
PARTIES/ATTORNEYS

Plaintiff	The Residences at Depot Street L.P.	Christopher E. Haskell Ryan D. Zick Price, Postel & Parma LLP
Defendant/Cross- Complainant	Wallace Smith Contractors	Julie D. Testa, Esq., Tiffany C. Fowler, Esq. Lorber, Greenfield & Olsen, LLP _____ Randall D. Gustafson, Esq. Katie C. Brach, Esq. Lilly Walker, Esq. Lincoln, Gustafson & Cercos, LLP
Cross-Defendant	Cell-Crete Corporation Inc.	David L. Brault Law Offices of David L. Brault

TENTATIVE RULING

The requests for judicial notice are granted.

The motion for summary judgment is denied. The court finds the Commercial Code does not apply because the transaction does not involve a “good” within the meaning of Commercial Code section 2102, and even if it did, the moving party failed to produce evidence regarding the relative costs of the goods vs. services provided in the transaction, thus failing to sustain its burden of production on whether goods or services predominate. Based on the face of the contract, the court finds the contract was predominantly for services.

The court need not consider the objections to the declaration of Eric Domeier as it was not relevant to the decision.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote

Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

According to the separate statement, on July 18, 2018, Wallace Smith Contractors (Wallace) entered into a contract with The Residences at Depot Street, L.P. (The Residences or plaintiff) to construct an 80-unit apartment complex located at 201 and 205 North Depot Street in Santa Maria, California (Project). On August 27, 2018, Wallace and Cell-Crete Corporation (“Cell-Crete”) entered into a Subcontract Agreement wherein Cell-Crete agreed to “perform and furnish all of the work, labor, services, materials, plant equipment, tools, scaffolds, appliances, and all other things necessary for Gyp-Crete Levelrock.” Cell-Crete performed the work in November and December 2021 and was paid in full for its work. Wallace hired Templeton Flooring to install a luxury plank vinyl flooring over the gyp-crete on the second and third floors and the concrete slab on the first floor. Templeton notified Wallace & Smith of concerns with the gyp-crete and asked for additional money to level the floor with Ardex material. The Owner and Wallace chose to proceed without paying for the Ardex material. Templeton installed the floors after doing minimal Ardex floor leveling

On September 16, 2020, plaintiff recorded a Notice of Completion for the portion of the Project located at 201 Depot Street, stating that the work was completed on June 24, 2020. On October 27, 2020, plaintiff recorded a Notice of Completion for the portion of the Project located at 205 Depot Street, stating that the work was completed on September 22, 2020.

Plaintiff alleges that, on or around May 2021, after the completion of construction, it discovered that the finished floor at the Project—in the public and private areas of both buildings—was developing gaps at the end joints and was visually out-of-flat with noticeable high and low spots. It filed a First Amended Complaint on April 12, 2023, against Wallace for this defect, among others, alleging (1) Breach of Contract and (2) Negligence.

On October 24, 2022, Wallace filed a cross-complaint against Cell-Crete Corporation, Inc. alleging that it was the subcontractor on the Project responsible for the alleged defects. The cross-complaint alleges causes of action for: (1) equitable/partial/total indemnity; (2) express indemnity; (3) breach of contract re: workmanlike manner; (4) breach of contract re: insurance requirements; (5) breach of express and implied warranties; (6) declaratory relief: duty to defend; (7) declaratory relief: duty to indemnify; and (8) declaratory relief.

Cell-Crete now moves for summary judgment against Wallace on Wallace’s cross-complaint because Wallace accepted, and never revoked its acceptance of, Cell-Crete's construction goods. Cell-Crete contends that, pursuant to the California

Commercial Code, Wallace is barred from any remedy against Cell-Crete. Wallace contends that the Commercial Code does not apply, as the contract was for services, or alternatively, that there is an issue of fact whether the contract was for goods or services. Opposition and reply have been submitted.

All papers have been read and considered.

Requests for Judicial Notice

Cell-Crete requests the court take judicial notice of the following documents:

1. The Residences at Depot Street L.P. original complaint against Wallace & Smith filed June 22, 2022 (Ex. 1.)
2. Wallace & Smith's Answer and Cross-Complaint against Cell-Crete and others. (Ex. 2.)
3. Cell-Crete's answer to Wallace & Smith's Cross-Complaint (Ex. 3.)
4. The Residences at Depot Street L.P. First Amended Complaint (Ex. 4.)
5. Wallace & Smith answer to Plaintiff's First Amended Complaint (Ex. 5.)
6. Declaration of Paul Cooper submitted in support of Wallace & Smith's Motion for summary adjudication (Ex. 6.)
7. Templeton Floor Company Inc.'s Responses to Scope of Work and General Background Interrogatories (Ex. 7.)

Wallace & Smith requests the court take judicial notice of this court's order granting its Motion for Summary Adjudication as to Cross-Defendant Cell-Crete, entered on May 28, 2024.

There are no objections to the requests. The court thus grants them.

Summary Judgment Standards

We start with the familiar standards associated with summary judgment motions. A trial court properly grants a motion for summary judgment only if no triable issue exists as to any material fact, and the defendant is entitled to

judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 415.)

The moving party [here, the cross-defendant] bears the burden of showing the court that the plaintiff has not established, and cannot reasonably expect to establish, a prima facie case. (*Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, 620.) A defendant, as moving party, meets its burden of showing that a cause of action has no merit if it shows that “one or more elements of the cause of action . . . cannot be established, **or that there is a complete defense to the cause of action.**” (Code Civ. Proc., § 437c, subd. (p)(2), emphasis added; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849; see *Shiver v. Laramee* (2018) 24 Cal.App5th 395, 400 [a “ ‘defendant moving for summary judgment based upon the assertion of an affirmative defense . . . ‘has the initial burden to show that undisputed facts support each element of the affirmative defense’ . . . ”].)

Once a defendant has carried that burden, the burden shifts to the plaintiff “to show that a triable issue of one or more material facts exists as to the cause of action [or the defense]. . . .” (Code Civ. Proc., § 437c, subd. (p).) A court can find a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.)

Commercial Code

Here, Cell-Crete argues the Commercial Code offers a complete defense to this cause of action.¹ Sales of goods are governed by the California Uniform Commercial Code.² Division 2, entitled “Sales,” governs “transactions in goods.” (§ 2102.) “ ‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action.” (§ 2105.)

If the goods fail in any respect to conform to the contract, the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit and reject the rest. (§ 2601.) Rejection of goods must be made within a reasonable time after their delivery; it is ineffective unless the buyer seasonably notifies the seller. (§ 2602(1).) After rejection any exercise of ownership by the buyer with respect to any

¹ It is worth noting that this defense was not alleged in Cell-Crete’s Answer filed December 13, 2022. This arguably undermines the motion entirely. (See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 443-444—evidence offered on unpleaded claim, theory or defense irrelevant because outside scope of pleadings.) As plaintiff does not raise this issue in opposition, the court will address the merits.

² All future statutory references are to the Commercial Code unless stated otherwise.

commercial unit is wrongful as against the seller. (Comm. Code § 2602(2)(a).) If the buyer takes possession before rejection, she is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. (§2602(2)(b).) Right to refuse to accept goods and right to rescind after acceptance of goods must both be exercised within reasonable time. (*Garetto v. Almaden Vineyards* (1953) 118 Cal.App.2d 99.)

In determining whether a contract is one of sale or one to provide services, the court must look to the ‘essence’ of the agreement. When service predominates, the incidental sale of items of personal property does not alter the basic transaction. (*Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.* (1989) 208 Cal.App.3d 1297, 1305.)

“The test for inclusion or exclusion is not whether [goods and services] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).”

(*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1494 citing *Bonebrake v. Cox* (8th Cir. 1974) 499 F.2d 951, 960, fns. omitted.)

The court may compare the relative cost of the goods and services in the transaction and the purpose of the agreement to determine whether it is predominantly a sale of goods or transaction for services. (*C9 Ventures, supra*, 202 Cal.App.4th at 1494.)

While the UCC includes a definition for “goods,” it does not include a definition for services. However, case law has developed one. A contract for services involves the purchase of labor and the “knowledge, skill, and ability” of the contracting party. (*R Power Biofuels, LLC v. Chemex LLC* (N.D. Cal. 2016) 2016 WL 6663002, at *7; *TK Power, Inc. v. Textron, Inc.* (N.D. Cal. 2006) 433 F. Supp.2d 1058, 1062 (finding design of a prototype to involve a contract for services); see also *FiTeq Inc. v. Venture Corp.* (N.D. Cal. 2015) 2015 WL 3987912, at *6–7, at *6 (holding that the engineering and design of a “smart” credit card involves a contract for services, but that the manufacture of those cards for sale involves a contract for goods); see e.g., *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.* (1989) 208 Cal.App.3d 1297, 1305 (manufacture from negatives of release prints of a motion picture constitutes a service to the owner of the negatives and the manufacture and delivery of the resulting prints to the owner of the negatives does not constitute a sale of “goods” within the meaning of section 2105.) The court will use this as guidance in its analysis.

The Contract Was Not for the Sale of Goods

1. Whether the UCC is Applicable to the Transaction

The parties do not cite, and the court was unable to find, California opinions that consider how the Commercial Code applies to these factual circumstances. But because California adopted the Uniform Commercial, the court may consider decisions from other jurisdictions construing the statutory text. One important purpose of the Uniform Commercial Code is to make uniform the law among the various jurisdictions, and therefore courts generally afford great deference to the decisions of our sister jurisdictions interpreting its provisions. (See *Severin Mobile Towing, Inc. v. JPMorgan Chase Bank, N.A.* (2021) 65 Cal.App.5th 292, 303.)

2. Was the Product a “Good” for Purposes of the Commercial Code?

As noted, the Commercial Code provisions govern the sales of goods. Thus, the first question is whether the product here was a “good” for purposes of the Commercial Code.

The Subcontract Agreement provides:

[Cell-Crete] shall perform and furnish all of the work, labor, services, materials, plant equipment, tools, scaffolds, appliances, and other things necessary for Gyp-Crete Levelrock. [¶] **Description:** Provide materials, labor and equipment to install USG Levelrock Sound Reduction Board and USG Levelrock 2500 Gypsum Concrete at The Residences and Depot Street . . .”

(Sep. Stmt., No. 4; Russo Decl., Exh. A, ¶ 1.1.)

Under “Inclusions,” the Subcontract Agreement provided: “Scope of work to be performed at the second and third floors of Building 1 and Building 2 only, and to include:”

- Placement of perimeter isolation fabric along walls and penetrations, 15# vapor barrier building paper.
- Placement of USG Levelrock Sound Reduction Board, 3/8# thick.
- Placement of USG Levelrock 2500 Gypsum Concrete.

(Russo Decl., Exh. A, ¶ 1.1.)

Cell-Crete argues these provisions identify materials that are goods supplied by Cell-Crete. (Sep. Statement, Nos. 7-9.)

The comments to the UCC definition state that “[t]he definition of goods is based on the concept of movability.... It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.” (Official Comment, UCC § 2-105(1).) “Movability,” in turn, describes “[p]roperty that can be moved or displaced, such as personal goods; a tangible or intangible thing in which an interest constitutes personal property; specif., anything that is not so attached to land as to be regarded as a part of it as determined by local law.” (Black's Law Dictionary (12th Ed., 2024 [movable].))

Case law has developed the contours of this definition. Property that is destined to be affixed to real property does not necessarily preclude it from being classified as a good, particularly where it remains “movable.” Thus, a contract for the sale of equipment to reconstruct a fire damaged bowling alley (e.g., lane beds, ball returns, chairs, bubble ball cleaning machine, lockers, house balls, storage racks, shoes, and foundation materials) was a transaction in goods covered by Uniform Commercial Code despite the fact that substantial services were involved in the installation of the equipment in the buyers' bowling alley. (*Bonebrake v. Cox* (8th Cir. 1974) 499 F.2d 951, 960.) A fall protection equipment system was considered goods even though it was installed in a milling company's corn silos. The components were movable and shipped before installation. Even after the original installation, once the equipment failed in one silo, all equipment was uninstalled and shipped back to Ohio for analysis. (*Lorad, LLC v. Azteca Milling L.P.* (N.D. Ohio 2023) 670 F.Supp.3d 470, 490–491.)

In contrast, however, a roofing system did not qualify as “goods” under the UCC. Although the individual components of the roofing system (such as shingles, nails, or felt) would likely constitute movable goods under the UCC, the roofing system as a whole was constructed in place on plaintiffs' home such that it was always attached to the residence and was never an item of movable personal property. (*Rogers v. Restore Contracting, Inc.* (S.D. Ohio 2024) 721 F.Supp.3d 630, 641.)

Here, the instant factual situation more closely aligns with that in *Rogers* than the scenarios described in *Bonebrake* or *Lorad*. The court finds that while the individual components for constructing the concrete floor may constitute movables, once the floor has been poured, it is now attached to the project. It could not, for example, be returned in one piece in the event of failure. It is not “movable” in a similar way as the roof in *Rogers*. A floor appears very much like a roof for these purposes. Thus, the court finds the concrete floor is not movable and therefore does not qualify as a “good” under section 2105.³

³ The court acknowledges at least two cases that have held the sale of concrete to be delivered and poured at a construction site constituted goods for purposes of the UCC. However, neither case included any analysis and therefore neither are persuasive to the court. (See *S. M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 39 Ill. App. 3d 353, 350 N.E.2d 321; *Maryland Supreme Corp. v. Blake Company*, 369 A.2d 1017.)

3. Predominantly Goods or Services

Even assuming the item does qualify as a “good,” the court finds that Cell-Crete has failed to produce facts regarding the relative costs of the transaction. Thus, it failed to meet its burden of production on the issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826—moving party bears the initial burden of production to make a *prima facie* showing that there are no triable issues of material fact.)

The court may compare the relative cost of the goods and services in the transaction and the purpose of the agreement to determine whether it is predominantly a sale of goods or transaction for services. (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1494.) In *Pittsley v. Houser* (1994) 125 Idaho 820, for example, the court considered whether the UCC applied to carpet installation. It first acknowledged that “there is little dispute that carpets are ‘goods,’ [but] the transaction in this case also involved installation, a service.” It applied the “predominant factor” test as set forth above, noting that the test essentially involves consideration of the contract in its entirety, applying the UCC to the entire contract or not at all.⁴ The Idaho court held:

“The record indicates that the contract between the parties called for “165 yds Masterpiece # 2122—Installed” for a price of \$4319.50. There was an additional charge for removing the existing carpet. The record indicates that Hilton paid the installers \$700 for the work done in laying Pittsley's carpet. It appears that Pittsley entered into this contract for the purpose of obtaining carpet of a certain quality and color. It does not appear that the installation, either who would provide it or the nature of the work, was a factor in inducing Pittsley to choose Hilton as the carpet supplier. On these facts, we conclude that the sale of the carpet was the predominant factor in the contract, with the installation being merely incidental to the purchase.”

(*Id.* at 823.)

In *R Power Biofuels, LLC v. Chemex LLC* (N.D. Cal. 2016) 2016 WL 6663002, the district court determined for purposes of a motion to dismiss that a contract to design and engineer a biodiesel plant and engineer as well as manufacture and deliver the modular units of the plant was a contract predominantly for goods and that the Uniform Commercial Code applied. While this case hinged in part on the allegations in the complaint that seemed to concede the predominant purpose was for goods, as opposed to services, the court also was convinced by allegations that:

⁴ In doing so, it rejected the second line of authority that allows the contract to be severed into different parts, applying the UCC to the goods involved in the contract, but not to the services. (*Pittsley, supra*, 125 Idaho at 823.)

“[P]laintiff spent \$3 million to acquire the modular units and \$486,000 on pure services (\$76,000 for the February 14, 2012 Services Order and \$410,000 for design and engineering services). Thus, only about 14% of the total money spent on the contract was used purely for services. This proportion is comparable to the proportion in *Pittsley v. Houser*, 125 Idaho at 820, a case cited approvingly in *C9 Ventures*, 202 Cal. App. 4th at 1494. In *Pittsley*, the court found that the sale of goods predominated when the services were approximately 16.2% of the total cost. *Pittsley*, 125 Idaho at 823 (of \$4319.50 total spent on carpeting, \$700 was spent on installation).”

(*Chemex, supra*, 2016 WL 6663002, *8; see also, *Niagara Bottling, LLC v. Rite-Hite Company, LLC* (C.D. Cal. 2019) 2019 WL 1768875, at *7—finding contracts between the parties were predominantly for goods (dock levelers), rather than services (installation) where the quoted price for installation was roughly less than a quarter of the total contract price.)

Here, Cell-Crete concedes it provided installation services. (Sep. Statement, Fact Nos. 4, 6 – 9.) It nevertheless argues it predominantly provided goods for this transaction. It has provided no facts regarding the relative costs of the transaction. As case law has demonstrated this to be the critical test when attempting to resolve this issue, the absence of such evidence undermines Cell-Crete’s position.⁵

Moreover, it appears from the language of the contract itself that its predominant purpose was for installation services. The contract itself describes the work as follows: “perform and furnish all of the work, labor, services, materials, plant equipment, tools and all other things necessary for Gyp-Crete Levelrock.” It continues by specifying that the subcontractor was to “provide materials, labor and equipment to install USG Levelrock Sound Reduction Board and USG Levelrock 2500 Gypsum Concrete . . .” Each subcategory under the scope of work to be performed all identified “placement” of the product. Although these provisions expressly require Cell-Crete to furnish material, they primarily describe installation of the product (e.g., “work,” “labor” “services,” “equipment,” and “tools,” required for installation). Moreover, other provisions in the contract are hallmarks of a service contract rather than provision of goods. The work was to be completed per the contractor’s construction schedule (Russo Decl., Exh. A, ¶ 1.1) and was required to be completed within 45 days. (Russo Decl., Exh. A, ¶ 3.1.) The job was paid by progress payments from which a reserve was withheld. (Russo Decl., Exh. A, ¶ 5.1.) These provisions are indicia of a contract that is predominantly for service. Thus, even if the court found the subject of the contract to be for goods and services, it also finds the contract is predominantly for services.

⁵ Cell-Crete itself acknowledged this test for determining predominance in its opening brief. (See Motion, p. 10, ll. 8-10.)

As such, the Commercial Code does not apply and Cell-Crete's defense (e.g., that Wallace failed to reject the goods within a reasonable time pursuant to the Commercial Code) fails. This decision is made as a matter of law and therefore the court need not address Cell-Crete's objections to the declaration of Eric Domeier.⁶

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

⁶ The reply asserts that Wallace & Smith presented no admissible evidence to refute the contract was for the sale of goods.