1. FOOTE v. SOUTH LAKE TAHOE POLICE DEPT., 23CV0913

Demurrer

Pending before the court is defendant City of South Lake Tahoe's (erroneously pled as South Lake Tahoe Police Department) unopposed general and special demurrer to plaintiff's Complaint.

1. Background

On June 8, 2023, plaintiff filed his Complaint against defendant stating causes of action for (1) use of excessive force; (2) harassment; (3) falsifying a police report; (4) wrongful arrest; and (5) false imprisonment. Attached to the Complaint is a handwritten "Memorandum of Causes of Action" wherein plaintiff alleges that the South Lake Tahoe Police Department ("SLTPD") arrested him numerous times on "false pretenses."

Plaintiff's memorandum details three police contacts that occurred on October 5, 2022, December 15, 2022, and March 1, 2023, respectively.

On October 5, 2022, plaintiff was allegedly using a bike path when SLTPD Officer Rider[1] "pull[ed] up on" plaintiff, attacked plaintiff, put him in a "neck submission choke hold," and slammed plaintiff to the ground.

On December 15, 2022, Officer Rider allegedly displayed "[p]retty much the same type of behavior."

On March 1, 2023, at approximately 5:45 p.m., plaintiff was allegedly waiting at a bus stop when SLTPD Officer Toderean drove by, saw plaintiff, turned around, and immediately placed plaintiff under arrest without probable cause and without any explanation as to why the arrest was being made. During the arrest, SLTPD Officer Dylan allegedly used excessive force.

[1] Plaintiff refers to the officers in his Complaint by last name only.

Plaintiff's memorandum states "[t]here are many other instances" where SLTPD officers handled him "aggressively," harassed him, and placed him under arrest without a warrant.

2. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

3. Discussion

Defendant argues that its demurrer should be sustained because (1) the Complaint fails to allege compliance with the government claim filing requirement and plaintiff failed to submit a government claim to defendant prior to filing this lawsuit; (2) the Complaint fails to set forth a statutory basis of liability against defendant; (3) the Complaint includes a defect or misjoinder of parties; and (4) the Complaint is uncertain and ambiguous.

3.1. <u>Government Claim Presentation Requirement</u>

The Government Claims Act requires a plaintiff seeking damages against a public entity to present a government claim before filing a lawsuit. (Gov. Code, § 945.4.) A claim based on an "injury to person" must be presented no later than six months after accrual of the cause of action. (*Id.*, § 911.2, subd. (a).) "[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of Cal. v. Superior Court* (2004) 32 Cal.4th 1234, 1239 [discussing Gov. Code

sections 911.2 and 945.4].) Similarly, failure to allege facts demonstrating or excusing compliance with the requirement subjects a complaint to general demurrer for failure to state a cause of action. (*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 878.)

Defendant contends that plaintiff failed to allege in his Complaint that he complied with the claim-presentation requirement. (See Bardzell Decl., Ex. A.) Having reviewed the Complaint, the court agrees. Therefore, the court sustains the demurrer on these grounds.

Based on the dates on which plaintiff claims he was arrested by defendant (October 5, 2022; December 15, 2022; and March 1, 2023), the deadline to present a government claim expired on April 5, 2023; June 15, 2023; and September 1, 2023, respectively. Defendant alleges that plaintiff did not, in fact, present a timely government claim. (Dem. at 7:9–10.) Additionally, defendant submitted a declaration stating that plaintiff admitted during the parties' November 13, 2023, meet and confer that he did not file a government claim. (Bardzell Decl., ¶ 3.) Therefore, the court denies leave to amend.

3.2. Statutory Basis for Liability

"A public entity is not liable for an injury" "[e]xcept as otherwise provided by statute." (Gov. Code, § 815.) "In other words, direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.)

Defendant argues that plaintiff's Complaint identifies no statutory authority for any of the causes of action. (Dem. at 9:1.) The court agrees. Therefore, the demurrer is also sustained on these grounds.

3.3. Misjoinder of Parties

Defendant claims there is a misjoinder of parties because the named defendant, "South Lake Tahoe Police Department," is not a separate legal entity capable of being sued. (Dem. at 9:15–17.) However, this ground for objection does not appear on the face of the Complaint. Therefore, the court overrules the demurrer on this ground.

3.4. Uncertainty

Lastly, defendant specially demurs on the grounds that the Complaint is ambiguous and uncertain. (Dem. at 10:10–11.) A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 [citing text]; *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

Defendant argues that "[t]he Complaint fails to specifically identify the factual circumstances underlying Plaintiff's general allegations of misconduct by the City or its employees." (Dem. at 10:24–25.) The Complaint alleges that on October 5, 2022, plaintiff was allegedly using a bike path when SLTPD Officer Rider "pull[ed] up on" plaintiff, attacked plaintiff, put him in a "neck submission choke hold," and slammed plaintiff to the ground.

The Complaint also alleges that on March 1, 2023, plaintiff was allegedly waiting at a bus stop when SLTPD Officer Toderean drove by, saw plaintiff, turned around, and immediately placed plaintiff under arrest without probable cause and without any explanation as to why the arrest was being made. During the arrest, SLTPD Officer Dylan allegedly used excessive force. These allegations sufficiently place defendant on notice of the claims directed against it. Therefore, the demurrer is overruled on this basis of uncertainty.

TENTATIVE RULING # 1: THE DEMURRER IS SUSTAINED, IN PART, WITHOUT LEAVE TO AMEND AND OVERRULED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042

BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

2. NAME CHANGE OF FICETO, 23CV1930

OSC Re: Name Change

TENTATIVE RULING # 2: PETITION IS GRANTED AS REQUESTED.

3. NAT. COLLEGIATE STUDENT LOAN TRUST 2006-2 v. BASTA, SCL20130123

Motion to Set Aside Dismissal and Enter Judgment Against Defendant

Plaintiff moves the court pursuant to Code of Civil Procedure section 664.6 to vacate the entry of dismissal and enter judgment pursuant to the parties' Conditional Stipulated Settlement Agreement.

1. Background

This action arises out of a $16,396.60 debt that defendants owe to plaintiff. On August 13, 2023, plaintiff filed its Complaint for Account Stated. On December 17, 2013, the parties entered the Conditional Stipulated Settlement Agreement (the "Agreement"). On September 30, 2015, the court dismissed the case without prejudice, retaining jurisdiction pursuant to Code of Civil Procedure section 664.6.

Thereafter, defendants made payments towards the balance due totaling $1,697.54. However, the last payment defendants made was on April 26, 2023.

2. Discussion

Code of Civil Procedure section 664.6, subdivision (a) provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If the parties to the settlement agreement or their counsel stipulate in writing or orally before the court, the court may dismiss the case as to the settling parties without prejudice and retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (*Ibid.*)

"A motion to enforce a settlement agreement under Code of Civil Procedure section 664.6 provides a summary procedure 'for specifically enforcing a settlement contract without the need for a new lawsuit.' [Citation.] 'Factual determinations made by a trial court on a section 664.6 motion to enforce a settlement must be affirmed if the

trial court's factual findings are supported by substantial evidence.' " (*Red & White Distribution, LLC v. Osteroid Enterprises, LLC* (2019) 38 Cal.App.5th 582, 586.)

Here, the settlement agreement provides, "In the event DEFENDANTS fail to make any payment by its respective due date, and upon Declaration of PLAINTIFF or PLAINTIFF's attorney regarding said default, the Court shall set aside the dismissal without prejudice, resume jurisdiction over the matter, and enter a Judgment in favor of [plaintiff] and against DEFENDANT(S) in the following amounts: (1) Principal in the amount of $16,396.60, plus interest thereon at the rate of 3.55 % per annum from September 01, 2011; (2) costs in the amount of $495.00, plus attorney's fees in the amount of $1,000.00; (3) if applicable, DEFENDANT(S)' first appearance fee of $740.00; and (4) if applicable, DEFENDANT(S) shall receive a credit for any payments made under this Stipulation prior to default." (Boone Decl., Ex. 1 at ¶ 6.)

The court finds that defendants have defaulted on their payments required under the terms of the Agreement. Therefore, the court grants plaintiff's motion to set aside the dismissal without prejudice, resume jurisdiction over the matter, and enter Judgment in favor of plaintiff and against defendants in the amount of $15,254.06.

TENTATIVE RULING # 3: MOTION IS GRANTED. THE COURT WILL VACATE THE ENTRY OF DISMISSAL AND ENTER JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN THE AMOUNT OF $15,254.06. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY TRHOUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

4. GIBBONS v. CHADWELL, ET AL., 23CV1354

Motion for Reconsideration of Change of Venue Order

On November 8, 2023, the court granted defendants' motion for change of venue. Pending before the court is plaintiff's motion for reconsideration of that order under Code of Civil Procedure section 1008.

A motion for reconsideration under Code of Civil Procedure section 1008 must be "based on new or different facts, circumstances, or law," and the "party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) The motion is timely if it is brought within 10 days after service of the notice of entry of the order upon the party.[2]

Here, plaintiff's motion is not based on new or different facts, circumstances, or law. According to plaintiff, "the new facts are that the Court confused the plaintiff with defendant in reaching its decision." (Reply at 1:26–27.) This is not a new fact and would not change the court's ultimate ruling to transfer the matter. Therefore, the motion for reconsideration is denied.

TENTATIVE RULING # 4: MOTION FOR RECONSIDERATION IS DENIED. THE COURT WILL NOT HEAR ORAL ARGUMENT. (CAL. RULES OF CT., RULE 3.1306, SUBD. (a); *MARRIAGE OF NADKARNI* (2009) 173 CAL.APP.4TH 1483, 1498.)

[2] The court served notice of the ruling on the parties on November 9, 2023. However, it appears that the court may have used an incorrect address for plaintiff. Plaintiff alleges that he was served notice of the ruling on November 22, 2023, by defense counsel. Therefore, the court deems the current motion (filed Nov. 30, 2023) to be timely.

5. KUSHNER v. RIGHTPATH SERVICING, LLC, ET AL., 23CV1329

Motion for Preliminary Injunction

On January 3, 2024, the court granted defendants' request to continue the preliminary injunction hearing previously set for January 12, 2024. Appearances are required on January 12, 2024, to schedule a new hearing date and briefing schedule.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JANUARY 12, 2024, IN DEPARTMENT FOUR.

6. WASHBURN v. PINNACLE REAL ESTATE GROUP OF LAKE TAHOE, 22CV0930

Motion to Deem Facts Admitted

Pending before the court is plaintiffs' motion to deem matters admitted.

A party served with requests for admission must serve a response within 30 days. (Code Civ. Proc., § 2033.250.) Failure to serve a response entitles the requesting party, on motion, to obtain an order that the genuineness of all documents and the truth of all matters specified in the requests for admission be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).) When such a motion is made, the court must grant the motion and deem the requests admitted unless it finds that prior to the hearing, the party to whom the requests for admission were directed has served a proposed response that is in substantial compliance with the provisions governing responses. (Code Civ. Proc., § 2033.280, subd. (c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 776, 778; see also *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 395–396 ["two strikes and you're out"].)

In this case, plaintiffs' counsel declares that Request for Admission (Set One) was electronically served on defendant on August 19, 2023. Plaintiffs' counsel also declares that plaintiffs granted a number of extensions to defendant. To date, defendant has not served any verified responses.

The motion is granted. The court reviewed plaintiffs' counsel's declaration and finds that $1,160.00 is a reasonable sanction under the Discovery Act.

TENTATIVE RULING # 6: MOTION TO DEEM MATTERS ADMITTED IS GRANTED. DEFENDANT MUST PAY PLAINTIFFS' COUNSEL $1,160.00 NO LATER THAN 30 DAYS FROM THE FILING OF PROOF OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY

TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

7. KOVACH, ET AL. v. FAUMUINA, ET AL., PC20210367

Motion to Re-Open Discovery

Pending is defendants' motion to reopen discovery under Code of Civil Procedure section 2024.050.

1. Background

Plaintiffs filed their Complaint on July 15, 2021. On February 1, 2022, the court set a jury trial for March 13, 2023. On February 21, 2023, based on stipulation of the parties, the court continued the jury trial to August 7, 2023. On July 7, 2023, the court granted defendants' request to continue the August 7, 2023, jury trial on the grounds that defendant needed additional time to complete discovery. The July 7, 2023, order was silent as to the discovery cutoff date.

Trial is currently set for June 24, 2024.

2. Meet and Confer Requirement

Code of Civil Procedure section 2016.040 requires that "[a] meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., § 2016.040.) The case law does not provide detail about what constitutes a reasonable and good faith attempt to resolve a discovery dispute. "A determination of whether an attempt at informal resolution is adequate … involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibility to determine what measure

and procedures are appropriate in varying circumstances." (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.)

Here, defense counsel submitted a declaration stating that he met and conferred with plaintiff's counsel via email. Attached to the declaration is a copy of the July 31 and August 13, 2023, email exchanges, which show that defense counsel stated the following only: "So the Judge continued the trial date to allow for our outstanding discovery and simultaneously closed discovery? Please reconsider the sensibility of that position, so I don't waste the Court's time with a motion."

Plaintiff argues that this was an insufficient meet and confer. Based on the totality of the circumstances, the court disagrees. The instant dispute is whether the court should reopen discovery after the court granted a continuance to conduct further discovery. Defense counsel's email, while short and compact, hits the heart of the issue. Therefore, the court finds that the meet and confer requirement has been met.

3. Discussion

Code of Civil Procedure section 2024.020, subdivision (a) provides that, "Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (Code Civ. Proc., § 2024.020, subd. (a).) "Except as provided in [Code of Civil Procedure] Section 2024.050, a continuance or postponement of the trial date does not operate to reopen discovery proceedings." (Code Civ. Proc., § 2024.020, subd. (b).)

Code of Civil Procedure section 2024.050 provides, "On motion of any party, the court may grant leave … to reopen discovery after a new trial date has been set. This motion shall be accompanied by a meet and confer declaration …." (Code Civ. Proc., § 2024.050, subd. (a).) "In exercising its discretion to grant or deny this motion the court shall take into consideration any matter relevant to the leave requested, including, but not limited

to, the following: [¶] (1) The necessity and the reasons for the discovery. [¶] (2) The diligence or lack of diligence of the party seeking the discovery …, and the reasons that the discovery was not completed …. [¶] (3) Any likelihood that permitting the discovery ... will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party. [¶] (4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action." (Code Civ. Proc., § 2024.050, subd. (b).)

Here, defendants seek discovery regarding plaintiff's new spinal surgery claims, brain imaging records, and employment history. (Mtn. at 4:22–24.) Additionally, defendant seeks expert discovery, which has not yet occurred. (*Id*. at 4:25–27.) The court finds that these discovery requests are necessary and promote the policy favoring a trial on the merits. Additionally, the parties should be able to complete such discovery before the current trial date set for June 24, 2024. Therefore, the court grants the request to re-open discovery, with the new discovery cut-off dates to correspond with the current trial date.

TENTATIVE RULING # 7: MOTION TO RE-OPEN DISCOVERY IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY TRHOUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

8. FLANAGAN, ET AL. v. ROCCA, 23CV0768

(A) Demurrer

(B) Motion to Strike Portions of Defendant Rocca's Second Amended Cross-Complaint

(A) <u>Demurrer</u>

Pursuant to Code of Civil Procedure section 430.10, subdivision (e), plaintiffs/cross-defendants Tim Flanagan and Emily Flynn generally demur to the First and Second causes of action, both for breach of contract, asserted in defendant/cross-complainant Christina Rocca's Second Amended Cross-Complaint ("SACC"). Defendant did not file an opposition.

1. Background

This is a limited civil case.

2. Requests for Judicial Notice

Pursuant to Evidence Code section 452, subdivision (d)(2), plaintiffs' requests for judicial notice of defendant's Verified Cross-Complaint filed July 11, 2023, and First Amended Cross-Complaint filed August 14, 2023, in this matter are granted.

3. Legal Principles

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

4. Discussion

"A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

Plaintiffs contend that the First and Second causes of action of defendant's SACC are deficient with respect to whether or not a valid contract exists. In an action based on a written contract, a plaintiff may plead the legal effect of the contract, plead its precise language, or attach a copy of the contract to the complaint to be incorporated by reference. (See *Construction Protective Servs., Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198–199; *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401–402.)

In this case, the SACC alleges, "a contract was in place." Additionally, the SACC indicates that a copy of the agreement is attached as Exhibit A. Plaintiff argues, "While the Defendant duly attached the parties [sic] written contract (which alone would have sufficiently plead the existence of a contract), she then rendered her cross-claim defective through wholly inconsistent pleading with the following specific factual allegations: (1) 'A contract was in place …. Also see exhibit A & B in the contract, attached and incorporated therein by reference' and (2) 'the contract was voluntarily altered.' [Citations.]" (Dem. at 10:10–15.) Plaintiff argues it is unclear what documents "Exhibits A & B in the contract" refer to as the contract defendant incorporated by reference in Exhibit A does not include any nested exhibits; and the contract attached to the SACC does not reference an Exhibit A or B. The court agrees and sustains the demurrer on these grounds.

4.1. Sham Pleading Doctrine

Next, plaintiff claims that defendant's factual pleading within the SACC's first cause of action violates the sham pleading doctrine since the material facts concerning the nature

and existence of the parties' agreement(s) contradict the factual allegations in defendant's original Cross-Complaint. (Dem. at 11:17–20.)

Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 742–743 [affirming an order sustaining defendants' demurrer without leave to amend when the plaintiff filed an amended complaint omitting harmful allegations from the original unverified complaint]; see also *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151 ["If a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations."].)

The sham pleading doctrine "cannot be mechanically applied." (*Avalon Painting Co. v. Alert Lumber Co.* (1965) 234 Cal.App.2d 178, 185.) It "is not intended to prevent honest complainants from correcting erroneous allegations or prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.) Instead "the rule must be taken together with its purpose, which is to prevent [an] amended pleading which is only a sham, when it is apparent that no cause of action can be stated truthfully." (*Callahan v. City and County of San Francisco* (1967) 249 Cal.App.2d 696, 699.)

Here, the original Cross-Complaint alleges, "A valid contract was in place. A verbal contract was also in place while waiting for the Site assessment. Without the Site Assessment results a contract can not [sic] be determined." The SACC alleges that a written contract was in place, that contract negotiations occurred, and that "the contract was voluntarily altered [and] canceled due to defendants[']stated 'new job.' " The court finds that the sham pleading doctrine does not apply here because the allegations in the SACC are not inherently contradictory or antagonistic with those in the original Cross-

Complaint. (See *Steiner v. Rowley* (1950) 35 Cal.2d 713, 719.) This is not a situation where the contradiction of the original allegation carries with it the onus of untruthfulness. (See *Macomber v. State* (1967) 250 Cal.App.2d 391, 399).

4.2. Defendant's Second Cause of Action Brought on "Common Count"

Defendant's SACC includes a second cause of action framed as a common count for money owed. A common count is not a specific cause of action. "[R]ather, it is a simplified form of a pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. [Citations.]" (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.) "When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable. [Citations.]" (*Id.* at pp. 394–395.) Thus, in the present case, defendant's common count must fall along with her first cause of action for breach of contract.

The court does not reach the issue of whether defendant's demand to foreclose a mechanic's lien via common count pleading improperly "splits the action."

(B) <u>Motion to Strike</u>

Code of Civil Procedure section 92 enumerates permissible pleadings and motions in limited civil cases. At subdivision (d), it provides that "[m]otions to strike are allowed only on the ground that the damages or relief sought are not supported by the allegations of the complaint. (Code Civ. Proc., § 92, subd. (d).)

Plaintiff claims that the following portions of the SACC should be stricken: (1) the claim for lost profits (SACC at p. 3, ¶ BC-4); (2) the request for notice of judgment for enforcement of defendant's mechanic's lien (SACC at p. 4, ¶ CC-4); (3) the prayer for judgment through the enforcement of defendant's mechanic's lien (SACC at p. 2, ¶ 10, subd. (d)); and (4) the entirety of the SACC, as it is unsigned by defendant, who is representing herself in this action.

First, plaintiff argues that the allegations do not support a claim for lost profits. However, it appears that plaintiff's issue with the claim for lost profits is that "Defendant does not clarify what she means by the term 'lost profits.' " (Mtn. at 9:28.) The court finds that the parties can explore that issue through discovery. The motion to strike the claim for lost profits is denied.

Next, plaintiff argues that the request for notice of judgment for enforcement of defendant's mechanic's lien is improper where defendant does not state a cause of action to foreclose on the lien. The court agrees. Therefore, the portions of the SACC requesting notice of judgment shall be stricken.

Lastly, plaintiff argues that the entire SACC should be stricken where defendant, acting in pro per, did not sign the pleading. (See Code Civ. Proc., § 128.7, subd. (a).) Code of Civil Procedure section 128.7, subdivision (a) provides in part, "An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney of party." Accordingly, the court will strike the SACC for lack of signature.

TENTATIVE RULING # 8: THE DEMURRER IS SUSTAINED IN PART WITH LEAVE TO AMEND AND OVERRULED IN PART. THE MOTION TO STRIKE IS GRANTED IN PART WITH LEAVE TO AMEND AND DENIED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

9. OLESON v. VANHEE, 22CV0505

Order to Show Cause Re: Dismissal

On August 28, 2023, plaintiff filed a Notice of Settlement of Entire Case. To date, there is no request for dismissal in the court's file.

TENTATIVE RULING # 9: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JANUARY 12, 2024, IN DEPARTMENT FOUR.