

PROPOSED TENTATIVE

On February 13, 2024, the court (in a detailed written order) denied plaintiff Constellation NewEnergy's motion for summary judgment without prejudice (even though there was no opposition). The background of the lawsuit, the nature of the pleading, and the claims advanced are detailed in the previous order, and will not be recounted here. Suffice it to say here that the sole cause of action in the operative pleading is for breach of contract, and the court had no real choice but to deny the motion because plaintiff failed to address in its separate statement the requirement that plaintiff perform all that was required under the contract, or show why performance was excused. The court directed plaintiff to renew the motion, with a new 75-day time period, in order to remedy the deficiency.

Plaintiff filed a "Renewed Motion" for Summary Judgment on February 13, 2023, for hearing on May 7, 2023. Plaintiff insists initially that it adequately raised the issue of its performance or excuse from performance in Undisputed Issue No. 3 of its initial separate statement, which provides as follows: "In response [to defendant's default on the first payment], notice of default was promptly given in writing to California Asphalt Production, Inc." Plaintiff then references the following evidence in support: 1) a declaration of Gail Rosen, a "Strategic Credit Analyst" employed by plaintiff; she was the custodian of records and familiar with the business dealings with defendant; she indicates that on March 9, 2021, the plaintiff and defendant entered into an agreement, requiring defendant to "make certain cash payments" of which \$439,620.35. Ms. Rosen declares that plaintiff "reasonably relied upon the execution of the Agreement in rendering its performance and forbearing from taking immediate action to collect the underlying debt"; she declares that when defendant defaulted on the first payment, a "notice of default" was promptly given to defendant, and no cure was made; 2) a declaration from Timothy Carl Aires, detailing the agreement and the nature of discovery between the parties (RFAs as Exhibits B and C), form interrogatories, set one (as Exhibit D and E; and 3) Exhibits A (the Settlement Agreement), Exhibit B ((4) RFAs), Exhibit C (defendant's objections and responses to the 4 RFAs); Exhibit D (plaintiffs' proffered form interrogatories, set one); and Exhibit E (defendant's responses and objections to form interrogatories, set one. Plaintiff insists that this evidence shows that its performance (or excuse to perform) was "in fact raised and disputed with"

Defendant (again) has not filed opposition. On April 30, 2024, plaintiff submitted a reply.

The court is not persuaded that plaintiff adequately addressed the issue of its performance requirements (or an excuse thereof) in its initial summary judgment motion. It is settled: "The plaintiff cannot enforce the defendant's obligation without first performing the conditions precedent imposed on plaintiff. . . ." (3 Witkin, California Procedure (6th ed. 2023); see

Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co. (2014) 231 Cal.App.4th 1131, 1147 [a “condition precedent is either an act of party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises].) Nothing in the identified documents satisfactorily addresses this requirement. The closest is the following statement in Ms. Rosen’s declaration, in which she declared as follows: “Constellation New Energy- Gas Division LLC reasonably relied upon the execution of the Agreement in rendering its performance and forbearing from taking immediate action to collect the underlying debt.” As required in CACI No. 303, plaintiff (to recover damages) must show, inter alia, that “plaintiff did all, or substantially all, of the significant things that the contract required” before a recovery is possible, or plaintiff was otherwise “excused from having” to do those things required. The court was left to guess (or at a minimum left to determine on its own) whether plaintiff performed all that it was required to perform pursuant to the settlement agreement at issue (or whether plaintiff’s performance was excused); nothing in the RFAs or form interrogatories addresses this requirement, informs the court what performance was required, and explains adequately whether such performance was satisfied or excused. It was wise for plaintiff to resubmit the summary judgment motion anew, with a new 75-day notice, which has been done.

As to the merits of the new summary judgment motion, the court initially grants defendant’s request to take judicial notice 1) of the number of days passed between March 9, 2021, and May 7, 2024 (1,151 days); and 2) based on prejudgment interest of 10% for breach of contract, at \$120.41 per day. From March 9, 2021, to May 7, 2024, totaling \$138,591.91.¹

Further, plaintiff has cured the earlier deficiencies in the new motion and new separate statement. As noted in the original order, “the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” (*Janney v. CSAA Ins. Exchange* (2021) 70 Cal.App.5th 374, 410; *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) “[T]he 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.” [Citation.]” (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1463; see also *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1153–1154.) “A plaintiff moving for summary judgment establishes the absence of a defense to a cause of action by proving ‘each element of the cause of action entitling the party to judgment on that cause of action.’ [Citation.] The plaintiff need not, however, disprove any affirmative defenses alleged by the defendant. [Citation.] Once the plaintiff’s burden is met, the burden of proof shifts to the

¹ Under Civil Code section 3287, a trial court must award prejudgment interest from the time there exists both a breach of contract and a liquidated claim. (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 293.) Pursuant to Civil Code section 3289, subdivision (b), if a contract is entered into after January 1, 1986, and the contract does not stipulate a legal rate of interest, “the obligation shall bear interest rate at a rate of 10 percent per annum after breach [of contract].” The parties did not stipulate to a rate should there be a breach.

defendant ‘to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.’ [Citation.] In meeting this burden, the defendant must present ‘specific facts showing’ the existence of the triable issue of material fact.” (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1081.)

Plaintiff has shown there are no disputed issues of material fact as to each element of the breach of contract cause of action. It has shown the existence of a contract (Separate Statement, Issue Nos. 1 and 2); plaintiff’s performance (this time demonstrating that plaintiff’s only performance requirement under the contract was payment and, when following default, affording defendant three (3) days to cure any default (Issues Nos. 3, 4, and 5); defendant’s breach (Issue No. 3, 7, and 8); and the resulting damages to plaintiff of \$439,620.35, together with prejudgment interest of \$138,591.59. Defendant, who was properly served at the addressed provided listed on its answer, has (again) not filed opposition, and has thus failed to present or identify any issue of disputed fact.

The court will grant plaintiff’s summary judgment motion and enter judgment in plaintiff’s favor.

Pursuant to California Rules of Court, 3.1308(a)(1) and Santa Barbara County Superior Court Local Rule 1301, the court does not require a hearing; oral argument will be permitted only if a party notifies all other parties and the court by 4:00 p.m. (Department 2) the day before the hearing of the party’s intention to appear. This tentative ruling will become the ruling of the court if notice of intent to appear has not been given. If no hearing is held, plaintiff is directed to provide a proposed order and judgment for signature commensurate with this tentative, with appropriate notice to defendant pursuant to California Rules of Court, rule 3.1312, which will then be signed and entered by the court