SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/26/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2002478

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: KEN MAYER vs. DEFENDANT: JOHN KOZUBIK, ET AL	

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT

RULING

Defendants John and Shannon Kozubik's ("Defendants") motion for summary judgment is denied.

BACKGROUND

This is a dispute over a home renovation. In 2019, Defendants hired Plaintiff Ken Mayer, doing business as Mayer & Company ("Plaintiff"), to serve as the contractor for an extensive home remodeling project. (Responsive Separate Statement ("RSS"), No. 1.) The parties' written contract called for Plaintiff to partially demolish, remodel, and build an addition on the property. (RSS, No. 2.)

Plaintiff performed some of the work on the project himself, but subcontracted "almost all" of it to other contractors. (RSS, No. 5.) In advance of his deposition, Plaintiff provided a "summary" listing various subcontractors who worked on the project. (RSS, No. 8; see Defendants' Ex. B at Ex. 2.) Among numerous other service providers, the summary identifies Reyes Construction as the subcontractor hired to perform "demolition, concrete, framing and siding work." (RSS, No. 10; Defendants' Ex. B at Ex. 2.) Of the work done on the project in those categories, Reyes Construction performed approximately 90%, with the balance performed by Plaintiff personally. (RSS, No. 10; Defendant's Ex. B at Ex. 2, 53:7-19, 54:12-24.)

Defendants paid all of Plaintiff's invoices except the last one, Invoice No. 200310, dated March 10, 2020, which was for $98,449.23. (RSS, No. 7; Defendants' Ex. A at Ex. 8, MAYER01026.) That $98,449.23 is "the primary amount [Plaintiff] seeks to recover in this action." (RSS No. 7; see also Complaint, p. 6 [Prayer].) Invoice No. 200310 attributes the charges to "Contract items plus additional charges noted in blue, see spreadsheet." (Defendants' Ex. A at Ex. 8, MAYER01026.) The spreadsheet referenced is not before the Court.

Plaintiff's Complaint alleges that Defendants breached the contract by failing to pay the final invoice, among other alleged breaches. (Complaint, ¶ 15.) Plaintiff additionally asserts causes of action for monies due, quantum meruit, account stated, and foreclosure of mechanic's lien. Defendants now move for summary judgment on the basis that Reyes Construction's unlicensed status precludes Plaintiff from recovering on the contract.

LEGAL STANDARD

Any party may move for summary judgment. (Code of Civ. Proc, § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th 826, 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th 826, 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar, supra*, 25 Cal.4th 826, 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar*, 25 Cal.4th 826, 851.) When the moving party is the defendant, this initial burden entails showing "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) "Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*)

The burden of production on a defendant's motion for summary judgment may also shift to the plaintiff upon a showing by the defendant that the plaintiff does not have, and cannot reasonably obtain, evidence required to factually support his or her claim. (See, e.g., *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283.) In order to shift the burden of production to the plaintiff based on a lack of evidence, the defendant's evidence must exclude the possibility that the plaintiff may reasonably obtain evidence sufficient to establish the claim. (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1442.) "[T]he burden should not shift without stringent review of the direct, circumstantial and inferential evidence" that the plaintiff does not have and cannot expect to obtain material facts supporting a prima facie case. (*Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 83.)

Regardless of any burden-shifting, "from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th 826, 850.) "Where the evidence submitted by a moving defendant does not support judgment in his favor, the court must deny the motion without looking at the opposing evidence, if any, submitted by the plaintiff." (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 354; see also Code Civ. Proc., §§ 437c, subd. (p)(2) [on defendant's motion for summary judgment, plaintiff has no burden to oppose until defendant has met initial burden]; *Pepperell v. Scottsdale Ins. Co.* (1998) 62 Cal.App.4th 1045, 1054 ["If the moving defendant does not meet the burden, the plaintiff need not make any showing at all."].)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar*, *supra*, 25 Cal.4th 826, 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at 843.)

PROCEDURAL MATTERS

Reply Papers

Along with their reply brief, Defendants submitted a separate document entitled "Reply to Plaintiff's Opposition to Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment." The summary judgment statute does not provide for a "reply separate statement." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 306 [abrogated in unrelated part as stated in *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 853, fn. 12].) Accordingly, the Court disregards this document.

Defendants also submitted new evidence along with their reply brief. (See Granskog Reply Dec. & Exs. A-C thereto.) This is not permitted. (*Nazir*, *supra*, 178 Cal.App.4th 243, 306; see also *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 [holding that on a motion for summary judgment, a trial court violates the nonmoving party's due process rights when it considers evidence filed for the first time with the movant's reply].) The Court disregards the declaration Defendants submitted with their reply and all of its exhibits.

Defendants' reply brief suggests that they could not have presented this new evidence alongside their moving papers (see Reply, p. 4), but Defendants have not presented any authority suggesting that this circumstance allows the Court to consider the new evidence. A party opposing summary judgment has a due process right to be "fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*San Diego Watercrafts*, *supra*, 102 Cal.App.4th 308, 316.) If the movant is not capable of filing a motion for summary judgment that "inform[s] [the opposing party] of what issues it [must] meet in order to oppose the motion" (*ibid.*), it should either forego a motion for summary judgment entirely or seek an extension of the time permitted to file one.

The Court additionally disregards the unauthorized sur-reply filed by Plaintiff.

Defendants' Evidentiary Objections

The Court does not address Defendants' objections to Plaintiff's evidence because they were not material to the disposition of this motion. (See Code Civ. Proc., § 437c, subd. (q).) The Court decided the motion in Plaintiff's favor without reaching Plaintiff's opposition because Defendants did not carry their initial burden. (See *Y.K.A. Industries*, *supra*, 174 Cal.App.4th 339, 354; see also Code Civ. Proc., §§ 437c, subd. (p)(2); *Pepperell*, *supra*, 62 Cal.App.4th 1045, 1054.)

DISCUSSION

Business and Professions Code, section 7031, subdivision (a) ("Section 7031(a)") provides:

> "[N]o person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that

> they were a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person[.]"

Although phrased as a pleading requirement, Section 7031(a) renders licensure an element of a contractor's case whenever he seeks to recover compensation for work for which a license was required. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 517.) That the unlicensed work was performed by an unlicensed subcontractor, as opposed to the plaintiff contractor himself, does not provide an escape from Section 7031(a). The statute "bars even a licensed general contractor . . . from bringing an action for compensation for an act or contract performed by an unlicensed subcontractor where a license is required." (*Kim v. TWA Construction, Inc.* (2022) 78 Cal.App.5th 808, 831.) Defendants argue that one of Plaintiff's subcontractors, Reyes Construction, was unlicensed, so Section 7031(a) prevents Plaintiff from maintaining this action and Defendants are entitled to summary judgment.

Defendants have not presented evidence that any of the work for which Plaintiff seeks compensation – that billed in the final invoice – was performed by Reyes Construction. Their motion apparently assumes that if a general contractor retains a single unlicensed contractor to perform a portion of the work on a larger project, Section 7031(a) precludes the general contractor from recovering any compensation for *any part* of that project, as opposed to precluding him from recovering any compensation for any work performed by the unlicensed subcontractor. Defendants have not provided any legal authority for this. Even if this argument holds water, however, the motion must be denied because Defendants have not offered sufficient evidence that Reyes Construction was unlicensed.

Defendants offer a document obtained from the Contractors State License Board's website entitled "Contractor's License Detail for License # 770210." (Granskog Dec., ¶ 4 & Ex. C.) It indicates that License No. 770210 was a Class C-8 ("Concrete") license; was issued to Reyes Construction of 7916 Bonanza Drive, Bakersfield, California 93307 on October 14, 1999; and expired on October 31, 2007. (Granskog Dec., Ex. C.) There is no indication that this document lists all contractor's licenses held by Reyes Construction at any time. Its title indicates that it is a summary of information pertaining to a single license held by Reyes Construction during a particular period of time well predating the events described in the Complaint. It is not proof that Reyes Construction did not hold a required license during the period at issue in this case. It is also hearsay that Defendants have not made any effort to fit within the confines of a hearsay exception. (See *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638 [motions for summary judgment must be decided upon admissible evidence].)

Nor does Mr. Granskog's statement that "Reyes Construction has not had a general contractor's license (class B) at any time, and its concrete subcontractor's license (class C-8) expired in 2007" prove that Reyes Construction did not have the required licensure. (Granskog Dec., ¶ 4.) First, Mr. Granskog's declaration establishes that this statement is not based on personal knowledge, but instead on representations from the Contractors State License Board. (See Granskog Dec., ¶ 4 ["According to the CSLB . . ."]; see also Code Civ. Proc., § 437c, subd. (d) "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge[.]"].) To the extent this statement is based on Exhibit C, it is without support, as stated above. (See Granskog Dec., ¶ 4 [suggesting that declarant learned "this information" from

Exhibit C].) Second, even if this statement were true, Defendants have not established that Reyes Construction required a Class B general contractor's license to perform the work it did on Defendants' property, and the bare fact that Reyes Construction had a concrete subcontractor's license that expired in 2007 says nothing about what licenses it may or may not have had in 2019.

"When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee." (Bus. & Prof. Code, § 7031, subd. (d).) This provision does not negate the movant's burden on a motion for summary judgment to show that there is no triable issue as to any material fact and that it is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, *supra*, 25 Cal.4th 826, 843; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶ 10:255 ["*Assuming the moving party has met its burden of production*, the opposing party must make an affirmative showing on matters on which it has the burden of proof at trial."] [emphasis added].) Even if Plaintiff would ultimately be required to prove Reyes Construction's licensure at a trial, to prevail on a motion for summary judgment on the ground that Plaintiff cannot prove such licensure, Defendants must either present competent evidence that Reyes Construction was unlicensed or present evidence that Plaintiff does not have and cannot reasonably obtain evidence that Reyes Construction was properly licensed. (*Scheiding*, *supra*, 69 Cal.App.4th 64, 83.) Defendants have done neither.

Defendants have also failed to establish that Reyes Construction was required to be licensed to perform the work that it performed. Their Separate Statement does not address this element of Section 7031(a). (See Bus. & Prof. Code, § 7031(a) [contractor may not maintain an action "for the collection of compensation for the performance of any act or contract *where a license is required by this chapter*"]; see also *California-American Water Co. v. Marina Coast Water Dist.* (2022) 86 Cal.App.5th 1272, 1297 ["[I]f the separate statement does not contain all material facts on which the motion is based, the moving party has failed to meet its initial burden of production[.]"].)

Because Defendants have not carried the burden associated with a defense motion for summary judgment, the motion is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for April, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/26/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2102625

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: GIGI PAGANI vs. DEFENDANT: MICHAEL FOX	

NATURE OF PROCEEDINGS: MOTION – LEAVE TO FILED THIRD AMENDED COMPLAINT

RULING

Plaintiff Gigi Pagani's ("Plaintiff") Motion for Leave to File Third Amended Complaint is DENIED. The sham pleading doctrine precludes Plaintiff from amending the complaint to remove harmful allegations which had previously been raised in defense to her claims without sufficient explanation. The Court finds that the Third Amended Complaint ("TAC") purports to do just that. Moreover, Plaintiff's unreasonable delay in making the Motion coupled with the resulting prejudice to defendant Michael Fox ("Defendant") also justifies denial of the Motion.

BACKGROUND

Plaintiff and Defendant were in a non-marital romantic relationship with one another from around 2008 to 2020. When Plaintiff was getting divorced from her prior husband, she was awarded the family home located at 24 Oak Mountain Court ("the home"). However, at the time, the home value was less than the mortgage and Plaintiff was concerned about making the mortgage payments. Ultimately Defendant purchased the home from Plaintiff and her ex-husband in May of 2009 for $953,950. The sale was memorialized in a Standard Residential Purchase Agreement ("Purchase Agreement") signed by Mr. Pagani, Plaintiff, and Defendant. The Purchase Agreement contained an integration clause that explicitly merges any prior agreement "with respect to the property" in the Purchase Agreement. Only Defendant is on title to the Property.

Defendant lived at the home with Plaintiff until August of 2020, when the two broke up. After Plaintiff moved of the home, she filed suit against Defendant, alleging the parties had entered into an oral agreement where she would remain a "co-owner" of the home and would split its appreciation upon their breakup, and that Defendant breached that agreement when he refused to pay her that sum. Defendant denies these claims.

LEGAL STANDARD

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified unless opposing parties demonstrate unreasonable delay plus prejudice if the motion is granted. A mere showing of unreasonable delay by the plaintiff without any showing of resulting prejudice to defendants is an insufficient ground to justify denial of the plaintiff's motion. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, inter alia. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.)

A party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance with the Rules of Court is satisfied by including a copy of the proposed amended pleading, detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading including page, paragraph and line number, and attaching a declaration by plaintiff's counsel, as to: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request was not made earlier.

DISCUSSION

The original complaint in this matter was filed on August 12, 2021. An amended complaint was later filed on December 7, 2021. On April 12, 2022, a second amended complaint ("SAC") was filed. The SAC remains the operative pleading and includes causes of action for Breach of Contract, Breach of Implied Contract, Implied Contract, Quasi Contract/Estoppel/Unjust Enrichment, and Declaratory Judgment.

On April 18, 2023, Plaintiff filed another action (CIV2301117) ("the Second Action") against Defendant. That complaint was based on a similar set of operative facts, and included causes of action for Fraud/Breach of Fiduciary Duty, Negligent Misrepresentation, Recission, and Intentional Infliction of Emotional Distress.

The Court denied a Motion to Consolidate both actions and sustained a Demurrer to the Second Action based on the pendency of the current action. In its September 12, 2023 order re the same, the Court noted that Plaintiff could attempt to amend her complaint in the present action to include the causes of action she attempted to assert in the Second Action.

Plaintiff did not file a Motion for Leave to Amend until January 22, 2024. That Motion is presently before the Court.

Defendant opposes the Motion on the grounds that (1) Plaintiff's proposed amendment seeks to omit or contradict harmful facts as originally pleaded, without providing an explanation or excuse, and the amendment should therefore be treated as a sham; (2) Plaintiff acted with unreasonable and/or inexcusable delay in bringing the motion, and such amendment will result in prejudice to Defendant; and (3) Plaintiff's motion adds a new theory of recovery and imposes a

new liability on Defendant and would result in prejudice to Defendant if such amendment were to be permitted at this late time when Defendant had not prepared for such a claim/theory.

Omission of Harmful or Contradictory Facts

Defendant asserts that Plaintiff has omitted allegations regarding the timing of their alleged agreement. This was originally alleged as a verbal agreement on May 4, 2009. (Original Complaint ("OC"), p. 1, ¶ 3, emphasis added.) If the parties entered into the agreement on or about May 4, 2009, Defendant concludes that the alleged contract (formed prior to the signing of the Purchase Agreement on May 20, 2009) would be subject to the Purchase Agreement's integration clause, voiding it.

Second, Defendant claims Plaintiff has omitted prior allegations regarding her "interest" or "co-ownership" in the house to avoid a Statute of Frauds affirmative defense. In her SAC, Plaintiff pleaded that the parties had a "mutual understanding" that she would "retain her interest" in the Property and that in order to "protect her financial interest," if the parties ever broke up, then shortly after, Defendant would pay her a sum equal to one-half of its appreciation. (SAC, p. 2:13-18.) Plaintiff's SAC also alleges that "Ms. Pagani was selling her interest in the home with the understanding that she would co-own the home with him and receive the benefits of co-ownership, regardless of whether she was on the title..." (SAC, p. 5:24-27.)

The court has discretion to deny leave to amend where the proposed amendment omits or contradicts harmful facts pleaded in the original pleading, unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the amended pleading may be treated as a sham. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929; *See also Blain v. The Doctors Co.* (1990) 222 Cal.App.3d 1048, 1058 ["Where a complaint contains allegations destructive of a cause of action the defect cannot be cured by their omission without explanation in a subsequent pleading"].)

The Statute of Frauds requires that a contract for an interest in real property must be in a writing subscribed by the party charged. (Civ. Code, § 1624(a)(3).) The SAC alleges that Plaintiff remained a co-owner of the Property even after selling the Property to Defendant. (See eg, SAC, p. 5:24-27.) However, Plaintiff also alleges that the parties' agreement for her to retain an interest in the property and remain a co-owner, was oral or implied. Plaintiff's proposed TAC has removed all references to Plaintiff's "co-ownership" in the property, in an apparent effort to avoid Defendant's Statute of Frauds defense. The co-ownership allegations would also allow for a defense based on the integration clause in the Purchase Agreement when coupled with the prior allegations that the alleged oral agreement was entered into prior to the execution of the Purchase Agreement.

Plaintiff does not explain the basis for these changes in facts in her initial Motion. In her Reply, she merely cites to the Court's prior ruling on the Motion for Summary Judgment and Demurrer. In ruling on the Motion for Summary Judgment, the Court found that "Plaintiff has raised a triable issue of material fact as to whether the parties intended the alleged oral agreement regarding appreciation to be encompassed in the Purchase Agreement and thus barred by its integration clause." The ruling on the Demurrer held to the extent Plaintiff does not allege she is entitled to a portion of, or interest in, the Property itself but is instead seeking money in the

amount of half of the appreciated value of the Property, such a claim would not fall within the Statute of Frauds because it is not based on an agreement for the sale of real property or an interest therein.

The standards on summary judgment and demurrer are very different than the standard applied when litigating the case. Just because the Court found that a triable issue of material fact existed (MSJ) and held that the complaint sufficiently stated a cause of action (demurrer), does not mean the defenses raised by Defendant have been conclusively litigated. It *does* appear to the Court that Plaintiff is attempting to omit harmful allegations without sufficiently explaining the justification that warrants such a change.

On this basis, the Court DENIES the Motion for Leave to Amend on the basis of the sham pleading doctrine.

Delay and Prejudice

Plaintiff claims that she learned of new facts giving rise to the requested amendment at Defendant's deposition on January 9, 2023. However, she did not file her Motion for Leave to Amend until over a year later, on January 22, 2024. This clearly constitutes delay and lack of diligence on the part of moving party. The Court is not persuaded that Plaintiff's convoluted arguments regarding the filing of a second lawsuit, requesting consolidation, and ultimate decision to file a motion for leave to amend excuse the delay or constitute any sort of "diligence."

It is clear from the motion, Plaintiff learned the facts giving rise to the amendment in January of 2023 and did not file the motion for leave to amend until January of 2024. There is no satisfactory explanation for this delay.

However, a showing of unreasonable delay without any showing of resulting prejudice is an insufficient ground to justify denial of the motion. (*Higgins v. Del Faro, supra,* 123 Cal.App.3d at p. 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, inter alia. (*Magpali v. Farmers Group, Inc., supra,* 48 Cal.App.4th at p. 486-488.)

The Court finds that Defendant has successfully demonstrated prejudice justifying denial of the Motion. Written discovery in this case has already been extensively propounded and responded to, necessitating one motion to compel filed by Defendant. Both Defendant and Plaintiff have already been deposed.

If the Motion were granted, the parties would be obligated to engage in additional discovery, including sitting for duplicate depositions. Plaintiff seeks to add five (5) new causes of action: fraud, breach of fiduciary duty, negligent misrepresentation, recission, and intentional infliction of emotional distress. With the exception of the cause of action for recission, Plaintiff's new causes of action are based in tort, whereas her earlier claims were rooted in contract. For example, because the tort claims now allege that starting in 2009 Plaintiff suffered psychological and physical damages, Defendant would have to conduct substantial discovery to obtain and

evaluate Plaintiff's medical history to determine its validity. The added costs of preparation would be substantial.

Moreover, trial is set for October 23, 2024, with a court mandated settlement conference on September 11, 2024. There would be an insufficient amount of time to prepare five new causes of action (which would change the tenor of the complaint from its original focus) for trial and such rushed preparation would prejudice Defendant. Moreover, there is a high probability that the amendment would necessitate a continuance of the trial date, a delay of which would also prejudice defendant.

Accordingly, the Court finds that Plaintiff's lack of diligence and delay in making the Motion coupled with the prejudice to Defendant if the Motion were granted also justifies DENIAL of the Motion. (*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 915 [seeking leave to amend to add a cause of action for fraud approximately five months before trial despite knowledge of the facts giving rise to the amendments for several years justified finding of lack of diligence by plaintiff and prejudice to defendant, validating denial of the motion for leave to amend].)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/26/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2104266

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: MAKTAB TARIGHAT OVEYSSI SHAHMAGHSOUDI vs. DEFENDANT: NAPA VALLEY MEMORIAL PARK, ET AL	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – DISCOVERY FACILITATOR PROGRAM

RULING

Defendants' motion to compel the depositions of Plaintiffs and their representatives is granted. Plaintiffs are ordered to make these deponents available for deposition by no later than May 3, 2024.

Defendants' motion to compel further responses to special interrogatories and requests for production of documents is granted. Plaintiffs are ordered to provide responsive documents and further responses, without objections, by no later than May 3, 2024.

Both parties' requests for sanctions are denied.

Discussion

According to Defendants' counsel's declaration of non-resolution, there are two motions currently before the Court: (1) Defendants' motion to compel full and complete responses to special interrogatories and requests for production of documents, without objections; and (2) Defendants' motion to compel three depositions.[1] Both parties request an award of sanctions in connection with these motions.

This case is currently set for trial on May 14, 2024. An issue conference is scheduled for May 13, 2024.

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[1] Defendants' third motion, for a protective order regarding the depositions of Defendants Nahid Angha and Ali Kianfar, is no longer before the Court as these depositions have now been completed.

Responses to Written Discovery

Defendants contend that on February 16, 2024, a messenger hand-served Defendants' special interrogatories and requests for production of documents at Plaintiff's counsel's office. (Declaration of John Dahlberg ("Dahlberg Decl."), ¶¶2-5 and Exhs. 1-6.) Plaintiff's counsel calls this delivery "suspect", noting that in the past Defendants had always served documents on Plaintiffs by email. (Declaration of Elizabeth Zareh ("Zareh Decl."), ¶10.) However, Plaintiff's counsel does not state that she does not have someone named Ramario or Todd who works at her office (these names were identified by the messenger), or that she never located the discovery that Defendants' messenger confirmed was hand-delivered on February 16th. Indeed, her declaration is silent as to whether or not this written discovery was in fact delivered the date Defendants' messenger states it was.

After Defendants' counsel advised Plaintiffs' counsel that responses were late and sent a copy of the requests on April 2, 2024, Plaintiffs provided responses on April 12th. (Zareh Decl., ¶10.)

Defendants argue that Plaintiffs' responses are untimely and inadequate, and should be without objections as those have been waived. Plaintiffs argue that they have complied with their discovery obligations by providing the responses on April 12th.

The Court can rule on Defendants' pending motion despite Plaintiffs' service of late responses after the motion was filed. (*County of San Benito v. Superior Court* (2023) 96 Cal.App.5th 243, 278; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 408.)

Plaintiffs are compelled to provide responses to both the interrogatories and document requests, without objections, as well as responsive documents, by May 3, 2024. Plaintiffs waived their objections to this discovery by failing to provide timely responses and did not move for relief from this waiver. (Code Civ. Proc. §§ 2030.290(a) and 2031.300(a).) Further, Plaintiffs' responses must be Code-compliant. Plaintiffs' late responses to the request for production of documents do not fully comply with Sections 2031.210-2031.240. For example, simply stating "I have conducted a reasonable search and have no such records" does not comply with Section **2031.230.**[2]

Motion to Compel Depositions

Defendants contend that on February 14, 2024, they served notices of deposition for the following deponents, on all counsel by email: (1) Plaintiff Maktab Tarighat Oveyssi Shahmaghsoudi ("MTO")'s custodian of records; (2) MTO's person most knowledgeable; and (3) Plaintiff Nader Angha. (Dahlberg Decl., ¶¶6, 7 and Exhs. 7-10.) Plaintiff's counsel does not deny receiving these notices that day, but states that the dates Defendants selected for the depositions did not work for her. After some back and forth between counsel regarding available dates, Plaintiff's counsel confirmed dates for each witness (April 8, 10 and 11). She also stated that "code compliant" notices were required. (Zareh Decl., ¶7 and Exh. A.) Defendants' counsel

[2] The Court cannot comment on the adequacy of Plaintiff's late interrogatory responses as they are not included with Ms. Zareh's declaration.

then stated that he would send amended notices for the agreed-upon dates, but he never did so. (*Id.*, ¶¶8, 9.)

Plaintiffs argue that they do not have to make these deponents available because Defendants did not serve amended responses with the new deposition dates.

The Court grants Defendants' motion. Deposition notices were served but the depositions were not taken on the dates provided in the notices due to Plaintiffs' counsel's unavailability, and the parties ultimately agreed on other dates. Plaintiffs are ordered to produce the three deponents immediately for deposition, with the MTO custodian of records to sit for deposition first. As trial is currently set for May 13, 2024, these deponents must be made available for deposition by May 3, 2024.

Sanctions

Plaintiffs' request for sanctions is denied. Defendants' request for sanctions is also denied, as they fail to identify any statutory basis for sanctions in either their Notice of Motion or their accompanying Memorandum.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for April, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/26/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000534

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: JOEY DALE

PLAINTIFF: WELLS FARGO BANK, N.A. vs. DEFENDANT: EMILY E. WEBER	

NATURE OF PROCEEDINGS: 1) MOTION – OTHER: FOR ORDER DEEMING THE TRUTH IN THE MATTER SPECIFIED IN PLAINTIFF'S REQUEST FOR ADMISSIONS AS ADMITTED; DECLARATION OF ASHLEY MULHORN, ESQ.; NOTICE OF LODGING OF PROPOSED ORDER; PROPOSED ORDER
2) MOTION – SUMMARY JUDGMENT

RULING

MOTION TO DEEM REQUESTS FOR ADMISSIONS ADMITTED:

Plaintiff served Defendant with Request for Admissions on September 6, 2023. (Declaration of Ashley Mulhorn, ¶¶ 2-3.) Defendant's responses to the same were due on or before October 11, 2023. (Mulhorn Decl., ¶ 4.) A meet and confer letter was sent to Defendant regarding the outstanding discovery and provided her with additional time to respond. (Mulhorn Decl., ¶ 5.) To date, Defendant has failed to provide any responses. (*Ibid.*) The motion for order that matters be deemed admitted is granted. (Code Civ. Proc., § 2033.280.)

SUMMARY JUDGMENT:

The unopposed motion for summary judgment by plaintiff Wells Fargo Bank, N.A. ("Plaintiff") is GRANTED. (Code Civ. Proc., § 437c, subds. (c) and (p)(1).) Plaintiff has met its burden showing no triable issues of material fact exist as to any of the alleged causes of action.

Facts

Plaintiff filed this action on August 2, 2023, against defendant Emily E. Weber ("Defendant") alleging causes of action for breach of contract and common counts (money lent, money paid, open book account, and account stated).

Defendant applied to Plaintiff for a credit card account and entered into a written agreement with Plaintiff to be bound by the terms and conditions set forth in the Customer Agreement ("Agreement"), including that use of the issued card constituted acceptance of the Agreement. (Plaintiff's Separate Statement of Undisputed Material Facts ("SS") Nos. 1-3.)[1] Pursuant to the terms of the Agreement, Plaintiff would extend credit to Defendant whereby Defendant could use the credit card, making charges and Defendant would make payments plus any interest incurred. (SS Nos. 4-6.) Plaintiff provided Defendant with monthly statements reflecting all charges, payments, minimum payments due, including fees and interest incurred during that billing period. (SS Nos. 7-8.) There is no record of any unresolved disputes on the account or record of any active lawsuits against Plaintiff for unresolved disputes on the account at issue. (SS Nos. 9-10.)

The last payment applied to the account or transaction made by Defendant was on January 17, 2023. (SS No. 11.) No further payments were made by the Defendant and Defendant was in default pursuant to the terms of the Agreement. (SS No. 12.) The balance due on Defendant's account is $12,687.33, resulting in damages to the Plaintiff in the amount of the same. (SS Nos. 13-14.)

Standard for Summary Judgment

A plaintiff moving for summary judgment meets his or her burden of proof by showing there is no defense to each cause of action by proving each element of the cause of action. (Code Civ. Proc., § 437c(p)(1); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 ["summary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by defendant as well as prove each element of his own cause of action. . . . All that the plaintiff need do is to 'prove [ ] each element of the cause of action' "].) Once a plaintiff meets this burden, the burden shifts to defendant "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c(p)(1).)

Discussion

Plaintiff claims it is entitled to summary judgment against Defendant on the grounds that there is no triable issue of material fact or issue of liability entitling it to summary judgment. (Amended Notice of Motion, pp. 1:27-2:1.) Plaintiff alleges a breach of contract based upon common counts of money lent, money paid, open book account, and account stated against Defendant.

The elements of a breach of contract cause of action are: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance of the contract; (3) defendant's breach; and (4) damage to plaintiff resulting from the breach. (*State Compensation Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 449 ("*ReadyLink*").)

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[1] The Court refers only to the facts supporting Issue No. 1 regarding breach of contract allegations for simplicity, unless otherwise noted. Those facts likewise apply to Issue Nos. 2 -5 as set forth in the SS when applicable, but are numbered differently.

"A common count alleges in substance that the defendant became indebted to the plaintiff in a certain stated sum, for some consideration such as 'money had and received by the defendant for the use of the plaintiff,' or 'for goods, wares and merchandise sold and delivered by plaintiff to defendant,' or 'for work and labor performed by plaintiff'; and that no part of the sum has been paid." (4 Witkin, Cal. Procedure (5th ed. 2008), Pleading §557, p. 685; *Pike v. Zadig* (1915) 171 Cal. 273, 275.) The only essential allegations are the statement of indebtedness in a certain sum, the consideration—e.g. goods sold, work done, etc., and nonpayment. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.)

An account stated is "an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752.)

A "book account" is "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Code Civ. Proc., § 337a) A book account is "open" where a balance remains due on the account. (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5.)

Here, Plaintiff proffers evidence of the agreement for the credit card, that Plaintiff performed its obligation under the terms of the agreement by extending funds to Defendant for various goods, services, and cash advances, that Defendant failed to honor the obligations under the terms of the credit card agreement by failing to pay the sums owed to Plaintiff, and that Plaintiff is owed a sum certain in the amount of $12,687.33. (SS Nos. 1-14.)

The Court finds that Plaintiff has met its burden establishing each element of its causes of action. (SS Nos. 1-14 as to breach of contract, SS Nos. 15-21 as to money lent, SS Nos. 22-27 as to money paid, SS Nos. 28-36 as to open book account, SS Nos. 37-44 as to account stated.) Without controverting evidence from Defendant, the Court grants Plaintiff's motion for summary judgment.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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