

Santana v. Diaz
Hearing Date: March 20, 2024
Motion for Leave to File Cross-Complaint

22CV04554

TENTATIVE

On November 16, 2023, plaintiff Xavier Santana (plaintiff) filed an unlimited complaint against defendant Elizor Diaz (Ms. Diaz), alleging motor vehicle negligence. Briefly, Ms. Diaz was driving a 2016 Honda Accord on March 29, 2022, when she collided with a traffic control trailer, causing the trailer to spin and strike plaintiff, who was “setting up” the traffic control trailer in the course of his employment with Traffic Management Inc. Diaz answered on December 29, 2023. On August 24, 2023, plaintiff’s employer Traffic Management, Inc. filed a “first lien” on any judgment because of worker’s compensation payments made to plaintiff, pursuant to (as claimed in its notice) “Labor Code section 3852.”¹

On February 23, 2024, Diaz filed a motion for leave to file a cross-complaint pursuant to Code of Civil Procedure sections 426.5 [application for leave to file a compulsory cross-complaint], 428.10 [causes of action that can be raised in cross-complaint]; 428.20 [permitted joinder of person as cross-defendant]; and 428.50 [timed for filing cross-complaint and when leave of court required].) In a declaration submitted by Ms. Diaz’s attorney Brockenbrow, Ms. Brockenbrow declares that “the failure to file a cross-complaint for indemnity was not done with intent to mislead or otherwise deceive Traffic Management Inc. Defendant filed his answer more than eight months before Traffic Management Inc. appeared in this case. Through the course of discovery, new facts were revealed that suggest Claimant Traffic Management Inc had contributed to the occurrence of the incident and the injuries and damages of Plaintiff[,],” necessitating a cross-complaint for indemnity.

Some legal background seems warranted before addressing the propriety of the request. “There are no compulsory cross-complaints against parties other than plaintiff. Rather, the issue usually is whether a cross-complaint against such parties will be permissible.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023), Cross-Complaints, § 6:52.)² “A defendant can cross-complain against a codefendant or third person not yet a party to the action only if the cause of action asserted “(1) arises out of the *same transaction*, occurrence, or *series* of transactions or occurrences [set forth in the complaint] ... or (2) asserts a claim, right, or interest in the *property* or *controversy* which is the subject of the cause [of

¹ “The Labor Code [] permits an employer to recover workers’ compensation benefits it has become obligated to pay in three ways: “(1) bringing an action directly against the tortfeasor (§ 3852), (2) joining as a party plaintiff or intervening in an action brought by the employee (§ 3853), or (3) allowing the employee to prosecute the action and then applying for a first lien against the resulting judgment or settlement. (§ 3856(b).)” (*Duncan v. Wal-Mart Stores, Inc.* (2017) 18 Cal.App.5th 460, 469.) Although Traffic Management cites Labor Code section 3852 in support of its “first lien” in the submitted documentation, the appropriate statutory provision should be Labor Code section 3856, subdivision (b). (See also *Eli v. Travelers Indemnity Co.* (1987) 190 Cal.App.3d 901, 906 [Lab. Code, § 3586(b) allows an employer to seek a first lien against any judgment by plaintiff].)

² Technically, the moving party’s reliance of Code of Civil Procedure section 426.50, which applies to compulsory cross-complaints, is thus misplaced.

action] brought against him.” (Code. Civ. Proc., § 428.10, subd. (b) (emphasis added).) (*Id.* at § 6:525; see also Code Civ. Proc., § 428.20 [a party may join a nonparty through a cross-complaint if, had the cross cross-complaint been filed as an independent action, joinder of that party would have been permitted].) “Note that this is somewhat broader than the “same transaction-or-series rule” rule governing compulsory cross-complaints against plaintiff. Here, it is sufficient that the claims refer to the same controversy – even if not arising at the same time or out of the same series of events.” (Weil, *supra*, at ¶ 6:525.) Further, “defendants may cross-complain against any persons from whom they seek equitable indemnity. Defendants need only allege that the harm for which they are being sued is attributable, at least in part, to the cross-defendant [Citations omitted.]” (*Id.* at § 6:529; see also *Time for Living, Inc. v. Guy Hatfield Homes/All American Develop. Co.* (1991) 230 Cal.App.3d 30, 38 [cross-complaints for comparative equitable indemnity would appear virtually always transactionally related to the main actions].) Procedurally, pursuant to Code of Civil Procedures section 428.50, subdivisions (b) and (c), a cross-complaint with against any nonparty “may be filed at any time before the court has set a date for trial”; the moving party must seek leave of court, and the request “may be granted in the interest of justice at any time during the course of the action.”

At first blush it appears Ms. Diaz has satisfied these requirements. Her claims for apportionment (i.e., comparative fault) and partial equitable indemnity against this putative cross-defendant employer seem predicated on the same transaction at issue in the complaint (as raised by plaintiff employee). There is no reason to discount the explanations advanced by Ms. Brokenbrow in her declaration as to the timing of the request. The moving party has attached and or filed the proposed cross-complaint for consideration, satisfying all procedural requirements. All things being equal, the court would normally grant the motion.

All things are not equal, however. True, the court usually should not be concerned with the validity of the proposed cross-complaint in deciding whether to grant or deny the motion. (See, e.g., *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760 [the better course of action would be to allow an amendment to or a filing of a cross-complaint and then let the parties test its legal sufficiency in other appropriate proceedings, such as demurrer].) But the court nevertheless has discretion to do so, and more recent case authority, overlooked by the moving party as outlined below, has condemned the use of cross-complaints against an employer when an employee is injured on the job and sues a third party tortfeasor for causing those injuries – even when the employer has intervened (and thus, by logic, as here, sought a first lien against any judgment).

No doubt Ms. Diaz is entitled to an *offset* for any concurring negligence by the plaintiff's employer, for the purpose is to defeat the supposedly negligent employer's lien for workers' compensation benefits paid to the injured employee. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 71 [employer cannot recover worker's compensation benefits paid if the employer's negligence contributed to the employee's injury].) And it is true that Traffic Management, Inc., filed a “first lien” on any judgment/settlement secured by plaintiff, based on its worker's

compensation payments made to plaintiff employee. By the nature of the cross-complaint, Ms. Diaz is attempting to reduce the amount she may be liable to plaintiff – and as recouped by Traffic Management, Inc – through a cross-complaint based on Traffic Management Inc.’s alleged comparative fault and claims of equitable indemnity. “Even if the employer has not joined as a plaintiff in the employee’s action, filed a complaint in intervention or sought to interpose a lien, the defendant is *nonetheless* entitled to seek an offset based on the amount of the workers’ compensation benefits paid or owed on behalf of the employee in order to carry out the double recovery bar of *Witt v. Jackson*. ” (*Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1161–1162.) That is, to prohibit an employer from profiting from its own alleged wrong, the employer’s right to reimbursement is subject to being reduced or eliminated where the employer’s negligence contributed to the employee’s injury. The issue before the court at this time is how this offset can be effectuated, in light of Labor Code provisions that protect the employer who provides worker’s compensation benefits to an employee; can the issue be raised as an affirmative defense (requiring an amendment to the answer) or through a cross-complaint (as Diaz has attempted)?

The California Supreme Court has nevertheless expressly indicated that defendant’s offset in this regard **can be raised in the third party defendant’s answer to the employee’s complaint as an affirmative defense**. As noted in *American Construction & Engineering Co. v. Workers Comp. Appeals Bd.* (1978) 22 Cal.3d 829, 842, when the “issue of an employer’s concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer’s negligence as a partial defense, in the manner of *Witt*” (i.e., in the answer). (See also *Da Fonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 604, fn.6 [“ . . . Thus, even when the employer does not intervene to recoup benefits, the third party may assert the employer’s negligence as a partial defense . . . ”].)

Earlier published appellate cases indicated that a third party could file a *cross-complaint* against the employer for indemnity and contribution in these situations. (*Del Monte Corp. v. Sup.Ct. (Rockwell Int’l Corp.)* (1982) 127 Cal.App.3d 1049, 1053.) More recent published authority, however, taking the lead from the California Supreme Court above, have rejected the use of a cross-complaint as the appropriate procedural vehicle. *C.J.L. Const., Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 391, which involved a claim raised by a third party defendant tortfeasor against an employer in a declaratory relief cause of action, rejected the reasoning of “*Del Monte Corp.* and the dicta in other Court of Appeal decisions insofar as they support the conclusion that in this case [third party tortfeasor] could utilize the first amended cross complaint to litigate the amount of the *Witt v. Jackson* offset.” (*Id.* at p. 391.) According to the appellate court in *C.J.L.*, neither the employer nor the insurance carrier had filed a complaint in intervention. Second, “all of the third party defendants could, pursuant to [*American Construction* and *DeFonte*, *supra*] . . . raise the issue by way of an affirmative defense,” meaning “a trial judge may therefore dismiss a declaratory relief claim raising the

same questions in a cross-complaint.”³ Further, pursuant to Labor Code section 3864,⁴ the “purposes of the Worker’s Compensation Law would be contravened by permitting a third party to require the employer to undergo the expense of undertaking participation in a civil suit without its consent.” (*Ibid.*) The appellate court upheld the trial court’s grant of a motion for judgment on the pleadings for a declaratory relief cause of action raised in a cross complaint filed against the employer.

C.L.J Construction, Inc. was followed in *Difko Administration (US) Inc., v. Superior Court* (1994) 24 Cal.App.4th 126, which addressed the following issue directly: When an injured employee sues a third party defendant, not his employer, in tort, and the defendant wishes to raise the employer’s concurrent negligence, may the defendant file a cross-complaint against the employer alleging entitlement to a set-off or credit under the principles of *Witt v. Jackson*, supra? Or is the defendant limited to asserting the claim as an affirmative defense in its answer to the employee’s complaint, thus precluding the employer from being a party to the litigation? (*Id.* at p. 128.) The court rejected *Del Monte*, followed *C.J.L. Construction*, and concluded the trial court should have granted the employer’s motion to dismiss the cross-complaint, ultimately directing the third party tortfeasor to raise the issue in an answer. Critical to the *Difko*’s analysis were the following points: 1) it agreed with *C.J.L.* that *Associated Construction and DaFonte*, which did not expressly preclude cross-complaints, were nevertheless the appropriate guides; 2) the employer had made no effort to seek reimbursement, and thus, the issue could be raised as an affirmative defense, as there is “ample statutory means by which to obtain information from the non-litigant employer” through existing discovery provisions; and (most persuasively) 3) the worker’s compensation system rules operate to protect an employer from actual tort liability, but, as a general rule, from the expenses of that type of litigation. (*Id.* at pp. 132-134.) The *Difko* court concluded as follows: “In summary, we side with the *C.J.L.* court and hold that a third party defendant who wishes to establish his right to a *Witt v. Jackson* offset based on the employer’s concurrent negligence may only do so by raising the issue as defensive matter in his answer, in all cases in which the employer does not seek reimbursement for benefits provided to the employee by an independent action against the third party defendant, or by joining in the employee’s action as a party plaintiff, or by filing in the employee’s action a complaint in intervention, or applying therein for a first lien against the employee’s recovery, if any. The trial court therefore erred in denying Difko’s motions to dismiss.” (*Id.* at pp. 134–135.)

³ *C.J.L. Construction, Inc.*, noted that a “third party defendant need not sue an employer to prove its case. The Civil Discovery Act provides the litigants with more than adequate means to discover and prove at trial facts in the possession of a nonlitigant. [Citations.] A party to an action has the power to subpoena nonparty witnesses to testify at trial and to produce personal records.” (18 Cal.App.4th at p. 392.)

⁴ This provision provides: “If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.” (Lab. Code, § 3864.)

Note that these two cases predicated their conclusions in part on the fact the employer had not sought to intervene in the employee's lawsuit (or, as in this case, to seek alternatively a "first lien" against any judgment).

Intervention (and thus by logic the employer's attempt to secure a "first lien") was deemed irrelevant in *State of California v. Superior Court (Glovsky)* (1997) 60 Cal.App.4th 659. There, plaintiff employee sued a third party defendant tortfeasor following a traffic accident; defendant filed a cross-complaint against the employee's employer (the State of California), seeking indemnity and contribution, based on the employers supposed negligence; the State Compensation Insurance Fund filed a complaint in intervention to recover the worker's compensation benefits paid to the plaintiff. California filed a motion for judgment on the pleadings to the cross-complaint, which the trial court denied. California then filed a writ with the appellate court, which issued a stay, made the matter a cause, and addressed the following issue: "Does Labor Code section 3864 bar a third party litigant from cross-complaining against an employer for indemnity and contribution when the action is brought by plaintiff-employee of that employer who has been compensated by worker's compensation benefits provided by the employer?" (*Id.* at p. 661.)

Yes, determined *Glovsky* court. "*C.J.L Construction, Inc. v. Universal Plumbing, supra*, 18 Cal.App.4th 376, held that a cross-complaint for indemnification and contribution cannot be maintained where the employer or its carrier did not intervene in the lawsuit and the defendant raised the issue by answer. (See also *Difko Admin. (US) Inc. Superior Court*[, *supra*].) Both of these case point out the defendant's liability is still the same without the cross-complaint, and needed discovery consistent with due process may be reasonably obtained through the Discovery Act even though the employer is not a party. [¶] *Whether or not the employer has intervened in a lawsuit should not be determinative because Labor Code section 3864 prohibits suits against employers for reimbursement, or to enforce hold-harmless provisions, even where the employee, employer or both have prosecuted actions against a defendant.* Labor Code section 3864 has been held to apply to suits for equitable indemnity [citation], apportionment of fault, indemnity, and declaratory relief [citation].)" (*Id.* at p. 664, italics added.) "Therefore, the employer should have prevailed on the motion for judgment on the pleadings, and the policy of Labor Code section 3864 should not be circumvented even if a co-employee's alleged negligence could be theoretically imputed under respondeat superior." (*Id.* at pp. 664.665.)

As observed by one federal district court in summarizing existing California law: "*Glovsky* is the latest in a line of Courts of Appeal cases that have construed [Labor Code] section 3864 as eliminating an employer's third party liability under an equitable indemnity theory based on the reasoning that the employer is responsible solely for workers' compensation and is otherwise immune from tort liability." (*Hall v. North American Indus. Services, Inc.* (E.D. Cal., Oct. 11, 2007, No. 1:06CV00123 OWWSMS) 2007 WL 3020075, at *17, citing *Up-Right, Inc. v. Van Erickson* (1992) 5 Cal.App.4th 579, 582 [Lab. Code, § 3864 eliminates the employer's liability for equitable or implied indemnification of a third party tortfeasor].) The

Hall court went on to observe that the “[t]he California Supreme Court has agreed that this view of section 3864 fits most squarely with the express purpose of the workers' compensation laws as a “compensation bargain” where the employer assumes liability for industrial injuries without regard to fault in exchange for limitations on the amount of the liability,” citing *Employers Mutual Liability Ins. Co. v. Tutor-Saliba Corp.* (1998) 17 Cal.4th 632, 638 [the employer can be sued apart from the employee by the third party for indemnification if the employer has executed an indemnification agreement with the third party prior to the time of the injury; otherwise, Lab. Code § 3864 enforces exclusivity of worker’s compensation protections].) (*Hall, supra*, at p. 17.) In light of this authority, and as there was no written indemnity agreement, the *Hall* court concluded plaintiff’s employer “is not a proper party to the employee’s suit or to a third party indemnity/contribution claim.” (*Id.* at p. 18.)

Under this recent authority, the court tentatively denies the motion for leave to file a cross complaint for comparative fault and partial equitable indemnity against plaintiff’s employer, Traffic Management, Inc, as there is no suggestion of a written indemnity agreement between the moving party and Traffic Management, Inc. As in *Glovsky* (and as reinforced in *Hall*), Traffic Management, Inc. would not be a proper party to either the employee’s suit or any third party indemnity claim irrespective of whether of whether the employer requested intervention or submitted a first lien request as result of Labor Code section 3864, and Ms. Diaz can obtain discovery through numerous provisions of the Civil Discovery Act to support the affirmative defense. As a consequence, Ms. Diaz, will be permitted to file a request to amend her answer to the complaint, requesting comparative fault/equitable indemnity determinations against employer Traffic Management, Inc., as discussed in the same authority detailed above. The court recognizes that Ms. Diaz’s counsel failed to brief these issues in its motion, and will thus afford counsel an opportunity to address the issues orally at the hearing, at which time counsel may ask at the hearing (but not before) an opportunity to file supplemental briefing (but only if there is new authority on the issues presented not discussed in this order). Counsel should come prepared to discuss these issues.

The moving party is directed to appear at the hearing.