

**MASTEN, ET AL. v. N. RANCH BUILDERS, ET AL. PC-20150564**

**HEARING DATE: THURSDAY, 7/19/18 @ 9:00am - DEPT. 6**

The following tentative rulings are issued by Hon. James D. Garbolino, assigned for all purposes by the Chairperson of the Judicial Council:

**Cross-Complainant North Ranch Builder's  
Motions for Summary Adjudication (3)**

In October 2015, North Ranch Builders ("NRB") was hired by plaintiffs as the general contractor for the construction of a single-family home. Plaintiffs James Masten and Robin Masten commenced this action against defendants and NRB's president, Herbert Hasche. Plaintiffs alleged their home contained various material defects, including to gutters and downspouts, stucco, exterior walls, and the pool.

In January 2016, NRB filed an answer to the complaint along with its cross-complaint against plaintiffs and various subcontractors and material suppliers. Pending before the court are NRB's separate motions for summary adjudication<sup>1</sup> against three of these subcontractors and cross-defendants: (1) Roberti Unltd., Inc., dba Roberti Roofing & Construction ("Roberti"); (2) El Dorado Custom Pools, Inc. ("EDCP"); and (3) Sarah Lynn Flores, dba West Coast Stucco ("WCS").

**1. Standard of Review**

The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving

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<sup>1</sup> "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code of Civ. Proc. § 437c, subd. (f)(2).)

party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact.<sup>2</sup> "The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact."<sup>3</sup> The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion.<sup>4</sup>

## **2. Evidentiary Objections**

### **2.1 NRB's Objections to Evidence Submitted by Roberti**

NRB's Objection Nos. 1–10 are overruled.

### **2.2 WCS's Objections to Evidence Submitted by NRB**

The objections to the Declaration of Herb Hasche are overruled.

### **2.3 NRB's Objections to Evidence Submitted by EDCP**

NRB's Objection No. 1 is overruled.

## **3. NRB's Requests for Judicial Notice**

NRB's requests for judicial notice of Exhibits A through C, attached to the Appendix of Evidence, are granted. (Evid. Code § 452, subd. (d)(1).)

NRB's request for judicial notice of Exhibit J, attached to the Appendix of Evidence, is granted. (Evid. Code § 452, subd. (h).)

## **4. Procedural Objections**

Cross-defendant Roberti, without seeking leave to do so, filed supplemental documents in opposition to the request for summary adjudication on July 9, 2018. In essence, the supplement documentation seeks to show that

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<sup>2</sup> *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal.Rptr.2d 841].

<sup>3</sup> *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024 [68 Cal.Rptr.3d 897].

<sup>4</sup> *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449].

a settlement between plaintiffs and Roberti occurred shortly after the date that Roberti's opposition would have been due, on March 5, 2018. There is no explanation as to why Roberti chose to wait to file the supplemental opposition over four months from the normal due date and less than ten days from the date of the hearing on these motions. NRB filed an objection to Roberti's supplemental pleadings on the bases that Anders declaration and the written settlement agreement are untimely pursuant to Code of Civil Procedure § 437c, subd. (b)(2).

NRB's procedural objections to the July 9, 2018 filings by Roberti are sustained.

## **5. Discussion**

NRB's three motions are made on identical grounds that are directed to the issue of each subject cross-defendant's duty to defend NRB. NRB asserts that (1) it is entitled to summary adjudication on its tenth cause of action for declaratory relief on each cross-defendant's contractual duty to defend because plaintiffs' complaint alleges construction defects based on each cross-defendant's work; and (2) NRB is entitled to summary adjudication on its sixth cause of action for express indemnity on the issue of each cross-defendant's duty to defend NRB because plaintiffs' action potentially embraces matters within the indemnity.

"The interpretation of a contract is clearly a proper subject of declaratory relief."<sup>5</sup> A cause of action for declaratory relief is appropriate to determine the existence or nonexistence of the duty to defend.<sup>6</sup>

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<sup>5</sup> *S. Cal. Edison Co. v. Super. Ct.* (1995) 37 Cal.App.4th 839, 846 [44 Cal.Rptr.2d 227]; *see also* Code of Civ. Proc. § 1060.

<sup>6</sup> *Haskel, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 963, 978 [39 Cal.Rptr.2d 520].

In *Crawford v. Weather Shield Manufacturing*,<sup>7</sup> the California Supreme Court expressly acknowledged a developer may file a motion for summary adjudication to determine if a subcontractor owes a duty to defend.<sup>8</sup> A cause of action for declaratory relief should be disposed of by summary adjudication since the claim requests relief that can be determined only as a matter of law.<sup>9</sup> While courts are permitted to determine the existence of contractual duty,<sup>10</sup> the court's ruling on the issue must completely dispose of that issue.<sup>11</sup>

In the instant case NRB entered into contracts with subject cross-defendants. (NRB's Undisputed Material Facts ("UMF"), ¶ 13.) The contracts set forth the obligations of the Subcontractors to indemnify NRB from all damages and claims arising as a result of the subcontractors negligence.<sup>12</sup>

NRB contracted with cross-defendants as follows: (1) Roberti was to supply and install gutters, downspouts, and flashing work; (2) EDCP was to furnish supplies and build a pool and spa system pursuant to plans and specifications prepared and drawn by plaintiffs' architect Questar Pools; and (3) WCS was to furnish all labor, materials, and supplies for stucco, foam cornice details, and cove detail, as requested by NRB.<sup>13</sup> NRB did not contract with any other subcontractors to perform the respective work.<sup>14</sup> Plaintiffs' complaint alleges that they discovered materially defective work by various subcontractors,

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<sup>7</sup> *Crawford v. Weather Shield Manufacturing* (2008) 44 Cal.4th 541 [79 Cal.Rptr.3d 721].

<sup>8</sup> *Id.* at p. 565, fn. 12.

<sup>9</sup> *Exchequer Acceptance Corp. v. Alexander* (1969) 271 Cal.App.2d 11, 13 [76 Cal.Rptr. 328].

<sup>10</sup> *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 519.

<sup>11</sup> *Id.* at p. 522.

<sup>12</sup> See the provisions in NRB's Appendix of Evid., Ex. F, p. 4, Section 8.

<sup>13</sup> NRB's UMF, ¶ 14.

<sup>14</sup> NRB's UMF, ¶ 16.

including each of the subject cross-defendants.<sup>15</sup> After plaintiffs' complaint was filed, NRB tendered its defense to the subject cross-defendants.<sup>16</sup> Cross-defendants did not agree to provide, and are not providing, NRB with a defense in this action.<sup>17</sup>

NRB must show (a) the liability is covered by the contract, (b) the liability exists, and (c) the extent of that liability.<sup>18</sup>

While NRB has shown the existence of a contract and the existence of a defense and indemnity provision contained within that contract, NRB has failed to link the contract and each subject cross-defendants' scope of work under the contract to the claims presented by plaintiffs in this litigation. NRB's moving papers do not establish the alleged liability is within the scope of its defense and indemnity agreement with these cross-defendants. That is, NRB has not provided evidence establishing that any fees and expenses it has incurred or will incur are in defense of claims within these cross-defendants' scope of work, as opposed to NRB itself or another subcontractor that worked on the project.

The only evidence NRB submits suggesting the scope of what it may or may not be defending against are allegations contained in plaintiffs' complaint, which allegations NRB then incorporated into its cross-complaint. The majority of the allegations in both complaints are between plaintiffs and NRB, and do not even relate to the work performed by the subcontractors. In *Crawford, supra*,<sup>19</sup> the California Supreme Court made it clear that any defense obligation had to be "founded upon claims alleging damage or loss resulting from [the

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<sup>15</sup> NRB's UMF, ¶ 20.

<sup>16</sup> NRB's UMF, ¶ 10.

<sup>17</sup> NRB's UMF, ¶ 11.

<sup>18</sup> *Peter Culley & Assocs. v. Super. Ct.* (1992) 10 Cal.App.4th 1484, 1498 [13 Cal.Rptr.2d 624].

<sup>19</sup> 44 Cal.4th 541.

defendant's] negligent role."<sup>20</sup> The evidence submitted by NRB does not establish a link between the "allegations" contained in plaintiffs' complaint and the subject cross-defendants' scope of work for the project. *Crawford* differs from this case because it dealt with very specific language in the indemnity agreement and post-trial issues and costs that were more easily determined. That fact was recognized by the court at footnote 12, when it noted the practical difficulties in applying the ruling in a multi-party construction defect case in progress.

Furthermore, NRB's motion is premature because in order to completely dispose of the duty to defend issue, there has to be evidence of NRB's fees and their allocation. Pursuant to *Bramalea*,<sup>21</sup> NRB can only recover from subject cross-defendants those fees and costs incurred in the defense of this action it paid out-of-pocket.<sup>22</sup>

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<sup>20</sup> *Id.* at p. 553.

<sup>21</sup> *Bramalea Cal., Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468 [14 Cal.Rptr.3d 302].

<sup>22</sup> "Bramalea admits its attorney fees were entirely paid for by Zurich and it has suffered no out-of-pocket loss. Thus, any recovery it might receive from the subcontractors would be a prohibited double recovery unless allowed by the collateral source rule. The collateral source rule allows an injured person to recover from the wrongdoer for damages suffered even if he has been compensated for the injury 'from a source wholly independent of the wrongdoer,' such as insurance. [Citation] But the collateral source rule applies to tort damages, not to damages for breach of contract. [Citation.] This is due to the fundamental differences between tort and contract damages. [Citation.] 'The collateral source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance.' [Citation.]" (*Bramalea, supra*, 119 Cal.App.4th at pp. 472–473.)

During discovery in this case, NRB admitted it is being provided a defense by its insurance carrier. (EDCP Additional Undisputed Material Facts.)<sup>23</sup> Moreover, to ascertain the duty to defend by any subcontractor, it is necessary to determine what amount of NRB's defense costs are covered by each subject cross-defendant's specific indemnity agreement and its scope of work.<sup>24</sup> As NRB has not provided evidence of its fees and their allocation, it has not shifted the burden of production to cross-defendants on this issue.

NRB also has not made a prima facie showing that it properly tendered its defense to each subject cross-defendant pursuant to Civil Code § 2782.<sup>25</sup> Civil Code § 910(a) requires that a claimant alleging a violation against a builder "shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation." Here, NRB's letter of tender is a broadly-worded, blanket request for a defense and does not provide any detail about the nature of the claimed violations as to each subject cross-defendant.<sup>26</sup> Thus, NRB has not made a prima facie showing that the duty to defend was even appropriately triggered for each cross-defendant, or that there is a nonexistence of a triable issue of fact relating thereto.

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<sup>23</sup> AUMF, ¶ 23.

<sup>24</sup> *Crawford, supra*, 44 Cal.4th at pp. 554–555.

<sup>25</sup> "A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work." (Civ. Code § 2782, subd. (e).)

<sup>26</sup> NRB's Appendix of Evid., Ex. C.

Accordingly, NRB's separate motions for summary adjudication against Roberti, EDCP, and WCS are denied.

**TENTATIVE RULING: CROSS-COMPLAINANT NORTH RANCH BUILDER'S  
MOTIONS FOR SUMMARY ADJUDICATION ARE EACH DENIED.**