

Calaveras Superior Court

Civil Law & Motion Calendar

Friday, March 5, 2021

Hon. David M. Sanders, Courtroom 2

9:00 AM 20CF13302 Demurrer & Motion to Strike 10/14/2020 10/20/2021 OSC Hearing

Ptff/Pet: Sam's Heating & Air Inc.

Atty: Gurstel Law Firm Pc

Def/Res: Pearce, Sandra; Sullivan, Deirdre

Atty:

Tentative Ruling Demurrer: On October 19, 2020, the complaint was filed. On January 29, 2021, defendants timely demurred.

Defendants' request for judicial notice for Exhibits A through C pursuant to Evidence Code sections 452 and 453 is GRANTED.

When an ambiguous contract is the basis of an action, it is essential for the plaintiff to allege its own construction of the contract. As long as the complaint does not place a clearly erroneous construction on the provisions of the contract, in passing upon the sufficiency of the complaint, the judge must accept as correct the plaintiff's allegations as to the meaning of the contract. (Rutherford Holdings, LLC v Plaza Del Rey (2014) 223 Cal.App. 4th 221, 229.)

Both parties agree Business and Professions Code §7159 applies in this matter. However, the parties disagree whether that makes the work order (as claimed by defendants) or the contract (as claimed by plaintiff) void. The Court relies on *Asdourian v Araj* (1985) 38 Cal.3d 276, wherein the California Supreme Court ruled that a "[v]iolation of section 7159 is a misdemeanor punishable by fine and/or imprisonment. Nothing in the statute declares that an oral contract entered into in a contravention of section 7159 shall be void. Whether the statute is to be interpreted as providing exclusive penalties depends upon the intent of the Legislature." (Id. at 291 - 292.) The Court further stated that "[a]lthough the penalties provided by section 7159 are no longer exclusive, there is no indication that the Legislature intended that all contracts made in violation of section 7159 are void. Absent an express statutory prohibition, other exceptions to the general rule that illegal contracts are unenforceable may be applied." (Id. at 292.)

The California Supreme Court concluded that "[i]n compelling cases, illegal contracts will be enforced in order to 'avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.'" (Id.)

Civil Code §1582 provides that if "a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases, any reasonable and usual mode may be adopted." Although defendants did not sign in the box provided on page 4, their signatures are located on page 1 under the financing information. The Court finds these overall signatures location to be reasonable and this discrepancy does void the contract.

Therefore, based on the foregoing, plaintiff has alleged sufficient facts to support a viable cause of action under California's liberal pleading practice and the demurrer to the first cause of action is OVERRULED.

Defendants' demurrer to the second cause of action also is OVERRULED. A common count does not assert a specific cause of action but rather pleads, in a simplified form, the existence of a monetary indebtedness. (*McBride v Boughton* (2004) 123 Cal.App.4th 379, 394.) To sufficiently plead a common count, the complaint need only allege: (1) a statement of indebtedness in a sum certain, (2) the consideration given, and (3) nonpayment. (*Famers Ins. Exch. V Zerlin* (1997) 53 Cal.App.4th 445, 460.)

For example, a cause of action for money had and received is sufficiently pleaded if the complaint alleges that defendant "is indebted to the plaintiff in a certain sum for money had and received by the defendant for use of the plaintiff." (Id.) Plaintiff has met this low threshold.

The clerk shall provide notice of this ruling to the parties forthwith. Plaintiff to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.

Tentative Ruling on Motion to Strike: On October 19, 2020, the complaint was filed. On January 29, 2021, defendants filed this motion.

Plaintiff concedes that the prayer for attorney's fees should be stricken. Therefore, defendants' motion is GRANTED as to the attorney's fees allegations and prayer.

The clerk shall provide notice of this ruling to the parties forthwith. Defendants to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.