Attorneys for Defendant
JOHNSON DRYWALL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF REDWOOD

JOSEPH LEE and HELEN LEE, Plaintiffs, vs. CONNOR CONSTRUCTION, INC., et al., Defendants. _____/	Case No. 999999 DEMURRER TO COMPLAINT Date: Time: Dept. Complaint filed: Trial date:

INTRODUCTION

The complaint here at issue arises out of construction of a custom home for plaintiffs by a general contractor (Connor Construction, Inc.) and numerous subcontractors, including defendant Beta Drywall. Plaintiffs originally brought arbitration proceedings against Connor and recovered a net arbitration award (including attorney's fees and interest) of $1,584,000 based on construction defects. Beta has requested that the court from its own files take judicial notice of the award, and of the fact that it has been fully satisfied.

On April 30, 2001, while the arbitration was pending, plaintiffs filed an action in this court against Connor Construction, Inc. (Santa Lucia County Superior Court No. 01234). The second amended complaint in that action alleges fraud, negligent

misrepresentation, negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, RICO violations, breach of contract, and breach of warranty. Connor Construction filed a cross-complaint against numerous subcontractors, including Beta. Beta has answered the cross-complaint.

Plaintiffs filed the instant action (No. 43210) on July 18, 2002. The complaint names as defendants the various subcontractors who worked on the construction project, including Beta. It attempts to allege claims for fraud, negligent misrepresentation, negligence, breach of contract, and breach of warranty. Although it does not explicitly so state, each claim appears to be against all defendants. The instant action and Case No. 01234 were consolidated by Pre-Trial Order No. 4 (in that case), but Beta has only now been served with the instant complaint.

The complaint is insufficient in numerous respects. The first and second claims for fraud and negligent misrepresentation are based on conduct by three named defendant subcontractors, none of which has any connection to Beta. The only allegations that might possibly connect Beta to the alleged fraud are a one-sentence boilerplate agency allegation too conclusory to support a cause of action against Beta under the circumstances, and an allegation that the Construction Contract between plaintiffs and Connor somehow imposed duties on Beta.

The third claim for negligence fails to state a cause of action against Beta because it is based on breach of duties allegedly imposed on Beta by the Construction Contract between plaintiffs and Connor, to which Beta is not a party, and because it fails to allege any negligent act by Beta, or that such act proximately caused damage to plaintiffs. The third claim is also barred by res judicata because it asserts the same claim for construction defects that plaintiffs asserted (and on which they recovered) in the arbitration against Connor.

The fourth and fifth claims for breach of contract and breach of warranty are uncertain in that it cannot be determined whether plaintiffs are alleging breach of the

Construction Contract between plaintiffs and Connor, or breach of the subcontract between Connor and Beta. To the extent plaintiffs allege breach of the Construction Contract, no cause of action is stated because Beta is not a party to that contract. If plaintiffs' intention was to allege breach of the subcontract, they have failed to make any clear allegation to that effect. Moreover, it cannot be determined whether the subcontract sued upon is written, oral, or implied from conduct.

ARGUMENT

1. The first and second claims fail to connect Beta with the alleged fraud and/or negligent misrepresentation, and therefore fail to state claims against Beta.

Plaintiffs' fraud and negligent misrepresentation claims are based on three specifically alleged acts. The first is that "[d]efendants Jones Construction and Does One through Ten" represented to plaintiffs that "defendants" had subcontracted with Jones in the amount of $154,151; that "defendants" invoiced plaintiffs in that amount; and that "defendants" paid Jones only $149,151. The second is that "[d]efendant Lee Wood Windows and Does Eleven through Twenty" represented to plaintiffs that "defendants" would install Kolbe & Kolbe windows and doors; that "defendants" invoiced plaintiffs based on bids for Kolbe & Kolbe windows and doors; and that "defendants" installed inferior "knock offs." Lastly, plaintiffs allege that "[d]efendants John Brown, individually and dba Brown Painting Co., Does Twenty-One through Thirty, and each of them," wrongfully concealed certain facts from plaintiffs regarding an insurance claim; and that "[e]ach named defendant" concealed the facts with the intent to defraud plaintiffs.

The complaint nowhere alleges that Beta participated in or had any knowledge of these alleged fraudulent acts. Nevertheless, plaintiffs' repeated allegation that "defendants" committed the acts indicates an intention to charge all named defendants,

including Beta. Only two allegations could possibly connect Beta with the alleged fraud, but neither is sufficient to state a cause of action.

The first is a generic agency allegation: "At all material times described below, defendants each acted as the agents, employees and joint venturers of one another in the acts and omissions described below." A general allegation of agency is one of ultimate fact and is usually sufficient against a demurrer. *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 230. But under certain circumstances such boilerplate pleading may be deemed too conclusory to charge a particular defendant.

In *Moore v. Regents of the University of California* (1990) 51 Cal.3d 120, a leukemia patient treated at the U.C.L.A. Medical Center sued after learning that a patented cell line, developed from his cells without his knowledge or consent, was being commercially exploited. The plaintiff's complaint alleged claims for conversion, breach of fiduciary duty, lack of informed consent, and numerous other wrongs against Golde (the physician who treated him at the Center), the Regents (who owned and operated the Center), Quan (a researcher employed by the Regents), and Genetics Institute, Inc. and Sandoz Pharmaceutical Corporation, two companies that, after the cell line was developed and patented, contracted with Golde and the Regents for its commercial use. The complaint included a boilerplate agency allegation that each defendant was the other's agent, etc.

When the defendants demurred to the complaint, the trial court considered only the first cause of action for conversion, which it concluded did not state a cause of action. Reasoning that all the other causes of action incorporated the earlier defective allegations, the trial court sustained general demurrers to the entire complaint with leave to amend. In a later proceeding, the trial court sustained Genetics Institute's and Sandoz's demurrers without leave to amend on the ground that the plaintiff had failed to state a cause of action for conversion "and that the complaint's allegations about the entities' secondary liability were too conclusory." *Id.*, at 128. The court of appeal reversed, holding that the

complaint did state a cause of action for conversion, and directed the trial court to decide the other causes of action it had never expressly ruled upon. As to the secondary liability (i.e., agency) allegations, the court of appeal "agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient," but it directed the trial court to grant plaintiff leave to amend them. *Ibid.*

The supreme court reversed the court of appeal's decision. It concluded that the complaint did not state a cause of action for conversion and directed that defendants' demurrers to that cause of action be sustained without leave to amend. *Id.*, at 148. But it held that the complaint did state causes of action against Golde for breach of fiduciary duty and lack of informed consent, and directed that Golde's demurrers to those causes of action be overruled. *Ibid.* It further directed that the Regents', Quan's, Genetics Institutes', and Sandoz's demurrers to those causes of action be sustained with leave to amend. *Ibid.* As to Sandoz and Genetics Institute, who could only be liable on those causes of action if Golde were acting as their agent, the supreme court agreed with the court of appeal that the agency allegations, which it excoriated as "egregious examples of generic boilerplate," were too conclusory. *Id.*, at 134, fn. 12, and accompanying text. It therefore affirmed that portion of the court of appeal's decision. *Ibid.*

In *Moore*, all three courts apparently concluded that Genetics Institute and Sandoz had so little connection with the alleged wrongful acts that fairness precluded holding them as defendants based solely on conclusory agency allegations. In the instant action, the relation between plaintiffs' fraud allegations and Beta is similar.

By their conclusory agency allegation, plaintiffs apparently are attempting to assert that the subcontractors named as having committed the fraudulent acts, while working on aspects of the construction project having no connection with Beta, were nevertheless acting as Beta's agents. Such a relationship between subcontractors would be extremely unusual. See, e.g., *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1144 ("The subcontractor customarily performs one task which is

integrated into a whole. It does not control the trades which precede or follow it on the job.").[1] If plaintiffs have some basis for believing that such an agency relationship actually existed, they should be required to plead it. Otherwise, Beta should not be required to answer for the fraud of parties with whom it has no relationship whatever.

The only other allegation that might possibly tie Beta to the alleged fraud relates to the terms of the "Construction Contract." Paragraph 24 of the complaint alleges that the general contractor, Connor, entered into a written contract with plaintiffs, which it dubs the "Construction Contract." Paragraph 25 alleges that the

> Construction Contract established affirmative duties on the part of any subcontractor hired by Connor Construction, Inc., to be bound to the Construction Contract and assume all obligations and responsibilities with Connor Construction by the written contract assumed toward the plaintiffs as set forth by Article 5 of the Construction Contract, including but not limited to duties to coordinate and supervise all construction . . . ."
>
> Complaint, ¶25, at 7:21-8:2.[2]

This allegation cannot form the basis of any claim of liability against Beta. The complaint alleges that plaintiffs and Connor entered into the Construction Contract, and

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[1]The converse—i.e., that Beta was the named-subcontractors' agent—would be equally unusual, but would still be insufficient absent additional allegations. An agent is not liable for the principal's fraud unless the agent knew of or participated in the fraud. *Mars v. Wedbush Morgan Securities, Inc.* (1991) 231 Cal.App.3d 1608, 1616; 2 Witkin, SUMMARY OF CAL. LAW (9th ed. 1987) Agency and Employment, §145, at 141. Thus, even if the conclusory agency allegation were accepted as a sufficient allegation that Beta was the named subcontractors' agent, the complaint still would not state a fraud cause of action against it absent additional allegations that Beta knew of or participated in the fraud.

[2]In fact, plaintiffs are referring to Article 5 of the General Conditions incorporated into the Construction Contract, and their characterization of its provisions is inaccurate. If plaintiffs had attached a copy of the Construction Contract to the complaint and incorporated it by reference, or if there were a complete copy of the Construction Contract (including Article 5 of the General Conditions) in the court's records that could be judicially noticed, Beta could move to strike the allegations that contradict the writing. *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1426 fn. 8.

that Beta entered into a subcontract with Connor. Since Beta is not a party to the Construction Contract, that contract cannot "establish affirmative duties" on Beta's part. *Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519; Acret, ATTORNEY'S GUIDE TO CALIFORNIA CONSTRUCTION AND DISPUTES (CEB 2nd ed. 1990) §3.73, at 201. Thus, even if the Construction Contract purported to make Beta responsible for some other subcontractor's conduct, it simply could not do so.

In short, the first and second claims seek to hold Beta vicariously liable for other subcontractors' alleged fraud. Under the circumstances of this case, plaintiff's conclusory agency allegation is insufficient, and no such liability may be founded on any provision of the Construction Contract because Beta is not a party to it. The first and second claims therefore fail to state a cause of action against Beta, and Beta's demurrers thereto must be sustained.

2. The third claim for negligence fails to state facts sufficient to constitute a cause of action, and is barred by the doctrine of res judicata.

Beta's demurrer to the third claim for negligence must be sustained on two separate grounds: (1) plaintiffs have failed to allege the necessary elements of a cause of action for negligence, and (2) plaintiffs' negligence claim is barred by the doctrine of res judicata. See, e.g., *Castro v. Higaki* (1994) 31 Cal.App.4th 350 (defense of res judicata may be asserted by demurrer).

A. Failure to allege the elements of negligence

To set forth a claim for negligence adequately, a complaint must allege: "(1) defendant's legal duty of care toward plaintiff, (2) defendant's breach of duty (the negligent act or omission), (3) injury to plaintiff as a result of the breach (proximate or legal cause), and (4) damage to plaintiff." *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013. Plaintiffs' Third Cause of Action fails to satisfy these requirements.

First, it alleges that "defendants" owed plaintiffs a duty of care under the Construction Contract. Negligent performance of a contract may constitute a tort, i.e., that the duty breached, for negligence purposes, may arise out of a contract. *Eads v. Marks* (1952) 39 Cal.2d 807, 810-811. But Beta is not a party to the Construction Contract. Thus, that contract cannot be the source of any duty forming the basis of a negligence claim against Beta.

Second, the third claim alleges that defendants "failed, refused, and neglected to perform the obligations under the Construction Contract, as more fully described above." The only failures to perform "described above" are set forth in paragraph 25 of the complaint.[3] It alleges numerous construction defects (cracked tile and marble, defective welding, defective plumbing, etc.), but nowhere is there any allegation of a defect related to the drywall Beta installed. Absent some allegation that Beta committed a negligent act, i.e., breached a duty, the complaint does not state a cause of action against Beta for negligence. See, *La Jolla Village*, *supra*, 212 Cal.App.3d at 1145 (in refusing to extend strict liability to subcontractors, the court noted that subcontractors may still be held liable on conventional contract and negligence theories "[i]f the alleged construction defect results from the fault of a subcontractor.").

Finally, since the Third Cause of Action does not allege any negligent act on Beta's part, it necessarily fails to allege that Beta's negligence proximately caused injury to plaintiffs.

B. Res judicata

In the arbitration between plaintiffs and Connor, the arbitrator awarded plaintiffs the cost to repair construction defects "as estimated by Adamson Associates, including an

[3]Plaintiffs may argue that the charging allegation also refers to the wrongs alleged in the first and second claims for fraud and negligent misrepresentation, but the complaint alleges no facts that would make Beta responsible for those wrongs.

amount for contingency, material escalation and the rework contractors' overhead and profit." Connor paid the arbitration award within days after its entry.

Adamson Associates' cost estimate shows that plaintiffs were compensated for most, if not all, of the defects alleged in the present complaint. For example, the estimate includes replacement of the "knock off" windows and doors with Kolbe & Kolbe products as called for in the original plans and specifications. As to the drywall Beta installed, virtually every page of the cost estimate includes demolition and/or replacement of "gypsum wallboard."

The doctrine of res judicata has two aspects. Where a plaintiff has obtained a judgment, a second action on the same claim is precluded because the cause of action is merged in the judgment. 7 Witkin, CAL. PROCEDURE (3rd ed. 1985) "Judgment," §189, at 622-623. This is known as "claim preclusion," and bars reconsideration "not only of all matters actually raised in the first suit but also matters which could have been raised." *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1175.

The doctrine's second aspect is referred to as "collateral estoppel." It provides that in a new action on a different cause of action, the prior judgment is conclusive on matters actually litigated in the former action. 7 Witkin, *supra*. Beta submits that plaintiffs' third claim asserts the same cause of action as the arbitration against Connor, and that it is barred as res judicata. But even if it were determined that the third claim somehow presents a different claim, the doctrine of collateral estoppel would bar any claim it purports to state against Beta for defective drywall work.

The doctrine of res judicata applies to arbitration proceedings as well as judicial proceedings. *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015. Specifically, a prior arbitration between homeowners and a general contractor regarding construction defects precludes the homeowners' later court action against a subcontractor. *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749.

In *Thibodeau*, a general contractor and various subcontractors constructed a house.

The homeowners complained of numerous construction deficiencies and initiated arbitration proceedings against the general contractor. The arbitrator's award included $2,261 to the homeowners for the concrete driveway's repair. Six to eight months after the arbitration, the homeowners hired a concrete expert who concluded that the repairs to the driveway would cost far more. The homeowners then brought suit against Crum, the concrete subcontractor, to recover for the additional repairs. The trial court rejected Crum's res judicata defense, but the appellate court reversed. It concluded that the prior arbitration precluded the homeowners' claim (i.e., did not just have collateral estoppel effect) because the arbitration encompassed all claims for construction deficiencies arising out of the project. With specific reference to the driveway, the court stated: "[T]he two proceedings here involve the same homeowner, the same home, and the same driveway. The Thibodeaus were obliged to assert their various claims of damage to the driveway in one proceeding." *Id.*, at 757.

The same reasoning applies in the present case. All claims for construction defects were encompassed in the arbitration between plaintiffs and Connor, and the award included sums for demolition and replacement of drywall. The instant negligence claim against Beta is therefore barred as res judicata.

Plaintiffs may argue that Beta's demurrer to the third claim should be denied for the same reasons that the court denied Connor's motion for summary judgment and summary adjudication in Case No. 01234, in which Connor argued that the prior arbitration barred that action under the doctrine of res judicata. But review of plaintiffs' second amended complaint against Connor in that action, and the court's order denying Connor's motion, shows that the earlier ruling is not dispositive of Beta's res judicata defense.

The second amended complaint in Case No. 01234 alleges claims against Connor for fraud (including billing irregularities as well as construction defects), negligent misrepresentation, negligence, negligent and intentional infliction of emotional distress,

RICO violations, breach of contract, and breach of warranty. In its ruling on Connor's motion, the court first noted that whether the second amended complaint asserts the same cause of action as that involved in the arbitration proceeding depends on whether it is based on the same "primary right," i.e., whether it seeks to recover for the same harm. The court then concluded that "fraud, emotional distress and the RICO violations are different primary rights and different issues with different harm" than the claim for repair costs asserted in the arbitration. *Id.*, at 3:10-12. It therefore held that res judicata did not bar the action against Connor, and denied Connor's motion for summary judgment and summary adjudication.[4] But the court also denied plaintiffs' cross-motion for summary adjudication as to Connor's Eighth Affirmative Defense (res judicata and collateral estoppel) because the arbitration ruling "may operate as an estoppel or conclusive adjudication as to such issues in this proceeding as were actually litigated and determined in the first action."

As the court noted in ruling on Connor's motion in Case No. 01234, whether a claim is the same as or different from a claim previously adjudicated depends on whether it is based on the same primary right. "California has consistently applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860, quoting from *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795. The primary right involved is determined by the injury suffered. "[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant . . . . Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." *Ibid*. And seeking different remedies, like asserting different legal theories of liability, does not convert one cause of

[4]Although Connor's motion sought summary adjudication as to each cause of action, the court's ruling does not address those that are not based on fraud, emotional distress and RICO, or explain why summary adjudication was denied as to those causes of action.

action into many. "It is the right sought to be established, not the remedy or relief, which determines the nature and substance of the cause of action." *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1194 (bidder who claimed to have been wrongfully denied city contract sought writ of mandate, declaratory relief and injunctive relief—held: one cause of action stated).

The instant complaint's third claim for negligence against Beta asserts the same claim, based on the same primary right, that plaintiffs asserted in the arbitration proceeding. It does not allege different harm such as the court found with respect to the fraud, emotional distress and RICO claims asserted against Connor in Case No. 01234. Rather, if it states any claim at all against Beta it is one for damages based on defective drywall work. As in *Thibodeau, supra*, the arbitration award precludes a second proceeding based on that same cause of action.

3. The fourth claim for breach of contract fails to state facts sufficient to constitute a cause of action, is uncertain as to what contract plaintiffs are suing on, and is uncertain in that it cannot be determined whether the contract sued on is written, oral, or implied by conduct.

The complaint's fourth claim alleges breach of contract as follows: "At all times herein mentioned, plaintiffs were a party to the Construction Contract as well as intended beneficiaries to each subcontract for the construction of the house. By all the failures and breaches alleged above, defendants, and each of them, have breached the Construction Contract."

On its face, the fourth claim alleges only that defendants "breached the Construction Contract." But Beta is not a party to the Construction Contract. Therefore Beta cannot be liable for its breach. *Gold v. Gibbons, supra*; Acret, ATTORNEY'S GUIDE TO CALIFORNIA CONSTRUCTION CONTRACTS AND DISPUTES, *supra*. The fourth claim thus fails to state a cause of action against Beta.

Paragraph 46 also alleges that plaintiffs are intended beneficiaries of each subcontract, but it does not allege that any subcontract was breached. It is unclear why an allegation that plaintiffs are the subcontracts' third party beneficiaries would be included absent an allegation that the subcontracts were breached. To the extent that the subcontract allegation can be taken as an attempt to allege breach thereof, it renders the fourth claim uncertain as to what contract plaintiffs are suing on. Code Civ. Proc. §430.10(f).

Finally, even if the fourth claim alleged that Beta breached its subcontract with Connor, the claim would still be subject to demurrer. First, the complaint contains no allegation from which it can be determined whether the subcontract is written, oral, or implied by conduct. That in itself is grounds for demurrer under Code of Civil Procedure §430.10(g). Second, the complaint merely alleges that Beta entered into a subcontract with Connor but does not allege any of its terms, much less which of those terms was breached. An oral contract must be pleaded according to its legal effect (i.e., by alleging the substance of its relevant terms), and a written contract may be pleaded either according to its legal effect or verbatim (in the body of the complaint or as a copy attached and incorporated by reference). 4 Witkin, CAL. PROCEDURE (3rd ed. 1985) Pleading, §§467-471, at 507-509. Plaintiffs have not pleaded Beta's subcontract with Connor according to its legal effect or verbatim.

4. The fifth claim for breach of warranty fails to state facts sufficient to constitute a claim and is uncertain.

The fifth claim alleges breach of warranty as follows:

> Defendants and each of them, owed a duty, and made both express and implied warranties and had warranties of fitness for use and good workmanship implied by operation of law into the Construction Contract and each subcontractor which by all the failures and breaches alleged above,

> defendants, and each of them, have breached the Construction Contract, as well as all subcontractors.

The only contract alleged to have been breached is the Construction Contract. Johnson is not a party to the Construction Contract and cannot be liable for its breach. Apart from the allegation that the Construction Contract was breached, paragraph 49 is uncertain because it is completely unintelligible. Code Civ. Proc. §430.10(f) ("uncertain" includes ambiguous and unintelligible). Thus, Johnson's general and special demurrers to the fifth claim must be sustained.

CONCLUSION

Because plaintiff's claims are fatally defective, Johnson Drywall's demurrers to the complaint should be sustained.

Dated:

Respectfully submitted,

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