Filed 10/24/18 ConocoPhillips Company v. Pacific Convenience & Fuels, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONOCOPHILLIPS COMPANY et al., Cross-complainants and Appellants, v. PACIFIC CONVENIENCE & FUELS, LLC et al., Cross-defendants and Respondents.	B284021 (Los Angeles County Super. Ct. No. BC503381)

APPEAL from an order of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Affirmed in part, reversed in part, and remanded.

Valinoti, Specter & Dito, Ronald Specter and Mark Anthony Rodriguez, for Cross-complainants and Appellants.

ClouseSpaniac Attorneys, Katharine L. Spaniac and Lawya L. Rangel, for Cross-defendants and Respondents.

The legal issues presented in this appeal are relatively straightforward, but they are made complicated by the multiple parties involved and the interrelated contracts at issue—of which there are several. Cross-complainants and appellants ConocoPhillips Company and Phillips 66 Company (collectively, ConocoPhillips) were two of several named defendants in a complaint Felipe and Maria Mireles filed for injuries Felipe suffered as a result of a propane fire at a 76-branded gas station. ConocoPhillips, which owns the 76 brand and licenses it to other entities, filed a cross-complaint seeking indemnity from Pacific Convenience & Fuels, LLC (Pacific), Convenience Retailers, LLC (Convenience), Sam and Shireen Hirbod (the Hirbods), Apro, LLC (Apro), Suburban Propane, LP (Suburban), Field Energy Corporation (Field Energy), and Stephen Dakay (Dakay). The operative cross-complaint alleged, among other things, a cause of action for breach of contract to indemnify against Pacific and a cause of action for equitable indemnity against Pacific, Convenience, and the Hirbods (collectively, cross-defendants). We are asked to decide whether the trial court correctly sustained cross-defendants' demurrer to the cross-complaint, finding no legal basis on which ConocoPhillips could demand indemnification for the Mireles lawsuit.

I. BACKGROUND

A. The Three Contracts at Issue

1. ConocoPhillips licenses the 76 brand to Convenience

In January 2009, ConocoPhillips and Convenience entered into a contract they called a Master Branded Reseller Agreement (the Reseller Agreement). The Reseller Agreement "set out the

terms and conditions under which ConocoPhillips [would] sell to [Convenience] and [Convenience would] purchase from ConocoPhillips various petroleum products for resale by [Convenience] under the ConocoPhillips Brand . . . ." Through the Reseller Agreement, ConocoPhillips granted Convenience, among other things, "a non-exclusive license to use the ConocoPhillips Brand for the limited purpose of marketing, promoting, advertising and selling Branded CONOCOPHILLIPS Products." ConocoPhillips also gave Convenience permission to use the 76 brand and franchise "in conjunction with the advertising, distribution or sale of ConocoPhillips motor fuels" at certain service stations.

The Reseller Agreement contains an indemnity provision that obligated Convenience "to indemnify, defend and hold harmless ConocoPhillips . . . from any and all claims, demands, suits, actions or other loss or liability . . . arising out of any claim or cause of action at law or in equity or by contract, or any administrative or judicial action, or pursuant to any past, current or future agreement concerning or relating to any loss, . . . personal injuries, death, . . . or trademark infringement or environmental claims arising in any manner out of [Convenience's] operations, including but not limited to, the storage, transportation, handling, sale, or use of motor fuel sold hereunder, or from [Convenience's] performance or failure to perform under this Agreement, whether or not [Convenience] was negligent or otherwise at fault." The indemnity provision also states, however, that "such indemnification obligations shall not apply: [¶] (i) To the percentage of such Liabilities, if any,

attributable to ConocoPhillips's negligence or willful misconduct . . . ."[1]

2. ConocoPhillips sells Convenience to Pacific and the sale agreement includes an indemnity provision

On the same day ConocoPhillips and Convenience entered into the Reseller Agreement, ConocoPhillips agreed to sell Convenience to Pacific. The sale was accomplished through a contract the parties called the Amended and Restated Acquisition Agreement (the Acquisition Agreement). Pursuant to the Acquisition Agreement, ConocoPhillips sold "all of the issued and outstanding limited liability company interests" of Convenience, which it held through its control of a different entity, to an entity owned by Pacific.

Like the Reseller Agreement, the Acquisition Agreement included an indemnity provision. Specifically, Section 14.2 of the Acquisition Agreement, entitled "Indemnification by Purchaser" (i.e., Pacific), provides in pertinent part as follows:

"(a) Subject to the express provisions of this Article . . . after the Applicable Closing Date, [Pacific] shall indemnify, defend and hold harmless [ConocoPhillips], its Affiliates and the respective officers, directors, employees and agents of [ConocoPhillips] and its Affiliates (collectively, the

---

[1] The Hirbods and Pacific guaranteed the indebtedness and obligations of Convenience under the Reseller Agreement. The guaranty agreements did not contain separate indemnification provisions.

"Seller Indemnified Parties") from and against all Losses[2] incurred or suffered by a Seller Indemnified Party, but only to the extent attributable to:

[¶] . . . [¶]

(v) . . . any Legal Proceeding (including any workers' compensation proceeding) arising from the ownership or operation of [Convenience] and its Subsidiaries and their businesses on or after the Applicable Closing Date . . . ."

Also of significance to the issues presented on appeal, Section 14.2(b) states: "Notwithstanding any provision to the contrary [¶] . . . [¶] (iv) no Seller Indemnified Party may make any claim for indemnification under this Article XIV if it may make a claim for indemnification or has any other remedy with respect to the pertinent subject matter under another Transaction Document (whether or not such claim results in a payment of indemnification to any Seller Indemnified Party), and no Seller Indemnified Party may make a claim for indemnification under this Article XIV to the extent it may make a claim for indemnification under Article IX." "Transaction Document" was defined to include the Reseller Agreement between ConocoPhillips and Convenience.

---

[2] "Losses" were defined to include "all claims, losses, damages, liabilities, judgments, fees, penalties and costs (including the reasonable fees and expenses of counsel)."

3. Convenience assigns the Reseller Agreement to Apro

Some six years later, in June 2015, Phillips 66 Company,[3] Convenience, and Apro entered into a contract designated an Assignment, Assumption and Modification Agreement (the Assignment Agreement). Through the Assignment Agreement, Convenience assigned, and Apro assumed and accepted, Convenience's right, title, interest and obligations covered by the Reseller Agreement. In executing the Assignment Agreement, Phillips 66 Company (i.e., ConocoPhillips) "expressly waive[d], release[d], and forever discharge[d] Original Operator [Convenience] and Guarantor [the Hirbods and Pacific], [and] their respective Associated Parties, from any and all liability, claims, demands, damages, actions and causes of action, that [ConocoPhillips] has or might have, known or unknown, now existing or that might arise hereafter, under . . . the [Reseller Agreement] and Consignment Addendum" and other contracts into which the parties had entered. The Acquisition Agreement was not among the other contracts listed in this provision.

B. The Underlying Personal Injury Action

In March 2013, Felipe and Maria Mireles filed a complaint for personal injury and damages, alleging causes of action for negligence and loss of consortium. As alleged in the complaint, Felipe visited a 76 gas station in La Puente, California on October 1, 2011, to have his propane tank filled, and he was

---

[3] The operative cross-complaint identifies Phillips 66 Company as the assignee of "certain assets, rights, and liabilities of" ConocoPhillips Company.

grievously injured by a fire that ignited at the station when an employee was filling the tank.

The Mireles complaint named various defendants, including ConocoPhillips, Field Energy, Dakay (an employee at the gas station), and Suburban.[4] Pacific and Convenience were added to the lawsuit at a later date (the record reflects Felipe and Maria Mireles dismissed their complaint against Pacific with prejudice in April 2015 and dismissed their complaint against Convenience with prejudice in March 2016).

ConocoPhillips eventually moved for summary judgment on the Mireles complaint, arguing it (ConocoPhillips) did not own, operate, lease, control, or manage the location and property at which Felipe was injured, the propane that caused the incident, or the propane equipment involved in the incident. The trial court granted the motion, finding "no reasonable trier of fact could find ostensible agency for the 'supply' of propane under the[ ] circumstances." In a prior appeal, we reversed the grant of summary judgment because ConocoPhillips had not addressed the issue of ostensible agency in its motion for summary judgment, thus denying the Mireles plaintiffs an adequate opportunity to respond. (See *Mireles v. ConocoPhillips Company* (Sept. 8, 2015, B262204) [nonpub. opn.].)

After remand, ConocoPhillips again moved for summary judgment, this time addressing the ostensible agency theory of liability in its motion. The trial court denied the motion for summary judgment because it found, after the issue had been

---

[4] The Mireles' original complaint, the only iteration of their complaint in the appellate record, provides little to no detail regarding Field Energy, Dakay, and Suburban.

properly raised, that the Mireles plaintiffs had "raise[d] a triable issue of fact as to ConocoPhillips's liability based on . . . ostensible agency, i.e., whether Mr. Mireles reasonably believed, based on the 76 brand and logo, that he was purchasing [propane] from 76 and/or the agents of 76." After losing its summary judgment motion, ConocoPhillips filed a trial brief in which it stated: "There is only one issue left for trial against Conoco in this matter. Plaintiffs allege that Field Energy Corporation . . . and its employee, Stephen Dakay . . . were acting as the ostensible agents of Conoco" at the time of the incident.

C. ConocoPhillips's Cross-Complaint for Indemnification

In September 2016, ConocoPhillips filed a cross-complaint against Pacific, Convenience, Apro, Suburban, the Hirbods, Field Energy, and Dakay. As relevant here, this original cross-complaint alleged causes of action for breach of contract to indemnify and breach of contract to defend as against Pacific, Convenience, and Apro. It also alleged a cause of action for breach of guaranty against the Hirbods, and causes of action for equitable indemnity, contribution, and declaratory relief against all cross-defendants.

ConocoPhillips thereafter filed a First Amended Cross-Complaint (FACC). Among other things, ConocoPhillips alleged cross-defendants owed it a duty under the Reseller Agreement to provide a defense and indemnify it against any damages awarded in the Mireles action. Pacific, Convenience, and the Hirbods demurred to the FACC. Apro also filed its own demurrer. ConocoPhillips opposed the demurrers, and the trial court sustained them with leave to amend. As pertinent here, one of the grounds on which the trial court sustained the demurrer to

the breach of contract causes of action against cross-defendants was its conclusion that the Reseller Agreement's indemnity provision did not apply because the only viable theory of liability—ostensible agency—requires proof that the agency arose from ConocoPhillips's intentional acts or neglect and the Reseller Agreement states indemnity need not be provided if liability arises from "ConocoPhillips'[s] negligence or willful misconduct . . . ."

ConocoPhillips opted to file a Second Amended Cross-Complaint (the operative cross-complaint) rather than stand on the FACC as drafted and appeal the trial court's ruling. The operative cross-complaint identified the parties as follows. Field Energy "was the operator" of the La Puente 76 gas station. Suburban "was the owner and supplier of the propane equipment and propane gas at the [station] and was solely responsible for the installation, maintenance, and repair of said propane equipment, as well as the containment of propane gas within the propane equipment." Convenience "was the owner" of the gas station, "at all relevant times had control over the operations of" Field Energy and Suburban, "and maintained the right to prevent the presence of the dangerous condition" at the gas station. Pacific, Convenience, and the Hirbods were described in boilerplate terms as "the alter ego, successor, assignee, agent, servant, employee, and/or representative of each of the other cross-defendants." The operative cross-complaint further alleged, without elaboration, that Pacific, Convenience, and the Hirbods "were negligent and had control over the operations of" Field Energy and Suburban at the La Puente 76 station and "maintained the right to prevent the presence of the dangerous

condition . . . and knew or should have known of the dangerous condition . . . ."

The operative cross-complaint alleged five causes of action: (1) breach of contract to indemnify and defend, as against Pacific; (2) breach of contract to indemnify and defend, as against Convenience; (3) breach of contract, as against Apro; (4) breach of guaranty, as against the Hirbods; and (5) equitable indemnity, as against all cross-defendants. The breach of contract cause of action against Pacific alleged in pertinent part that the Acquisition Agreement (not the Reseller Agreement, as alleged in the FACC) required Pacific to indemnify and defend ConocoPhillips from the claims asserted in the Mireles complaint, ConocoPhillips had demanded indemnification, and Pacific had breached the contract by failing to indemnify and provide a defense. Also included in the operative cross-complaint's first breach of contract cause of action against Pacific were allegations that Pacific was equitably estopped from denying an obligation to indemnify ConocoPhillips because Pacific, through its insurance company, initially stated it would provide indemnity and defense, and ConocoPhillips had relied on Pacific's statement by accepting joint representation earlier in the litigation.

The equitable indemnity cause of action against cross-defendants alleged, without elaboration, that each cross-defendant was negligent, had control over the operations of Field Energy (station operator) and Suburban (propane supplier), maintained the right to prevent the presence of the dangerous condition at the La Puente 76 station, and knew or should have known of the dangerous condition.

D. Demurrers to the Operative Cross-Complaint and the Trial Court's Ruling

Cross-defendants (Pacific, Convenience, and the Hirbods) demurred to the operative cross-complaint. Prior to the demurrer hearing, ConocoPhillips voluntarily dismissed the second cause of action for breach of the Reseller Agreement against Convenience and the fourth cause of action for breach of guaranty against the Hirbods. Thus, by the time of the demurrer hearing, only the first cause of action for breach of the Acquisition Agreement against Pacific, and the fifth cause of action for equitable indemnity against all cross-defendants were at issue.[5]

In ruling on cross-defendants' demurrer, the trial court took judicial notice of several documents or portions thereof, including the Mireles' complaint, this court's prior appellate decision, and the trial brief filed by ConocoPhillips. The trial court specifically noticed ConocoPhillips's admissions in its trial brief that the use of the 76 brand at the La Puente gas station was governed by the Reseller Agreement, ConocoPhillips "police[d] its trademark" through the Reseller Agreement, and the Reseller Agreement granted a non-exclusive license to use the brand consistent with the trademark guidelines.

The trial court sustained the demurrer to the first cause of action for breach of contract against Pacific without leave to amend, offering several reasons for its ruling.

---

[5] The third cause of action for breach of contract against Apro was also before the court, but Apro is not a party to this appeal (Apro has appealed separately in case number B285752). We therefore dispense with further discussion of the procedural background with regard to Apro.

First, the trial court found ConocoPhillips was impermissibly seeking indemnity for its own negligent conduct, which was not contractually permitted. The trial court reasoned the only remaining viable theory of liability against ConocoPhillips in the Mireles matter was predicated on ostensible agency, which meant ConocoPhillips could be liable for damages only if it "'intentionally, or by want of ordinary care, cause[d] a third person to believe another to be his agent who is not really employed by him.'" The trial court found the Acquisition Agreement did not clearly state (nor did the Reseller Agreement clearly state) ConocoPhillips was to be indemnified for its own negligent conduct, and the trial court believed the absence of such clear, express language prevented ConocoPhillips from prevailing on a claim for contract-based indemnity.

Second, the trial court concluded ConocoPhillips waived its indemnity claim against Pacific. The trial court noted ConocoPhillips sought indemnity by cross-complaining against the cross-defendants in 2013. The court found it significant, however, that ConocoPhillips executed the Assignment Agreement in June 2015, which released the original operator (Convenience) and guarantors (the Hirbods and Pacific) from all liability under "(i) the [Reseller Agreement] and Consignment Addendum . . . ." The trial court concluded "[t]he remaining causes of action existed at the time of waiver and arose under the [Reseller Agreement], which governed the use of the 76 brand at the subject property" and concluded ConocoPhillips had therefore waived its claims against Pacific.[6]

---

[6] As we shall soon highlight, the trial court's reasoning was confined to the Reseller Agreement, not the Acquisition

Third, the trial court concluded ConocoPhillips's breach of contract claim was in any event precluded by the terms of the Acquisition Agreement, which provided no party "may make any claim for indemnification under this Article . . . if it may make a claim for indemnification or has any other remedy with respect to the pertinent subject matter under another Transaction Document (whether or not such claim results in a payment of indemnification to any . . . Indemnified Party . . .)." In the trial court's view, ConocoPhillips could not rely on the Acquisition Agreement's indemnity provision because ConocoPhillips had made a claim for indemnification under the Reseller Agreement (albeit an unsuccessful one, based on the trial court's FACC demurrer ruling) and the Reseller Agreement was a "Transaction Document" as defined in Assignment Agreement.

Fourth, the trial court found ConocoPhillips's estoppel allegations could not save its claim for indemnity because (1) promissory estoppel is inapplicable where there is consideration and (2) ConocoPhillips could not establish the elements for estoppel. As to the latter reason, the trial court found there were no facts Pacific knew that ConocoPhillips did not, and further found ConocoPhillips could not establish detrimental reliance stemming from its joint representation with other defendants because it had not sufficiently alleged any resulting prejudice.

The trial court also sustained cross-defendants' demurrer to the fifth cause of action for equitable indemnity. The court concluded equitable indemnity was not available as a matter of law because the indemnity rights ConocoPhillips sought to

---

Agreement that served as the foundation for the breach of contract claim as alleged in the operative cross-complaint.

enforce were expressly governed by contract. Noting ConocoPhillips could not seek equitable indemnity without pleading facts that would establish cross-defendants were concurrent tortfeasors responsible for Felipe's injuries, the trial court found the operative cross-complaint wanting because Pacific and Convenience had been dismissed with prejudice from the underlying action and the Hirbods were never named as defendants. The trial court further found ConocoPhillips alleged the injury to Felipe was attributable to propane equipment under the sole control and responsibility of third-party Suburban and that allegation precluded an equitable indemnity cause of action because "'[a] landlord will not be held liable for the defective condition of materials placed on his property, by others, which are not a part of the premises.'"

Having sustained the demurrer without leave to amend, the court entered an order dismissing the breach of contract cause of action against Pacific and the equitable indemnity cause of action against Pacific, Convenience, and the Hirbods.

II. DISCUSSION

ConocoPhillips maintains it was premature for the trial court to dismiss its cause of action for breach of the Acquisition Agreement against Pacific and its cause of action for equitable indemnity against all cross-defendants. We agree as to the breach of contract cause of action, but not as to the equitable indemnity cause of action.

As to the former, the Acquisition Agreement does not expressly state ConocoPhillips must be indemnified even for damages attributable to its own negligence, but the agreement's silence on this point means only that indemnification for active,

but not passive, negligence is precluded. We reject cross-defendants' assertion that ostensible agency can never be established via passive negligence and conclude instead that the manner in which the alleged ostensible agency arose is a question of fact that cannot be resolved at the demurrer stage. We also reject Pacific's related contentions that indemnity is necessarily precluded by other provisions of the Acquisition Agreement or by the Assignment Agreement. While facts regarding the alleged ostensible agency may ultimately preclude indemnity, that determination cannot be made on the record as it stands.

Although we reverse on the breach of contract claim, we hold the trial court properly sustained the demurrer to the equitable indemnity cause of action against Convenience, Pacific, and the Hirbods. The equitable indemnity claims against Convenience and Pacific fail because those entities' indemnity obligations, if any, must be determined solely by resort to the indemnity provisions in the relevant agreements. This rationale does not apply to the Hirbods because their agreement with ConocoPhillips (the guaranty agreement described *ante* at footnote one) includes no indemnity provision. But the equitable indemnity claim still fails because the operative cross-complaint pleads no facts to support the claim—only conclusory, boilerplate allegations that are properly disregarded when tested by a demurrer.

A. Appealability

ConocoPhillips appeals from the trial court's June 15, 2017, "Order of Dismissal of Causes of Action Alleged in . . . Second Amended Cross-Complaint as against Cross-Defendants, Pacific Convenience & Fuels, LLC, Convenience Retailers LLC, Sam

Hirbod and Shireen Hirbod Following Grant of Demurrer Without Leave to Amend." In the order of dismissal, the trial court "granted, without leave to amend" cross-defendants' demurrer as to the cause of action for breach of contract against Pacific and the equitable indemnity cause of action against Pacific, Convenience, and the Hirbods, ordering the causes of actions dismissed.

Cross-defendants note the order of dismissal is not a judgment and they assert no judgment of dismissal has been entered. Cross-defendants concede, however, that we should treat the order as appealable and rule on the merits of the appeal. As the issue goes to our jurisdiction, we provide a brief discussion.

The order in question dismisses the breach of contract and equitable indemnity causes of action. Those two causes of action were the only two still pending against these cross-defendants, and their dismissal effectively dismissed the case against each. Where "'the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment.' [Citation.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1.) We follow that course here.

B. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1

Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[ ].)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted (*Yvanova*).)

"'[T]he plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490-1491; accord, *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [validity of the trial court's *action*, not the *reason* for its action, is what is reviewable] (*E. L. White*).)

C. The Trial Court Erred by Sustaining the Demurrer to the Cause of Action for Breach of Contract Against Pacific

"An indemnity obligation . . . . may arise from 'express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances.' (*E. L. White*[*, supra*, 21 Cal.3d at p.] 506.) Courts interpret contractual indemnity provisions under the same rules governing other contracts, with a view to determining the actual intent of the parties. [Citations.]" (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864 (*Maryland Casualty*).) It is unclear at this stage of the case whether the Acquisition Agreement provides a proper basis for ConocoPhillips to claim

indemnity, and that lack of clarity means the demurrer should have been overruled as to the breach of contract cause of action.[7]

1. The ostensible agency theory does not preclude ConocoPhillips from seeking indemnity under the Acquisition Agreement

The Acquisition Agreement's indemnity provision states Pacific "shall indemnify, defend and hold harmless [ConocoPhillips], its Affiliates and the respective officers, directors, employees and agents of [ConocoPhillips] and its Affiliates (collectively, the "Seller Indemnified Parties") from and against all Losses incurred or suffered by a Seller Indemnified Party, but only to the extent attributable to: [¶] . . . [¶] . . . any Legal Proceeding (including any workers' compensation proceeding) arising from the ownership or operation of the LLC and its Subsidiaries and their businesses on or after the Applicable Closing Date . . . ." The provision is silent on whether there is indemnity coverage when liability is attributable to ConocoPhillips's own negligence.

---

[7] The trial court previously sustained with leave to amend cross-defendants' demurrer to ConocoPhillips's cause of action for breach of the Reseller Agreement in the FACC. ConocoPhillips did not stand on the FACC as pled and appeal that ruling. Rather, ConocoPhillips accepted the invitation to amend and changed its theory, no longer asserting a breach of the Reseller Agreement's indemnity provision but rather the Acquisition Agreement's indemnity provision (and general equitable estoppel). We therefore have no occasion in this appeal to pass on the correctness of the trial court's ruling regarding the Reseller Agreement.

If an indemnity provision does not address the issue of an indemnitee's negligence, it is referred to as a "general" indemnity provision. (*Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 624 (*Morgan*); *Markley v. Beagle* (1967) 66 Cal.2d 951, 962 (*Markley*).) "[T]he general rule [is] that a party will not be indemnified for its own active negligence under a general indemnity agreement," though it may be indemnified for its passive negligence. (*Morton Thiokol v. Metal Building Alteration Co.* (1987) 193 Cal.App.3d 1025, 1028 (*Morton Thiokol*); see also *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*); *Morgan*, *supra*, at p. 624; *Markley*, *supra*, at p. 962.)

"Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. [Citations.] Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform. [Citations.] 'The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law.' [Citation.]" (*Rossmoor*, *supra*, 13 Cal.3d at p. 629.) "Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact; active negligence may be determined as a matter of law, however, when the evidence is so clear and undisputed that reasonable persons could not disagree. [Citations.]" (*Ibid.*)

"[W]e do not employ the active-passive dichotomy as wholly dispositive . . . ." (*Rossmoor*, *supra*, 13 Cal.3d at p. 632.) Though the "general rule" is that "an actively negligent tortfeasor cannot recover under a general indemnity provision . . . that is silent on the issue of the indemnitee's negligence," this "general rule may not always apply and is merely a tool to be used to ascertain the intent of the parties." (*Maryland Casualty*, *supra*, 35 Cal.App.4th at p. 869.) Indeed, "'the question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.'" (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1537-1538.) For example, the Court of Appeal in *Morton Thiokol* held a party's active negligence did not preclude indemnity under a general indemnity agreement where an alternate finding would "deprive the indemnitee of the benefit of its bargain and read out of the contract essential provisions intended by the parties to govern their relationship . . . ." (*Morton Thiokol*, *supra*, 193 Cal.App.3d at pp. 1028-1030.)

We cannot conclude at this stage that the Acquisition Agreement's indemnity provision does not provide indemnity for ConocoPhillips. Though the indemnity provision does not specifically provide coverage for ConocoPhillips's own negligence, this means, at most, that ConocoPhillips is not entitled to indemnity for its active negligence. In other words, indemnity notwithstanding passive negligence is still possible.

Pacific contends ConocoPhillips is precluded from establishing a duty to indemnify (and, seemingly, to defend)[8] because the only liability theory still viable against ConocoPhillips following its summary judgment motion in the Mireles action was ostensible agency. The elements of ostensible agency do not support this interpretation. "Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent's authority, such belief must be generated by some act or neglect by the principal sought to be charged[,] and the person relying on the agent's apparent authority must not be negligent in holding that belief. [Citations.] Ostensible agency cannot be established by the representations or conduct of the purported agent; the statement or acts of the principal must be such as to cause the belief the agency exists. [Citations.]" (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403-404; see also *Associated*

---

[8] The parties' appellate briefing occasionally acknowledges ConocoPhillips sought both defense and indemnification but does not otherwise differentiate between the two. The duty to defend is distinct from the duty to indemnify and, depending on the contractual language, "a duty to defend may exist even if no duty to indemnify is ultimately found." (*Aluma Systems Concrete Construction of California v. Nibbi Bros. Inc.* (2016) 2 Cal.App.5th 620, 627.) Because Pacific's demurrer argues the entire indemnification provision does not apply here, because the parties make no distinction between the duty to defend and duty to indemnify, and because we ultimately conclude we must reverse on the arguments regarding the contractual duty to indemnify, we do not separately address the duty to defend.

Creditors' Agency v. Davis (1975) 13 Cal.3d 374, 399; *Goldman v. SunBridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1173 ["'Agency "can be . . . founded on ostensible authority, that is, some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons"'"].)

We see no reason to conclude the "act or neglect" required to create an ostensible agency necessarily constitutes "active negligence"; an ostensible agency might arise, for instance, from ConocoPhillips's failure to discover (before the Mireles accident) the propane tank placed at the La Puente 76 station or the manner in which the 76 brand was used or displayed in connection with propane dispensing. (See, e.g., *Rossmoor*, *supra*, 13 Cal.3d at p. 629 ["Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law"].) Neither the allegations in the cross-compliant nor the judicially noticed documents establish the ostensible agency, if any, is necessarily the result of active negligence by ConocoPhillips. The trial court therefore erred by sustaining the demurrer on this ground.

2. ConocoPhillips's indemnity claim is not necessarily precluded by other terms of the Acquisition Agreement

The Acquisition Agreement's indemnity clause also contains a proviso that is pertinent to our analysis: "[N]o Seller Indemnified Party may make any claim for indemnification under this Article XIV if it may make a claim for indemnification or has any other remedy with respect to the pertinent subject

matter under another Transaction Document (whether or not such claim results in a payment of indemnification to any Seller Indemnified Party)." The Reseller Agreement is included in the definition of a Transaction Document, and the parties disagree as to the meaning of this exclusion—particularly, the "may make any claim" language.

ConocoPhillips interprets the "may make any claim" language to mean an indemnity claim under the Acquisition Agreement is not barred unless a trier of fact determines ConocoPhillips can successfully make an indemnity claim under the Reseller Agreement. Pacific contends the provision precludes ConocoPhillips from asserting a right to indemnity under the Acquisition Agreement because ConocoPhillips previously alleged a claim for breach of the Reseller Agreement and it is immaterial whether that alleged claim was ultimately successful.

When parties settle an agreement in writing, their intent "is to be ascertained from the writing alone, if possible . . . ." (Civ. Code, § 1639.) However, the fact that the language of an agreement might at first blush appear clear "does not preclude the possibility that the parties chose the language of the instrument to express different terms." (*Pacific Gas and Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 Cal.2d 33, 39 (*Pacific Gas*).) "[T]he 'meaning of language is to be found in its applications. An indeterminacy in the application of language signals its vagueness or ambiguity. An ambiguity arises when language is reasonably susceptible of more than one application to material facts. . . . [Citations.]" (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.) When a contract is reasonably susceptible to two competing interpretations, any pertinent extrinsic evidence is admissible and should be

considered to determine its meaning. (*Pacific Gas*, *supra*, at p. 40; *City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 248 ["[I]f the instrument is reasonably susceptible to the interpretation urged, the court must receive any relevant extrinsic evidence the party puts forth to prove its interpretation"] (*City of Bell*); see also *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 ["Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning"].)

The "may make any claim" exclusion in the Acquisition Agreement is ambiguous because it is reasonably susceptible to both ConocoPhillips's and the cross-defendants' interpretation. On one hand, the exclusion is reasonably read to suggest—particularly when focusing on the word "make" and the parenthetical stating "whether or not such claim results in a payment of indemnification"—that resort to the Acquisition Agreement's indemnity provision is prohibited whenever a claim based on another Transaction Document satisfies the pleading standard for non-frivolousness (Code Civ. Proc., § 128.7). On the other hand, we cannot say a competing interpretation that focuses on the word "may," i.e., that "may make a claim" refers instead to a circumstance where indemnity can actually be had (assuming the indemnitor is solvent) is unreasonable either. Confronted with these two plausible interpretations on the face of the agreement, the trial court had an insufficient basis to resolve the issue as a matter of law. Rather, the parties would need an opportunity to submit any relevant extrinsic evidence for the court's consideration, which of course could not be done at the

demurrer stage of litigation. (*City of Bell*, *supra*, 220 Cal.App.4th at p. 248; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114-115 ["For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer"].) Granted, it may be that the trial court later reaches the same result upon consideration of any such evidence submitted, but ConocoPhillips must be given the chance to fully make its case for its proffered interpretation.[9]

3. ConocoPhillips did not give up its right to seek indemnity under the Acquisition Agreement by signing the Assignment Agreement

Pursuant to the terms of the Assignment Agreement, ConocoPhillips "expressly waive[d], release[d], and forever discharge[d]" Convenience, Pacific, and the Hirbods "from any and all liability, claims, demands, damages, actions and causes of action, that [ConocoPhillips] has or might have, known or

---

[9] For somewhat similar reasons, we reject cross-defendants' argument that ConocoPhillips cannot state a claim for breach of contract due to an assertedly unilateral settlement of the Mireles lawsuit. The fact of ConocoPhillips's settlement is not alleged in the operative cross-complaint and no facts concerning the claimed settlement are appropriate for consideration on appeal of a demurrer ruling.

unknown, now existing or that might arise hereafter, under (i) the [Reseller Agreement] and Consignment Addendum . . . ." Pacific contends this release waived ConocoPhillips's indemnity claims related to the Mireles complaint.

In essence, Pacific's argument appears to be that because the Reseller Agreement governed "[t]he rights of the parties with respect to the use of the 76[ ]brand at the property" on which the incident occurred, any claim for indemnity related to the use of the 76 brand must arise under the Reseller Agreement, even though the relevant breach of contract cause of action claims a breach of the Acquisition Agreement, not the Reseller Agreement. We agree the plain language of the Assignment Agreement released any claim against Pacific for breach of the Reseller Agreement. But the Reseller Agreement and the Acquisition Agreement are separate contracts, and ConocoPhillips did not release any claims under the Acquisition Agreement by executing the Assignment Agreement. To the contrary, the Assignment Agreement states the "release is expressly limited to its terms, and does not extend to any other liability, claims, demands, damages, actions, and causes of action." While claims under the Reseller Agreement were released by the Assignment Agreement, claims under the Acquisition Agreement were not.

In sum, the trial court erred in sustaining the demurrer to ConocoPhillips's breach of contract cause of action. Because we conclude the breach of contract cause of action was sufficiently pled, we need not reach the parties' substantive arguments regarding the estoppel allegations, which are part of the breach of contract cause of action. Even if we were to agree with the substance of Pacific's arguments, we could not separately sustain the trial court's ruling as to the estoppel allegations since they

only comprise part of a cause of action and cross-defendants did not move to strike them.

D. The Equitable Indemnity Cause of Action

Aside from contract, indemnity "may find its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case." (*E. L. White*, *supra*, 21 Cal.3d at p. 507; see also *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1736 (*Smoketree*).) "'[E]quitable indemnification is a matter of fairness.' [Citation.] The doctrine of comparative equitable indemnity is applied to multiple tortfeasors and is designed to apportion loss among tortfeasors in proportion to their relative culpability so there will be an equitable sharing of the loss among multiple tortfeasors. [Citations.]" (*Smoketree*, *supra*, at p. 1736.)

Where "the parties have expressly contracted with respect to the duty to indemnify, [however,] the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity." (*Rossmoor*, *supra*, 13 Cal.3d at p. 628; see also *C. L. Peck Contractors v. Superior Court* (1984) 159 Cal.App.3d 828, 834 ["[A]n express indemnity clause is accorded a certain preemptive effect, displacing any implied rights which might otherwise arise within the scope of its operation"].) ConocoPhillips expressly contracted with Pacific through the Acquisition Agreement, and with Convenience through the Reseller Agreement, regarding the duty to indemnify. The indemnity provisions in the respective agreements therefore bar resort to equitable principles to find

either Convenience or Pacific are obligated to indemnify ConocoPhillips.

ConocoPhillips resists this conclusion, relying on *E. L. White*, *supra*, 21 Cal.3d 497. In that case, our Supreme Court said: "[W]hen 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.' (Italics added.) [Citations.] When, however, the duty established by contract is by the terms and conditions of its creation inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play." (*Id.* at p. 508.) ConocoPhillips apparently believes—wrongly—that if its claims are not covered by the express indemnity provisions at issue, *E. L. White* permits it to seek equitable indemnity.

In *E. L. White*, the question was whether an express provision obligating E. L. White to indemnify the City of Huntington Beach for construction work precluded E. L. White from pursuing an equitable indemnity claim against the city once the city itself was determined to have been actively negligent and the cause of an accident (and thus, unable to recover under the express indemnity provision). (*E. L. White, supra*, 21 Cal.3d at pp. 502, 510.) Our Supreme Court held E. L. White could proceed on an equitable indemnity claim under these circumstances. (*Ibid.* ["[A]ny preemptive effect . . . which the [express indemnity] clause might have had in circumstances not involving active negligence on [the city's] part did not extend to the instant situation"]; see also *Maryland Casualty*, *supra*, 35 Cal.App.4th at p. 875.) Here, by contrast, there are express indemnity provisions in favor of ConocoPhillips and it is ConocoPhillips, not

Pacific nor Convenience, that is nevertheless attempting to proceed on an equitable indemnity theory despite the express contractual provisions. This is impermissible. The extent of Convenience and Pacific's indemnity obligations can arise solely from the relevant contracts. *E. L. White* requires no contrary result.

ConocoPhillips's argument that it should be permitted to allege a claim for equitable indemnity against Convenience because there are no contractual indemnity claims currently pending against Convenience is similarly unpersuasive. ConocoPhillips has asserted in this litigation that the indemnity provision in the Reseller Agreement covers the claims asserted in the Mireles action. It cannot avoid the legal consequence of that contract on the availability of an equitable indemnity remedy merely by dismissing its breach of contract claim against Convenience.

The claim of equitable indemnity asserted against the Hirbods is a different matter, however. ConocoPhillips and the Hirbods did not establish a contractual duty to indemnify as between them: As far as the cross-complaint reveals, ConocoPhillips's only contractual relationship with the Hirbods was through the guaranty agreement, which does not contain an indemnity provision. Though the Hirbods guaranteed "the full and prompt payment of all present and future indebtedness of" Convenience, they did not agree to be independently bound by the terms of the Reseller Agreement. Accordingly, we examine whether ConocoPhillips sufficiently alleged a cause of action for equitable indemnity against the Hirbods.

ConocoPhillips's allegations concerning the Hirbods in the operative cross-complaint, few as they are, are conclusory. The

operative cross-complaint identifies the Hirbods as individuals living in the State of California. It contains boilerplate allegations contending the Hirbods and the other cross-defendants were the "the alter ego, successor, assignee, agent, servant, employee and/or representative of each of the other cross-defendants . . . ." And it alleges all cross-defendants (which would include the Hirbods) "were negligent and had control over the operations of" Field Energy and Suburban at the La Puente station and "maintained the right to prevent the presence of the dangerous condition . . . and knew or should have known of the dangerous condition . . . ."

"The elements of a cause of action for indemnity are (1) a showing of *fault* on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible." (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135, 1139.) The operative cross-complaint alleges no *facts* that suggest how the Hirbods would have had control over Field Energy or Suburban, nor are any facts alleged in the pleading that would suggest the Hirbods had any involvement with the La Puente 76 station. Rather, the operative complaint's allegations pertaining to the Hirbods are mere conclusions of fact and law that are properly disregarded when determining whether a demurrer should be sustained. (*Yvanova*, *supra*, 62 Cal.4th at p. 924 ["For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law"]; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5 [boilerplate allegations that the defendants knew or were on notice of a perpetrator's past unlawful sexual conduct would not

suffice to state cause of action]; *Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 59 [conclusory allegations of at will employee status disregarded because a demurrer admits pleaded facts, not contentions, deductions, or conclusions of fact or law]; *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1073.) So disregarded, there is no basis for an equitable indemnity claim against the Hirbods.

DISPOSITION

The order of dismissal as to Convenience and the Hirbods is affirmed. The order of dismissal as to Pacific is reversed, and the case is remanded for further proceedings consistent with this opinion. All parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

JASKOL, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.