Civil · Tentative Rulings

DEPARTMENT I LAW AND MOTION RULINGS

If the parties wish to submit on the tentative ruling and avoid a court appearance on the matter, the moving party must contact the opposing party and all other parties who have appeared in the action and confirm that each will submit on the tentative ruling. Please call the court no later than 4:30 p.m. on the court day before the hearing, leave a message with the court clerk at (310) 260-3629 advising her that all parties will submit on the tentative ruling and waive hearing, and finally, serve notice of the Court's ruling on all parties entitled to receive service. If any party declines to submit on the tentative ruling, then no telephone call is necessary, and all parties should appear at the hearing.

Case Number: SC104952 **Hearing Date:** April 14, 2011 **Dept:** I

TENTATIVE RULING
SPIEGEL v UPTOWN
SUMMARY JUDGMENT (S&S)
APRIL 14, 2011

The motion of cross-defendant Wood Crafters by S&S, Inc. dba S&S Hardwood Flooring & Supplies for summary judgment as to the cross-complaint of Uptown Interiors, Inc. is GRANTED. Uptown's request for a continuance pursuant to CCP section 437c(h) is DENIED. S&S is ordered to prepare and submit a proposed judgment within 10 days. Moving party is ordered to give notice.

The doctrine of equitable indemnity applies only among defendants who are jointly and severally liable to the plaintiff. It can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors. One factor is necessary, however. With limited exception, there must be some basis for tort liability against the proposed indemnitor. The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible. (Expressions at Rancho Niguel Assoc. v. Ahmanson (2001) 86 Cal.App.4th 1135, 1139; Gouvis Engineering v. Superior Court (1995) 37 Cal.App.4th 642, 646.)

UPTOWN has not alleged any direct claims against S&S based on conduct or direct liability to UPTOWN. Rather, UPTOWN's cross-complaint is based solely on indemnity-based claims, which requires a finding that S&S is somehow jointly and severally liable to plaintiff. There is no requirement that plaintiff actually allege a cause of action in the complaint that could have been stated against the indemnity cross-defendant. Rather, an indemnitee (here UPTOWN) "may seek apportionment of the loss on any theory that was available to the plaintiff upon which plaintiff would have been successful." (Gem Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal.App.3d 419, 430.) Cross-complaints for equitable indemnity are almost always transactionally related to the main action. However, a defendant's right to seek indemnity against a co-tortfeasor is not limited to the plaintiff's determination of which defendants should be included in the complaint. A plaintiff has no right to single out a particular defendant to bear all the loss. (Willdan v. Sialic Contractors Corp. (2007) 158 Cal.App.4th 47, 55-56.)

UPTOWN contends that plaintiff could have stated claims against S&S for negligence and/or negligent misrepresentation. This raises issues regarding whether S&S owed a duty to plaintiff related to the flooring and whether that duty was breached because, as alleged in the complaint, the flooring selected for her remodel, and sold by S&S, was not suitable for use as an entire floor. UPTOWN's argument in the opposition that, "If it is true that the flooring should not have been used for an entire floor . . .," is ambiguous and speculative but UPTOWN does not have the burden

of proving that the flooring was unsuitable, plaintiff does. Requiring UPTOWN to argue here that the flooring was unsuitable would be contrary to its interests in defending against plaintiff's claim. Thus, any lack of evidence in the opposition relating to the suitability of the cherrywood flooring as an entire floor is inapposite. There is a triable issue of material fact regarding whether the cherrywood was suitable for use as an entire floor versus merely for decorative accents.

However, in light of the fact that S&S is only named as a cross-defendant in UPTOWN's cross-complaint, UPTOWN has the burden of proving that S&S had a duty to disclose any unsuitability when selling the flooring. UPTOWN states in the opposition that "if" the flooring was not suitable "and if S&S Hardwood Flooring – which specializes in hardwood flooring – failed to bring this fact to Uptown's attention when it sold Uptown 69 boxes of the material, then this omission adversely affected Uptown's ability to 'consult with Spiegel in the selection of materials to be used in the remodel,' a failure alleged in the complaint, because Uptown could have otherwise recommended another material." (Opposition at pp. 4-5.) Other than the simple sale of 69 boxes of flooring material, no facts or evidence have been provided regarding any interaction between an S&S employee/representative and Boyce Godsey relating to the flooring, what it was intended for or how it was selected. To state a claim based upon the omission of a material fact, there must be an affirmative duty to disclose. No authority has been provided to show that S&S had an affirmative duty to disclose any particular information to UPTOWN regarding the flooring purchased.

UPTOWN's argument that plaintiff could allege a claim against S&S for negligent misrepresentation is not supported. The elements of negligent misrepresentation are: (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages. Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit. (B.L.M. v. Sabo & Deitsch (1997) 55 Cal.App.4th 823, 834.) Again, there is no allegation that an S&S representative made any statement, much less a false statement, to UPTOWN regarding the suitability of the flooring for any particular purpose.

An implied warranty of fitness for particular purpose arises only where the purchaser at time of contracting intends to use goods for particular purpose, the seller has reason to know of such particular purpose at time of contracting, the buyer relies on seller's skill or judgment to select or furnish goods suitable for particular purpose, and the seller at time of contracting has reason to know that buyer is relying on such skill and judgment. (Keith v. Buchanan (1985) 173 Cal.App.3d 13, 25.) Again, there is no contention whatsoever by UPTOWN that any of its agents or representatives communicated the intended use of the flooring to S&S or that S&S had reason to know that UPTOWN was relying on its skill and judgment in purchasing that particular flooring. In fact, when asked whether S&S sells any American cherry wood intended for use as borders or accents, S&S Sales Manager Juan Torres responded, "Borders – no." (UPTOWN Separate Statement, Fact No. 49.) There is nothing to show that the sale of 69 boxes of American cherry wood flooring was somehow unusual or would have put S&S on notice that the buyer was intending to use it in a manner for which it was not suited. Even if the trier of fact determines that the American cherry wood flooring was not suitable for use as an entire floor, there is no basis to find that S&S had a duty to disclose.

There is simply no basis to find that S&S had a duty to provide flooring to meet plaintiff's or UPTOWN's expectations, which were never directly communicated to S&S. S&S had no role in the design of plaintiff's home or selection of the materials to be used. Rather, it simply provided the product selected and ordered by UPTOWN. In making the selection, Boyce Godsey could not recall whether he ever investigated the physical properties of the American cherry wood and does not recall whether any inquiry was ever made regarding the attributes of American cherry hardwood.

UPTOWN requests that this motion be continued pursuant to CCP section 437c(h) in order to conduct expert discovery. If the opposing party shows by declaration that essential evidence may exist but cannot, for reasons stated, then be presented, the Court must deny the motion or

continue it for a reasonable period. (CCP section 437c(h).) To be entitled to a continuance, the party opposing the motion for summary judgment must show that its proposed discovery would have led to facts essential to justify the opposition. (Scott v. CIBA Vision Corp. (1995) 38 Cal.App.4th 307, 325-326.) A declaration in support of a request for continuance must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. Continuance of a summary judgment hearing is not mandatory when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing. In such cases, a continuance is discretionary. (Cooksey v. Alexakis (2004) 123 Cal.App.4th 246, 253-254.)

No declaration has been provided to support UPTOWN's request for a continuance. The declaration of UPTOWN's counsel, Paal H. Bakstad, filed along with the opposition papers, is silent as to the requested continuance. UPTOWN's argument that good cause for the continuance was already set forth in the declaration of Paal Bakstad in support of the March 21, 2011 ex parte application is not well taken, as it was not well taken in the summary judgment motion by Arborcraft. The ex parte application was denied. There is no explanation as to what discovery is outstanding and how it is necessary to the opposition. There is also no explanation why the discovery sought could not have been completed sooner. UPTOWN appears to be basing its argument on plaintiff's lack of expert evidence regarding the problem(s) with the hardwood floors, but there is nothing to show that UPTOWN conducted any of its own discovery to support the indemnity or other claims against S&S, brought into this action via the its cross-complaint. A lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing. Although the statute does not expressly mention diligence, it does require a party seeking a continuance to declare why "facts essential to justify opposition ... cannot, for reasons stated, then be presented" (CCP section 437c(h)), and courts have long required such declarations to be made in good faith. There must be a justifiable reason why the essential facts cannot be presented. An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. The statute itself authorizes the imposition of sanctions for declarations presented in bad faith or solely for purposes of delay. (CCP section 437c(j).) A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner. Again, there is simply no such showing here.

The motion of defendant Wood Crafters by S&S, Inc. dba S&S Hardwood Flooring & Supplies for summary judgment as to the cross-complaint of Uptown Interiors, Inc. is GRANTED. UPTOWN's request for a continuance pursuant to CCP section 437c(h) is DENIED.
