-194; *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1626–1627.)

Plaintiff's arguments that the REA does not give Defendant the right to build an encroaching structure interfering with Plaintiff's business operation or to take Plaintiff's property for Defendant's exclusive use are not alleged in the FAC. Plaintiff's cause of action for trespass, as pleaded, is solely based on the allegation that "it did not give permission for Defendants to enter upon the Property and build a portion of their structure on the Property." (FAC ¶ 11.)

Accordingly, Defendant's motion for judgment on the pleadings with respect to the first cause of action for trespass is GRANTED WITH LEAVE TO AMEND. It appears reasonably possible that Plaintiff can allege facts showing Defendant surpassed its rights under the RFA. An amended complaint may be filed within 20 days from the service date of the final order.

B. Second Cause of Action for Nuisance

A nuisance is broadly defined as any non-trespassory interference with the use and enjoyment of an interest in land. (*San Diego Gas & Elec. Co. v. Sup.Ct.* (1996) 13 Cal.4th 893, 937.) To state a cause of action for private nuisance, a plaintiff must allege (1) a possessory interest in the land affected; (2) the defendant's creation of a nuisance that is injurious to health, indecent or offensive to the senses, an obstruction to the free use of the property, or an unlawful obstruction of certain kinds of thoroughfares or publicly accessible lands; (3) the nuisance is unreasonable; and (4) the nuisance caused plaintiff substantial actual damage. (*Id*. at 937-939; Civ. Code § 3479.)

Plaintiff's nuisance claim, as pleaded, arises out of Defendant's unpermitted entry and encroachment upon its property. (FAC ¶ 18.) Defendant argues entry was authorize, and its reconstruction was lawful and in compliance with the REA and government codes. Plaintiff comments in its opposition that Defendant's construction permits were obtained based on plans that did not include the encroachment, the FAC does not contain such allegations.

As explained above, REA article IV, section C, expressly and unambiguously granted Defendant an encroachment easement over, under, across the Plaintiff's property for purposes of construction connected to the development of the shopping center.

Accordingly, Defendant's motion for judgment on the pleadings as to the second cause of action for Nuisance, is GRANTED WITH LEAVE TO AMEND. An amended complaint may be filed within 20 days from the service date of the final order.

C. Third Cause of Action for Declaratory & Injunctive Relief

Any person claiming rights with respect to property, a contract, or a written instrument (other than a will or trust) may bring an action for a declaration of the party's rights or duties with respect to another. (Civ. Code Proc. § 1060.) A plaintiff's declaratory relief complaint must specifically allege that an actual, present controversy exists, and must state the facts of the respective claims concerning the disputed subject matter. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 807.) However, declaratory relief should not be used to determine issues that are already fully engaged by other causes of action. (*Hood v. Superior Court* (1995) 33 Cal. App. 4th 319, 324. "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." (*California Ins. Guarantee Ass'n v. Superior Court* (1991) 231 Cal. App. 3d 1617, 1624 (quotations and citation omitted).)

Defendant contends (1) declaratory relief is moot pursuant to Mr. Manrao's deposition testimony, and (2) injunctive remedy is inappropriate because the FAC alleges adequate legal remedy. Defendant's argument against declaratory relief lacks evidentiary support since the Court has declined to take notice of Mr. Manrao's deposition testimony.

Nonetheless, as pleaded, Plaintiff's declaratory and injunctive relief cause of action is derivative of its first two causes of action, which the Court has found inadequately plead.

Accordingly, Defendant's motion for judgment on the pleadings with respect to the FAC's third cause of action for declaratory and injunctive relief is GRANTED WITH LEAVE TO AMEND. An amended complaint may be filed within 20 days from the service date of the final order.

Calendar Lines 8-9
Case Name: *Zurich American Insurance Company v. James River Insurance Company, et al.*
Case No.: 20CV361184

Before the Court is (1) defendant James River Insurance Company's ("James River") motion for summary judgment or in the alternative, summary adjudication; and (2) plaintiff Zurich American Insurance Company's ("Zurich") motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of the remodel of Aloft Hotel in Sunnyvale (the "Project"). (Complaint, ¶ 8.) S.D. Deacon ("Deacon") had subcontracts with defendants DKS, Inc. ("DKS") and Cal-Delta Plumbing Inc. ("Cal-Delta") to perform the plumbing work. (Complaint, ¶ 10.) The agreements included an obligation to indemnify and defend Deacon, as well as to obtain insurance and name Deacon as an additional insured on that insurance. (*Ibid*.) DKS and Cal-Delta caused and/or contributed to the damages to the plumbing system and the Project, which included issues from the use of PVC and CPVC pipe, resulting in underlying litigation. (Complaint, ¶¶ 9, 11.)

Deacon incurred sums for related repairs, and Zurich insured Deacon, who sought and obtained reimbursement under the insurance policy. (Complaint, ¶¶ 12-14.) By issuing payments, Zurich was subrogated to Deacon's rights to recover from others legally responsible and liable for the repairs. (Complaint, ¶ 15.) Zurich also defended Deacon in the underlying action. (Complaint, ¶ 16.)

James River issued liability policies to Cal-Delta and DKS, under which Deacon was an additional insured. (Complaint, ¶¶ 17, 20.) Deacon tendered the claims to James River, seeking coverage on the policies, but was denied. (Complaint, ¶¶ 18-19, 21-22.)

On January 3, 2020, Zurich filed its Complaint asserting claims for (1) declaratory relief (duty to defend); (2) declaratory relief (duty to indemnify); (3) equitable indemnity (defense); (4) equitable indemnity (indemnity); (5) equitable contribution (defense); (6) equitable contribution (indemnity); and (7) equitable subrogation. James River and Zurich filed these motions on October 19 and 2023, Zurich, respectively.

II. 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*, 25 Cal.4th 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*, 25 Cal.4th at p. 843.)

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

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code 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*, 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

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 843.)

III. James River's Motion for Summary Judgment

A. Request for Judicial Notice

James River requests judicial notice of:

(1) Plaintiff Sequoia Insurance Company's ("Sequoia") Complaint in the underlying action (Ex. D);

(2) Deacon's cross-complaint in the underlying action (Ex. E);

(3) Sequoia's request for dismissal in the underlying action (Ex. I);

(4) Deacon's request for dismissal in the underlying action (Ex. J);

(5) The notice of entry of dismissal in the underlying action (Ex. K); and

(6) The Complaint in the instant matter (Ex. P.)

These items are court records and are the proper subject of judicial notice. (Evid. Code, § 452, subd. (d).) Thus, James River's request is GRANTED.

B. Analysis

James River moves for summary judgment or in the alternative, adjudication of the following causes of action and issues:

(1) Whether the second, fourth, and sixth causes of action are time-barred;

(2) Whether Zurich can establish James River's primary liability for the loss (causes of action one through four);

(3) Whether Zurich can establish that it paid more than its fair share (causes of action 5-6); and

(4) Whether Zurich was primarily liable for the loss (seventh cause of action).

According to James River's undisputed material facts, on May 30, 2017, Deacon signed an agreement acknowledging its demand for reimbursement from Zurich and Zurich's agreement to pay Deacon for pipe replacement. (James River's Separate Statement of Undisputed Material Facts ("James River's UMF"), No. 1.) On June 2, 2017, Zurich issued payment. (James River's UMF, No. 2.) Zurich's internal claims note states:

> Addressing the second component of this claim relating to the pipe damage caused by the use of dissimilar and incompatible materials, inspections have confirmed that the improper PVC pipe was installed in limited areas… Deacon has agreed to retain Axis as a

repair contractor to replace all PVC with CPVC pipe. The repairs are ongoing and have been scheduled around hotel vacancy. The cost of these repairs is estimated at roughly $413K.

Indemnity Reserve:

I have discussed my reserve recommendations with the insured C.O.O Bill Townsend in line with Special Handling directives. It appears that the damages relating to the pipe burst should be transferred to the project subcontractor Cal-Delta and its carrier. However, risk transfer for the damages to the pipe caused by the use of dissimilar materials appears unlikely, as it is anticipated James River will rely on your work exclusions as to these repairs. I have therefore recommended a $415K loss reserve, in line with the recently provided pipe repair estimate. Mr. Townsend has confirmed his agreement with this reserve recommendation.

(James River's UMF, No. 3.)

On September 7, 2018, Sequoia filed a lawsuit against Deacon. (James River's UMF, No. 4.) James River defended Deacon as an additional insured under DKS's policy under reservation of rights. (James River's UMF, No. 7.) Zurich issued a coverage position letter to Deacon stating its coverage was excess. (James River's UMF, No. 8.) Pursuant to the terms of the Settlement Agreement, James River agreed to pay Sequoia $775,000. (James River's UMF, No. 9.) The parties dismissed their claims against each other. (James River's UMF, Nos. 10-12.) Zurich issued a commercial general liability policy to Deacon, with limits of $2,000,000 per occurrence; $4,000,000 general aggregate. (James River's UMF, No. 13.) James River issued a commercial general liability policy to Cal-Delta. (James River's UMF, No. 16.) Zurich incurred over $200,000 in fees. (James River's UMF, No. 19.)

Zurich submits the additional material facts: From August 2014 to August 2015, Shashi, the owner of the Aloft Hotel, undertook a complete remodel with Deacon as the general contractor. (Zurich's Additional Material Facts ("Zurich's AMF"), No. 1.) The remodeled hotel consists of a three story "North Tower" and a four story "South Tower", which are connected by a lobby. (Zurich's AMF, No. 2.) During the remodel, DKS, the initial plumbing subcontractor, installed the rough plumbing of

the North Tower and part of the South Tower. (Zurich's AMF, No. 3.) During the project, DKS was replaced by Cal-Delta, who completed the work on both towers. (Zurich's AMF, No. 4.) In their respective subcontracts, DKS and Cal-Delta agreed to defend, indemnify Deacon, perform as per the plans and specifications, and name Deacon as an additional insured on their insurance policies. (Zurich's AMF, Nos. 5-7, 10.) Cal-Delta agreed to notify Deacon if there were any discrepancies in the plans or specifications. (Zurich's AMF, No. 8.) Cal-Delta also agreed to warrant that any work performed by others, which was related to its own work, was satisfactory and acceptable. (Zurich's AMF, No. 9.)

James River insured Cal-Delta and DKS, with Deacon as an additional insured. (Zurich's AMF, Nos. 11-12.) Their policies included a primary and non-contributing endorsement with the following language:

> Any coverage provided to an Additional Insured under this policy shall be excess over any other valid and collectible insurance available to such Additional Insured whether primary, excess. Contingent or on any other basis ***unless a written contract or written agreement specifically requires that this insurance apply on a primary and noncontributory basis.***

(*Ibid*.)

In late June 2016, the plumbing in Room 327 started leaking and caused damage to the lower rooms. (Zurich's AMF, No. 14.) Deacon called Cal-Delta to respond to the leak because it delivered the completed plumbing for the remodel. (Zurich's AMF, No. 15.) In early July, the water at the Aloft Hotel was turned off so Cal-Delta could fix the pipe. (Zurich's AMF, No. 16.) When the water was turned back on, the fixed pipe burst, sending water into 11 rooms, the lobby, kitchen, and bar areas of the hotel. (Zurich's AMF, No. 17.)

After investigating, Cal-Delta noted the initial leak occurred where a PVC elbow was used, with PVC glue, in a run of CPVC pipe. (Zurich's AMF, No. 18.) It further noted:

> With PVC fittings mixed with CPVC pipe [they] could keep chasing more leaks as they continue to repair others. There are similar connections on the cold water line that may have problems in the future…

(Zurich's AMF, No. 19.)

Cal-Delta also noted several leaks in the area where they replaced PVC/CPVC piping and that there was still more PVC/CPVC in room 327 on the hot and cold lines. (Zurich's AMF, No. 20.) Zurich's expert Mark Hunter expressed concern that there was a mix of PVC and CPVC piping around the burst pipe, that these two types of pipes are incompatible, and the incompatibility contributed to the burst pipe. (Zurich's AMF, No. 21.) Sashi's expert J.B Giacoma raised similar concerns. (Zurich's AMF, No. 22.)

On November 3, 2016, Axis prepared a preliminary report on the piping issues that identified some areas of intermixed pipes. (Zurich's AMF, No. 25.) On December 14, 2016, Axis provided a summary of its findings about the pipe intermixing issue and a proposed repair. (Zurich's AMF, No. 26.) On December 15, 2016, the owners confirmed they needed Deacon to replace all PVC pipes with CPVC or copper. (Zurich's AMF, No. 27.) Axis noted the plans called for CPVC pipes to be used in the project and the mix was contrary to the plans. (Zurich's AMF, No. 28.)

On August 5, 2016, Deacon and Zurich tendered the issue to DKS, James River, and Cal-Delta, which specifically provided notice of an issue and potential claim regarding whether appropriate materials were used. (Zurich's AMF, No. 29.) After they received no response, they sent follow up tenders in September 2016. (Zurich's AMF, No. 30.) In October 2016, they were notified that James River, Cal-Delta, and DKS were investigating the pipe issue. (Zurich's AMF, No. 31.) In November 2016, Guy Tankersley, Cal-Delta's owner, stated he did not know why Zurich and Deacon were contacting him and directed them to James River. (Zurich's AMF, No. 32.)

In December 2016, before the repairs started, Zurich and Deacon informed James River, Cal-Delta, and DKS that the repairs would begin and they would pursue them for recovery of the amounts spent. (Zurich's AMF, No. 34.) Deacon repaired the pipe incompatibility issue. (Zurich's AMF, No. 37.) Bizhan Mahallati, with Axis, the entity that performed the repairs, testified he discussed with the hotel owners that the only way to warranty the plumbing system was to completely replace the intermixed areas. (Zurich's AMF, No. 38.) Axis completed the repair in phases between December 2016 and April 2017. (Zurich's AMF, No. 39.)

On June 1, 2017, after asking James River to indemnify Deacon and not receiving an acceptable response, Zurich funded the mitigation work. (Zurich's AMF, No. 40.) Deacon then paid Axis approximately $363,001. (*Ibid*.) Zurich also paid Sasha $27,982 for loss of use during the repairs. (Zurich's AMF, No. 41.)

1. ***Statute of Limitations***

Code of Civil Procedure section 339 provides: "An action upon a contract, obligation or liability *not founded upon an instrument of writing*…" must be brought within two years. (Code Civ. Proc., § 339, subd. (1).)

Relying on *Century Indemnity Co. v. Superior Court* (1996) 50 Cal.App.4th 1115 (*Century Indemnity*), James River argues Zurich's claims regarding Defendants' duty to indemnify are time-barred. In *Century Indemnity*, Century, Scottsdale, and Northbrook each insured a company for claims arising out of a particular set of circumstances, which led to litigation. (*Id*. at 1117.) Scottsdale defended the company and settled the litigation. (*Ibid*.) Century and Northbrook failed to pay Scottsdale and Scottsdale filed an action against both companies. (*Ibid*.) The court addressed whether an action brought by one insurance company against another to recover a pro rata share of defense costs expended to defend their coinsured was subject to the two-year statute of limitations under Code of Civil Procedure section 339. (*Id*. at p. 1117.) The court reasoned that while Scottdale's action rose out of Century's policy to the coinsured, Scottsdale and Century were not in privity of contract, thus, Scottsdale had no right to enforce the terms of the agreement; it reasoned Century's obligation to contribute to the defense of the coinsured was founded in principles of equity. (*Id*. at 1121.)

Here, Zurich insured Deacon while James River insured DKS and Cal-Delta. Deacon was an additional insured on both policies from James River. Zurich asserts it became subrogated to Deacon's rights to recover under the policies.

"Subrogation is the 'substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim.'" (*Interstate Fire and Casualty Insurance Co. v. Cleveland Wrecking Co.* (*Cleveland Wrecking*) (2010) 182 Cal.App.4th 23, 32-33.) "'In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in

order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid.'" (*Id.* at p. 33.)

Deacon's claims against James River would arise out of DKS' and Cal-Delta's policies. Thus, its claims are subject to a four-year statute of limitations. (See Code Civ. Proc., § 337 [four year statute of limitation for claims based upon a written instrument].) By standing in Deacon's position, Zurich's claims are subject to the same statute of limitation. On June 2, 207, Zurich made its payment. On January 3, 2020, Zurich initiated this matter. As a result, Zurich's claims are not time-barred. Thus, summary adjudication of causes of action two, four, and six cannot be granted on this basis.

2. ***Duties to Defend and Indemnify***

"The duty to defend is contractual." (*Buss v. Superior Court* (1997) 16 Cal.4th 35.) "[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity." (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081 (*Horace Mann*).) A "carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." (*Ibid.*, quoting *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275 (*Gray*).) "Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded." (*Horace Mann*, 4 Cal.4th at 1081.) However, "where there is no possibility of coverage, there is no duty to defend." (*Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1029 (*Fire Ins. Exchange*).)

"When determining whether a particular policy provides a potential for coverage and a duty to defend, [California courts] are guided by the principles that interpretation of an insurance policy is a question of law." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) "The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Ibid*, citing Civ. Code, § 1638; *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807 ["the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"].)

James River argues it had no duty to defend or indemnify Deacon regarding the pipe replacement because there was no suit to trigger the duty. The policy states, in relevant part:

> We will pay those sums that the insured becomes legally obligated to pay *as damages* of "bodily injury" or "property damages" to which this insurance applies. We will have the right and duty to defend the insured against *any "suit"* seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result…

(James River UMF, No. 17 [emphasis added].)

James River's policies define, "suit" as "*a civil proceeding* in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. 'Suit' includes:

> a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> b. Any other alternative dispute proceeding in which such damages are claims and to which the insured submits with our consent.

(James River, Exh. M & N, CGL, p. 15].)

In *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 878, the California Supreme Court explained that "a 'suit' is a court proceeding initiated by the filing of a complaint" for the purposes of analyzing a duty to defend. (*Id*. at p. 888.) The court stated a preference for a "bright-line rule that, by clearly delineating the scope of risk, reduces the need for future litigation." (*Ibid*.) The court also stated,

> The duty to defend arises when the insured tenders defense of the third-party lawsuit to the insurer…Prior to the filing of a complaint, there is nothing for the insured to *tender defense of,* and hence no duty to defend arises. It follows therefore that site investigation expenses incurred prior to the instigation of a lawsuit against the insured are not defense costs the insurer must incur. This is because the insurer does not yet have a duty to defend the insured.

(*Id*. at p. 886 [emphasis original].)

Here, there was no suit, as defined in James River's policies, at the time Zurich funded the pipe replacement and tendered the claims to James River. Thus, there was no duty to defend the pipe replacement. Moreover, James River defended Deacon in the underlying action under its policies, while Zurich issued a letter to Deacon stating its coverage was excess. (James River UMF, Nos. 7-9.)

Furthermore, James River's policy provides its insured indemnification for sums "that the insured becomes legally obligated to pay *as damages*… to which this insurance applies." (See James River, Exh. M & N, CGL, p. 15 [emphasis added].) In *Certain Underwriters at Lloyd's of London v. Superior Ct.* (2001) 24 Cal.4th 945, 962, the California Supreme Court differentiated between the phrases "sum that the insured becomes legally obligated to pay" and "sum that the insured becomes legally obligated to pay as *damages*", stating the latter would not be used outside of a court order. (*Id*. at 963-64.) Thus, James River meets its initial burden to establish no triable issue of material fact as to whether there was no duty to defend or indemnify Deacon, under the James River policies, from Sashi's claim regarding the pipes. The burden thus shifts to Zurich.

Relying on *Pruyn v. Agric. Ins. Co.* (1995) 36 Cal.App.4th 500 (*Pruyn*), Zurich argues Deacon is entitled to a presumption of liability. In *Pruyn*, an appeal from a motion to dismiss, the plaintiff sued defendants' insurers to enforce a stipulated judgment entered in her favor after she settled her claim in an underlying action. (*Id*. at p. 509.) The settlement included a covenant not to execute the judgment against the insured, and the insurers argued the judgment could not be enforced on them as a matter of law. (*Ibid*.) The court held that the insured was entitled to an evidentiary presumption in their favor regarding the existence and amount of the insured liability, stating: when "a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute." (*Ibid*.) The effect of the presumption is to shift the burden to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. (*Ibid*.) *Pruyn* is distinguishable because the insurer failed to defend the insured in the underlying action, while here, Zurich seeks to be reimbursed for the pipe replacement, which occurred prior to the underlying action. *Pruyn* also relates to the validity of the settlement agreement in the underlying action, which is not at issue in this matter.

Next, relying on *San Diego Housing Com'n v. Industrial Indem. Co.* (1998) 68 Cal.App.4th 526, 543 (*San Diego Housing*), Zurich argues James River was legally obligated to pay damages in response to Sashi's claim. In *San Diego Housing*, the housing commission and housing authority sued an insurer based on an underlying default judgment for damages for construction defects against a contractor insured by the insurer. (*Id*. at p. 530.) Plaintiffs there were additional insureds on the insurance policy. (*Ibid*.) Plaintiffs did not present any claims to the insurer, but instead paid repair expenses, obtained the default judgment, and then sought liability coverage for them. (*Id.* at p. 542.) The court found there was no duty to defend or indemnify because there was never a claim against the policy arising out of plaintiffs' status as additional insureds or any "suits" field by third parties. (*Id*. at p. 543.) The court reasoned "a discretionary ability on the part of an insurer to 'make such investigation and settlement of any claim… as it deems expedient' is not the same as a contractual duty of the insurer to respond to an insured's request for coverage that is based on an actual third party claim against it." (*Id*. at p. 543.)

One critical difference between *San Diego Housing* and the instant matter is the policy in the former did not define "suit" or "claim" for the purposes of defining the insurer's defense and indemnification duties. (*Id*. at p. 540, fn. 10.) Here, James River's policies explicitly require a "suit", which is defined as a civil proceeding, to trigger its duty to defend. Zurich cannot circumvent the language of the policies. Zurich's assertion that Sashi's claim would have turned into a lawsuit, which is not supported by any evidence, is not sufficient to meet its burden here. (See *Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh,* PA (2016) 6 Cal.App.5th 443, 460 ["Speculation about facts has been found to be insufficient when construing an insurer's duty to defend"].) Thus, summary adjudication is GRANTED as to causes of action one to four.

3. ***Fifth and Sixth Causes of Action- Equitable Contribution***

"Equitable contribution is the right to recover from a co-obligor who shares a liability with the party seeking contribution." (*Underwriters of Interest Subscribing to Policy Number A15274001 v. ProBuilders Specialty Insurance Co.* (2015) 241 Cal.App.4th 721, 728.)

"In an action by an insurer to obtain contribution from a coinsurer, the inquiry is whether the nonparticipating coinsurer 'had a *legal obligation* … to provide [a] defense [or] indemnity coverage for

the … claim or action prior to [the date of settlement],' and the burden is on the party claiming coverage to show that a coverage obligation arose or existed under the coinsurer's policy." (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 879 (*Safeco*).) The purpose of this rule is to ensure courts will not order a coinsurer to contribute to a loss that it had no obligation to pay under the terms of its policy. (*Safeco,* 140 Cal.App.4th 879; *American Continental Ins. Co. v. American Casualty Co.* (2001) 86 Cal.App.4th 929, 937-938.)

As the Court stated above, Zurich fails to establish a triable issue of material fact regarding James River's duty to defend or indemnify Deacon regarding the pipe replacement. As a result, there is no triable issue of material fact as to the equitable contribution claims. Thus, summary adjudication is GRANTED as to causes of action five and six.

4. ***Seventh Cause of Action-Equitable Subrogation***

The essential elements of an insurer's cause of action for equitable subrogation are: (a) the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (b) the claimed loss was one for which the insurer was *not* primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured. (*Caito v. United California Bank* (1978) 20 Cal.3d 694, 704 (*Caito*).)

James River argues this claim fails because Zurich (1) cannot establish that James River was primarily liable; (2) cannot show Deacon suffered a loss for which James River is liable; and (3) cannot show there is an existing, assignable cause of action against James River that Deacon could assert for its own benefit.

As the Court stated above, Zurich fails to show a triable issue of material fact regarding James River's duty to defend or indemnify. Consequently, Zurich cannot establish James River was primarily liable for the loss for which it compensated Deacon or that it was liable for Deacon's loss. Therefore, Zurich cannot show an element of the claim. (*Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1088 ["The moving party insurer must show the other insurer was primarily liable for the loss"]; see also *Caito, supra,* 20 Cal.3d at p. 704.) Thus, summary adjudication is GRANTED as to the seventh cause of action.

IV. Zurich's Motion for Summary Adjudication

Zurich moves for adjudication of the second cause of action for declaratory relief as to James River's and Cal-Delta's respective duties to indemnify.

A. James River's Evidentiary Objections

James River submits objections to Zurich's evidence do not need to be ruled upon because they do not comply with Rule of Court 3.1354. Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

James River submits a single document containing evidentiary objections and a proposed order in violation of Rule 3.1354, subdivision (c). Thus, the Court declines to rule on these objections.

B. Analysis

Given the Court's ruling above, Zurich's motion for summary adjudication of the second cause of action as to James River is DENIED.

1. Whether Cal-Delta has a Duty to Indemnify Zurich

Generally, parties to a contract may define within that agreement their duties toward one another in the event of a third-party claim against one or both arising from that relationship. (*Crawford v.*

Weather Shield Manufacturing Incorporated (2008) 44 Cal.4th 541, 551 (*Crawford*).) Terms of this type may require one party to indemnify another under specified circumstances, and may also assign one party, pursuant to the contract's language, responsibility for the other's legal defense when a third-party claim is made against the latter. (Civ. Code, § 2772 [defining indemnity]; see *Mel Clayton Ford v. Ford Motor Co*. (2002) 104 Cal.App.4th 46, 55.) Though subject to public policy and established rules of contractual interpretation, parties generally have "great freedom to allocate such responsibilities as they see fit." (*Crawford*, *supra*, 44 Cal.4th at 551, citing *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 507.) "When parties by express contractual provision establish a duty in one party to indemnify another, the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity." (*Morlin Asset Management L.P. v. Murachanian* (2016) 2 Cal.App.5th 184, 192 (internal citations omitted); *Regional Steel Corp. v. Superior Court* (1994) 25 Cal.App.4th 525, 528-529 [where parties have expressly contracted, the duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity; parties have bargained away their right to pursue equitable indemnity]; *Md. Casualty Co. v. Bailey & Sons* (1995) 35 Cal.App.4th 856, 864 [citing *Regional Steel Corp*. and holding that where there is an express contract provision for indemnity the scope of the duty is to be determined from the contract and not from equity].))

In *Prince v. Pacific Gas & Elec. Co*. (2009) 45 Cal.4th 1151, 1157, the Supreme Court explained that "we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.'" (Internal citations omitted.) "Express indemnity refers to an obligation that arises 'by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' Express indemnity generally *is not subject to equitable considerations or a joint legal obligation to the injured party*; rather, it is enforced in accordance with the terms of the contracting parties' agreement . . . . In this sense, express indemnity allows contracting parties 'great freedom to allocate [indemnification] responsibilities as they see fit,' and to agree to 'protections beyond those afforded by the doctrines of implied or equitable indemnity' . . . . Unlike express indemnity, traditional equitable indemnity requires no contractual relationship

between an indemnitor and an indemnitee. Such indemnity 'is premised on a joint legal obligation to another for damages,' but it 'does not invariably follow fault' . . . . A key restrictive feature of traditional equitable indemnity is that, on matters of substantive law, the doctrine is 'wholly derivative and subject to whatever immunities or other limitations on liability would otherwise be available' against the injured party." (*Id*. at 1158-1159, internal citations omitted, emphasis added.)

Cal-Delta contracted with Deacon to provide a "complete plumbing package" and incorporated DKS' work into its own (the "Subcontract"). (Zurich UMF, No. 7; Exh. 3, p. 2.) Cal-Delta agreed to defend and indemnify Deacon for all claims arising out of its work and to

> Notify Contractor in writing of discrepancies in the plans and specifications… bearing on performance of Subcontractor's work. In the event Subcontractor commences Subcontractor's work without notice to Contractor of such discrepancy, Subcontractor shall be solely responsible for bringing Subcontractor's work (and the work of other affect thereby) into conformance…

(Zurich UMF, No. 6; No. 8; Exh. 3, Exh. B, § 9.4.)

Cal-Delta further agreed:

> If the performance of any item of work by Subcontractor is related to or dependent upon any other item of work performed or materials furnished *by others*, Subcontractor *warrants*, by undertaking to perform its Work, that such other items are *satisfactory and acceptable*… Subcontractor *indemnifies* Contractor against any costs for repair or corrective work required as a result of Subcontractor proceeding with its work where precedent work is unsatisfactory.

(Zurich UMF, No. 9; Exh. 3, Exh. B, § 16.2 [emphasis added].)

Cal-Delta performed work in the areas where there was intermixed pipe. (Zurich UMF, Nos. 25-26.) Axis identified some of those areas as requiring repair. (*Ibid.*) Zurich contends Cal-Delta's duty to indemnify arises out of its own work and its warranty regarding DKS' work. Thus, Zurich has met its burden to show there is no triable issue of material fact regarding Cal-Delta's duty to indemnify Deacon.

Cal-Delta argues it did not have a duty to indemnify because the Subcontract, Exhibit A, which pertains to the scope of work, contains an exclusion of warranty which states "the work excluded shall

consist of… 1. Warranty of existing work installed by others." (Zurich, Exh. 3, p. 4.) It further argues this claim is barred by Civil Code section 2782.05, which provides:

> Provisions, clauses, covenants, and agreements contained in… or affecting any construction contract and amendments thereto entered into on or after January 1, 2013, that purport to insure or indemnify, including the cost to defendant, a general contractor… by a subcontractor against liability for claims of death or bodily injury to persons, injury to property, or any other loss, damage, or expense are void and unenforceable to the extent the claim arise out of, pertain to, or relate to active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor,… who are responsible to the general contractor… or for defects in design furnished by those persons, or to the extent the claims do not arise out of the scope of work of the subcontractor pursuant to the construction contract. This section shall not be waived or modified by contractual agreement, act, or omission of the parties.

(Civ. Code, § 2782.05, subd. (a).)

It appears Section 16.2 pertains to incorporation of work done by another in its own work performed, thus, Cal-Delta's liability arises out of its own actions in proceeding with its performance. (See Exh. 3, Exh. B, § 16.2 ["Subcontractor warrants, *by undertaking to perform its Work*, that such other items are satisfactory and acceptable… Subcontractor indemnifies Contractor against any costs for repair or corrective work required *as a result of Subcontractor proceeding with its work"*].) To the extent the provision holds Cal-Delta responsible for DKS' active negligence or willful misconduct only, it is void and unenforceable under Section 2782.05.

Cal-Delta argues the alleged negligent work was performed by DKS and it was brought to "complete the remaining plumbing." (Cal-Delta AMF, No. 7.) Cal-Delta provides the testimony of its owner, Tankersley, DKS' principal Jared Meeks, and Cal-Delta employee Francisco Chavez.

Chavez testified that Cal-Delta performed only finish/trim plumbing work during the project. (Cal-Delta AMF, No. 3.) According to Chavez, the above-ground and below-ground plumbing was already complete and the drywall was already up for the North Tower, the rough plumbing was similarly completed for the South Tower and drywall was already up for two of the floors, and Cal-Delta did not

install any plumbing lines within the interior of the hotel. (Cal-Delta AMF, Nos. 4-7.) Tankersley and Meeks similarly testified. (Cal-Delta AMF, Nos. 7-8.) This is sufficient to establish a triable issue of material fact as to whether Cal-Delta's work was related to DKS' work and thus whether Cal-Delta's own work on the Project triggered its duty to indemnify. Zurich's motion for summary adjudication is accordingly DENIED.