



LEXSEE 119 CAL. APP. 4TH 848

**BFGC ARCHITECTS PLANNERS, INC., Cross-complainant and Appellant, v.  
FORCUM/MACKEY CONSTRUCTION, INC. et al., Cross-defendants and  
Respondents.**

**G032543**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION THREE**

**119 Cal. App. 4th 848; 14 Cal. Rptr. 3d 721; 2004 Cal. App. LEXIS 979; 2004 Cal.  
Daily Op. Service 5466; 2004 Daily Journal DAR 7480**

**June 21, 2004, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Time for Granting or Denying Review Extended BFGC Architects v. Forum/Mackey, 2004 Cal. LEXIS 9281 (Cal., Sept. 24, 2004)

Review denied by, Request denied by BFGC Architects Planners, Inc. v. Forum/Mackey Construction Inc., 2004 Cal. LEXIS 9688 (Cal., Oct. 13, 2004)

**PRIOR HISTORY:** Appeal from a judgment of the Superior Court of Orange County, No. 02CC12061, C. Robert Jameson, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Cross-complainant, an architecture firm, appealed from a judgment of the Superior Court of Orange County (California) in favor of cross-defendant general contractors after their demurrers were sustained without leave to amend. The superior court held that the architecture firm's claims for implied indemnity required a predicate tort.

**OVERVIEW:** The architecture firm entered into a contract with a school district and agreed to prepare architectural drawings for and supervise construction of a high school. The district also entered into contracts with the general contractors for the site phase and construction phase. The district filed a complaint against the architecture firm for breach of contract and professional negligence. The architecture firm filed a cross-complaint, alleging that the contractors were negligent in failing to comply with the terms of their contracts with the district. The court held that the architecture firm's complaint did not state a cognizable claim on which to base equitable indemnity. Neither vicarious or strict liability nor implied contractual indemnity were alleged or existed. The architecture firm's allegation that the contractors breached their duties to the district by failing to comply with the terms of their contracts was not sufficient. Because the architecture firm did not suggest the prospect of amending the complaint until oral argument, the court

refused to consider the issue. The architecture firm failed to meet its burden to show it could plead different facts to cure the defects.

**OUTCOME:** The court affirmed the judgment.

**LexisNexis(R) Headnotes**

***Torts > Procedure > Multiple Defendants > Contribution > General Overview***

***Torts > Procedure > Multiple Defendants > Indemnity > Contractual Indemnity***

***Torts > Procedure > Multiple Defendants > Joint & Several Liability***

[HN1] Although the body of law defining and applying principles of equitable indemnity has not fully gelled but is still evolving, one thing is clear: The doctrine applies only among defendants who are jointly and severally liable to the plaintiff. Joint and several liability in the context of equitable indemnity is fairly expansive. It is not limited to the old common term "joint tortfeasor." It can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors.

***Torts > Procedure > Multiple Defendants > Contribution > General Overview***

***Torts > Procedure > Multiple Defendants > Indemnity > Noncontractual Indemnity***

***Torts > Vicarious Liability > General Overview***

[HN2] With limited exception, there must be some basis for tort liability against the proposed indemnitor. Generally, it is based on a duty owed to the underlying plaintiff, although vicarious liability and strict liability also may sustain application of equitable indemnity. In addition, implied contractual indemnity between the indemnitor and the indemnitee can provide a basis for equitable indemnity.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims***

[HN3] A plaintiff's pleadings control in ruling on a demurrer.

***Contracts Law > Breach > Causes of Action > General Overview***

[HN4] A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.

***Contracts Law > Types of Contracts > Settlement Agreements***

***Evidence > Judicial Notice > General Overview***

[HN5] The court of appeal may take judicial notice on its own motion.

***Civil Procedure > Appeals > Standards of Review > General Overview***

[HN6] The appellate court reviews the correctness of the trial court's order, not the reasoning underlying it.

***Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview***

***Civil Procedure > Appeals > Standards of Review > General Overview***

[HN7] In addition to determining that a pleading is defective, the appellate court must also consider whether the complaint is capable of being amended to state a cause of action. The burden is on the plaintiff to show there is a reasonable possibility it can do so.

*Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court*

*Civil Procedure > Appeals > Briefs*

*Civil Procedure > Appeals > Reviewability > Preservation for Review*

[HN8] The appellate court will not consider an issue not mentioned in the briefs and raised for the first time at oral argument.

## SUMMARY:

### CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district sued an architecture firm for breach of contract and professional negligence. The firm had entered into a contract with the district whereby the firm agreed to prepare architectural drawings for and supervise construction of a high school. The district also had entered into contracts with two contractors to act as general contractors for the site phase and construction phase, respectively. The firm filed a cross-complaint against the contractors, alleging that the contractors were negligent in failing to comply with the terms of their contracts with the district. The firm sought implied equitable indemnity, apportionment of fault/contribution, and declaratory relief for indemnity. The contractors each filed a demurrer and motion to strike the causes of action against them. The trial court sustained the demurrers without leave to amend, ruling that the negligence claim failed to state a cause of action because it sought purely economic damages. The equitable claims failed for that same reason and also because they were purely derivative of the negligence cause of action. (Superior Court of Orange County, No. 02CC12061, C. Robert Jameson, Judge.)

The Court of Appeal affirmed. The court held that one factor is necessary for the doctrine of equitable indemnity to apply. With limited exception, there must be some basis for tort liability against the proposed indemnitor. Generally, it is based on a duty owed to the underlying plaintiff, although vicarious liability and strict liability also may sustain application of equitable indemnity. In addition, implied contractual indemnity between the indemnitor and the indemnitee can provide a basis for equitable indemnity. However, the firm's cross-complaint alleging that the contractors failed to comply with the terms of their contracts with the district did not state a cognizable claim on which to base equitable indemnity. There were no facts alleged to support a finding that the contractors owed a tort duty to the district, the underlying plaintiff. Without any action sounding in tort, there was no basis for a finding of potential joint and several liability on the part of the contractors, thereby precluding a claim for equitable indemnity. The firm's failure to meet its [\*849] burden to show it could plead different facts to cure the defects in its cross-complaint precluded reversal on that ground. Thus, the trial court properly sustained the demurrers without leave to amend. (Opinion by Rylaarsdam, J., with Sills, P. J., and Fybel, J., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

**(1) Contribution and Indemnification § 8--Indemnity--Equitable Indemnity--Applications.**--The doctrine of equitable indemnity applies only among defendants who are jointly and severally liable to the plaintiff. Joint and several liability in the context of equitable indemnity is fairly expansive. It is not limited to the old common term "joint tortfeasor." It can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors.

**(2) Contribution and Indemnification § 8--Indemnity--Equitable Indemnity--Applications--Duty Owed to Underlying Plaintiff.**--One factor is necessary for the doctrine of equitable indemnity to apply. With limited exception, there must be some basis for tort liability against the proposed indemnitor. Generally, it is based on a duty owed to the underlying plaintiff, although vicarious liability and strict liability also may sustain application of equitable indemnity. In addition, implied contractual indemnity between the indemnitor and the indemnitee can provide a basis for equitable indemnity.

119 Cal. App. 4th 848, \*849; 14 Cal. Rptr. 3d 721, \*\*;  
2004 Cal. App. LEXIS 979, \*\*\*1; 2004 Cal. Daily Op. Service 5466

**(3) Pleading § 32--Demurrer to Complaint--Hearing and Determination.**--A plaintiff's pleadings control in ruling on a demurrer.

**(4) Contribution and Indemnification § 7--Indemnity--Equitable Indemnity--Breach of Duty to Underlying Plaintiff by Failing to Comply with Terms of Contract Not a Cognizable Claim on Which to Base Equitable Indemnity.**--An architecture firm's cross-complaint alleging that contractors on a school construction project breached their duties to a school district, the underlying plaintiff, by failing to comply with the terms of their contracts with the district was not a cognizable claim on which to base equitable indemnity.

[5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 89 et seq.]

**(5) Appellate Review § 126--Scope of Review--Correctness of Trial Court's Order Reviewed.**--The appellate court reviews the correctness of a trial court's order, not the reasoning underlying it. [\*850]

**(6) Pleading § 73--Amendment and Withdrawal--Time to Amend--After Appeal.**--In addition to determining that a pleading is defective, the appellate court must also consider whether the complaint is capable of being amended to state a cause of action. The burden is on plaintiff to show there is a reasonable possibility it can do so.

**(7) Appellate Review § 105--Briefs--Form and Requisites.**--The appellate court will not consider an issue not mentioned in the briefs and raised for the first time at oral argument.

**COUNSEL:** Collins, Collins, Muir & Stewart, Christine E. Drage, Jacqueline C. Pons-Bunney and Douglas Fee for Cross-complainant and Appellant.

Lang, Richert & Patch, Val W. Saldana and Tracy E. Sagle Benneyan for Cross-defendant and Respondent Forcum/Mackey Construction, Inc.

Case, Ibrahim & Clauss, Brian S. Case, F. Albert Ibrahim, Mark R. Guevara and Andrew C. Carlton for Cross-defendant and Respondent S.C. Anderson, Inc.

**JUDGES:** Rylaarsdam, J., with Sills, P. J., and Fybel, J., concurring.

**OPINION BY: RYLAARSDAM**

## OPINION

[\*\*722] **RYLAARSDAM, J.**--Cross-complainant BFGC Architects Planners, Inc. (plaintiff) appeals from a judgment entered in favor of cross-defendants Forcum/Mackey Construction Inc. (Forcum) and S.C. Anderson, Inc. (Anderson) (collectively defendants) after their demurrers were sustained without leave to amend. Plaintiff contends the court erred by holding that [\*\*\*2] its claims for implied indemnity required a predicate tort. We find the demurrers were correctly sustained without leave to amend and affirm.

## FACTS

Porterville Unified School District (district) and plaintiff entered into a contract whereby plaintiff agreed to prepare architectural drawings for and supervise construction of a high school. District also entered into contracts with Forcum and Anderson to act as general contractors for the site phase and construction phase, respectively. In its complaint against plaintiff for breach of contract and professional negligence, district alleged that after construction was completed, Anderson submitted a claim to district for more than \$ 11 [\*851] million, alleging "delays and disruptions stemming from [plaintiff's] defective design ... ." District paid Anderson just over \$ 4 million to settle the action; it also spent approximately \$ 717,500 in defense costs and more than \$ 2.1 million in change orders, many of which were caused by [plaintiff's] failure to perform its work expeditiously ... [or] with professional skill and care ... ."

Plaintiff filed a cross-complaint against several parties, including defendants. It alleged [\*\*\*3] defendants were negligent in failing to comply with the terms of their contracts with district and that they "breached their duties as to the standard of care" by failing "to administer, coordinate, construct, install, supervise, build, inspect and assemble [the] structures with reasonable skill and care" and by failing "to perform work and services in a timely manner." It further alleged these deficiencies caused "delays and disruption," led to the underlying dispute between district and Anderson, and caused plaintiff's damages. Plaintiff also sought implied equitable indemnity, apportionment of fault/contribution, and declaratory relief for indemnity.

Defendants each filed a demurrer and motion to strike the causes of action against them. Anderson argued the negligence claim failed to state a cause of action because it owed no duty to plaintiff in connection with plaintiff's performance obligations to district and because plaintiff claimed only purely economic damages. Anderson asserted the equitable causes of action [\*\*723] were based on the invalid negligence claim and could not stand alone.

Similarly, Forcum challenged the negligence cause of action, arguing it could [\*\*\*4] not be negligent as a matter of law because it had no agreement with plaintiff but had contracted only with district, and because the purely economic damages plaintiff sought were not recoverable. Forcum attacked the indemnity claim on the ground district had no cause of action against it, and the contribution and declaratory relief claims on the ground they could not stand without a valid underlying cause of action for negligence.

At the hearing, plaintiff agreed with the court's tentative ruling that the negligence cause of action failed based on the economic loss doctrine and limited its argument to the equitable claims. The court sustained the demurrers without leave to amend, ruling that the negligence claim failed to state a cause of action because it sought purely economic damages. The equitable claims failed for that same reason and also because they were purely derivative of the negligence cause of action.

#### [\*852] DISCUSSION

Plaintiff contends the court erroneously sustained the demurrers because it "misunderstood the term 'joint tortfeasor' ... ." It asserts that no " 'predicate' common law tort" is required to support its claim for equitable indemnity against [\*\*\*5] defendants. Rather, it argues, instead of looking at the allocation of fault, the focus should be on apportionment of the loss based on equity and good conscience. While these arguments have a surface appeal, on closer examination, they lack any factual underpinnings to sustain them in this case.

[HN1] (1) Although the body of law defining and applying principles of equitable indemnity has not fully gelled but is still evolving, one thing is clear: The doctrine applies only among defendants who are jointly and severally liable to the plaintiff. (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal. App. 3d 419, 430 [261 Cal. Rptr. 626].) As plaintiff maintains, joint and several liability in the context of equitable indemnity is fairly expansive. We agree it is not limited to "the old common term 'joint tortfeasor' ... ." It can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors. (*Yamaha Motor Corp. v. Paseman* (1990) 219 Cal. App. 3d 958, 964 [268 Cal. Rptr. 514].) [\*\*\*6]

(2) One factor is necessary, however. [HN2] With limited exception, there must be some basis for tort liability against the proposed indemnitor. (*Munoz v. Davis* (1983) 141 Cal. App. 3d 420, 425 [190 Cal. Rptr. 400].) Generally, it is based on a duty owed to the underlying plaintiff (e.g., *Yamaha Motor Corp. v. Paseman, supra*, 219 Cal. App. 3d at pp. 964-966; *Munoz v. Davis, supra*, 141 Cal. App. 3d at p. 425), although vicarious liability (*Fireman's Fund Ins. Co. v. Haslam* (1994) 29 Cal.App.4th 1347, 1356 [35 Cal. Rptr. 2d 135]) and strict liability (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal. Rptr. 380, 575 P.2d 1162]) also may sustain application of equitable indemnity. In addition, implied contractual indemnity between the indemnitor and the indemnitee can provide a basis for equitable indemnity. (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1028-1035 [269 Cal. Rptr. 720, 791 P.2d 290].) But neither vicarious or strict liability nor implied contractual indemnity are alleged or exist here. Thus, we are left with the requirement that defendants [\*\*\*7] owed a duty to district.

119 Cal. App. 4th 848, \*852; 14 Cal. Rptr. 3d 721, \*\*723;  
2004 Cal. App. LEXIS 979, \*\*\*7; 2004 Cal. Daily Op. Service 5466

[\*\*724] (3) And there are no facts to support this. Plaintiff argues that neither district's pleadings nor those of defendants can dictate the outcome. We agree, with the caveat that [HN3] plaintiff's pleadings control in ruling on a demurrer. (4) Here, plaintiff's own complaint torpedoes its claim. It [\*853] alleges defendants breached their duties to district by failing to comply with the terms of their contracts. This is not a cognizable claim on which to base equitable indemnity.

[HN4] "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, "[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies." [Citations.]" (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643 [101 Cal. Rptr. 2d 718, 12 P.3d 1125], superseded by statute on another ground as set out in *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079-1080 [135 Cal. Rptr. 2d 361, 70 P.3d 351].)

The only allegations [\*\*\*8] of defendants' misconduct are based on their alleged breach of contract, despite plaintiff's gloss that in doing so, they breached their duties. This is an improper attempt to recast a breach of contract cause of action as a tort claim. Nor is there any social policy that would demand resort to tort remedies. Without any action sounding in tort, there is no basis for a finding of potential joint and several liability on the part of defendants, thereby precluding a claim for equitable indemnity.

None of plaintiff's other arguments are on point. For example, the fact that district failed to sue the defendants is not why plaintiff's claim is barred. (*Yamaha Motor Corp. v. Paseman, supra*, 219 Cal. App. 3d at pp. 970-971.)

Nor are we basing the ruling on the district's prior settlement with Anderson. In its opening brief, plaintiff asked that we take judicial notice of the documents in a prior writ petition in this case (*BFGC Architects Planners, Inc. v. Superior Court* (Feb. 27, 2003, G031727) [summary denial by order]). The settlement agreement appears to be the reason for the request. However, plaintiff failed to file the required separate, noticed motion. (Cal. Rules of Court, rules 22(a)(1) [\*\*\*9] , 41(a); *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744 [122 Cal. Rptr. 2d 787].) While [HN5] we may take judicial notice on our own motion (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 37, fn. 2 [90 Cal. Rptr. 2d 15]), we decline to do so here. Plaintiff's argument that, by virtue of that settlement agreement, Anderson is controlling this action, thereby somehow giving plaintiff a right to equitable indemnity, lacks substance and is unpersuasive. In sum, we see nothing to compel us to change or expand the existing rule that bars plaintiff from recovering from defendants under the facts of this case.

(5) While our decision is not based on the exact same grounds as those articulated by the trial court, [HN6] we review the correctness of the order, not the reasoning underlying it. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th [\*854] 1443, 1451 [125 Cal. Rptr. 2d 277].) [HN7] (6) In addition to our determination the current pleading is defective, we must also consider whether the complaint is capable of being amended to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal. Rptr. 2d 709, 45 P.3d 1171] [\*\*\*10] .) The burden is on plaintiff to show there is a "reasonable possibility" it can do so. (*Ibid.*)

[HN8] (7) Plaintiff did not even suggest the prospect of amending the complaint until oral argument when it advised it would allege a tort if given leave to amend; no such argument was advanced in either the opening or reply brief. Too late. We will not [\*\*725] consider an issue not mentioned in the briefs and raised for the first time at oral argument. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [86 Cal. Rptr. 2d 209].) We deny plaintiff's request to file a postargument supplemental brief to raise this issue.

Plaintiff's failure to meet its burden to show it could plead different facts to cure the defects precludes reversal on that ground. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743 [1 Cal. Rptr. 2d 543, 819 P.2d 1].) The decision to sustain the demurrer without leave to amend was correct. (*Lee v. Bank of America* (1990) 218 Cal. App. 3d 914, 919-921 [267 Cal. Rptr. 387].)

119 Cal. App. 4th 848, \*854; 14 Cal. Rptr. 3d 721, \*\*725;  
2004 Cal. App. LEXIS 979, \*\*\*10; 2004 Cal. Daily Op. Service 5466

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Sills, P. J., and Fybel, J. [\*\*\*11] , concurred.

A petition for a rehearing was denied July 20, 2004, and appellant's petition for review by the Supreme Court was denied October 13, 2004.