# Tentative ruling in department 31 on Aug. 16, 2024 in Los Angeles County, CA - Case no: 21STCV23784

**CASE NAME:** GH PALMER, INC., A CALIFORNIA CORPORATION, ET AL. VS AQUATHERM, L.P., A LIMITED PARTNERSHIP, ET AL.

**CASE NO.:** 21STCV23784

On August 16, 2024, Los Angeles County Superior Court Department 31, issued the following tentative ruling.

The Reference Case No.: 21STCV23784 Los Angeles County, California. Hearing Date 08.16.2024.

View Case Records and Case History

Case Number: 21STCV23784 Hearing Date: August 16, 2024 Dept: 31 Tentative Ruling

Judge Kerry Bensinger, Department 31

HEARING DATE:
August 16, 2024
TRIAL DATE: Not set

CASE: GH Palmer, Inc., et al. v. Aquatherm, L.P., et al.

CASE NO.: 21STCV23784

DEMURRER TO CROSS-COMPLAINT WITHOUT MOTION TO STRIKE

MOVING PARTY: Plaintiff/Cross-Defendant GH Palmer, Inc.

RESPONDING PARTY: Defendants/Cross-Complainants Aquatherm GMBH Aquatherm L.P., AETNA NA, L.C. fa Aquatherm NA, LC

I. INTRODUCTION

On June 25, 2021, Plaintiffs, GH Palmer, Inc., Palmer/Flower Street Properties (GH Palmer) and GHP Management Corporation, initiated this action against Defendants Aquatherm, L.P., AETNA NA, L.C., and Aquatherm GMBH for (1) Breach of Express Warranty, (2) Strict Products Liability Manufacturing Defect, and (3) Strict Products Liability Design Defect. GH Palmer, a real estate developer, owns and operates apartment complexes known as The Lorenzo, the Da Vinci, and Broadway Palace (the Subject Properties). The Complaint alleges that Defendants sold defective Aquatherm piping to Plaintiffs which were installed in the Subject Properties. The pipes were sold with a warranty, which Defendants have refused to honor.

On February 23, 2024, Defendants filed a Cross-Complaint against GH Palmer, Inc. and GJM Engineering, Inc. (GJM) for (1) Negligence, (2) Contribution, and (3) Implied and Equitable Indemnity. The Cross-Complaint alleges as follows: GJM is a plumbing contractor that installed the allegedly defective piping in the Subject Properties. After construction on the Lorenzo was completed, Aquatherm L.P. identified and advised GH Palmer and/or GJM that GJM used improper installation methods, system design, system maintenance, and system operations for the Aquatherm piping.

On May 9, 2024, GH Palmer filed this Demurrer to the Cross-Complaint.

Defendants filed an opposition. GH Palmer replied.

II.
LEGAL STANDARD

A demurrer for sufficiency tests whether the complaint states a cause of action.¿ (Hahn v. Mirda (2007) 147 Cal.App.4th 740, 747.)¿

When considering demurrers, courts read the allegations liberally and in context, accepting the alleged facts as true.¿ (Nolte v. Cedars-Sinai Medical Center (2015) 236 Cal.App.4th 1401, 1406.)¿ Because a demurrer challenges defects on the face of the complaint, it can only refer to matters outside the pleading that are subject to judicial notice.¿ (Arce ex rel. Arce v. Kaiser Found. Health Plan, Inc. (2010) 181 Cal.App.4th 471, 556.)¿

III. DISCUSSION

A.
Meet and Confer¿¿
¿
Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person, by telephone, or by video conference with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.¿(Code Civ. Proc., § 430.41, subd. (a).) Plaintiffs counsel has complied with the meet and confer requirement.¿ (See Declaration of Elliott Z. Chen, ¶ 3.)
¿
B.
Analysis¿

GH Palmer demurs to each cause of action in the Cross-Complaint. The court addresses each in turn.

1.
Negligence (1st Cause of Action)

The elements for a cause of action for negligence are well established. They are (a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury. (Ladd v. County of San Mateo (1996) 12 Cal.4th 913, 917.)

Defendants negligence claim can be summarized as follows: GH Palmer and GJM negligently, carelessly, and wrongfully failed to use reasonable care in the design, development, manufacture, supervision, maintenance, repair, supply of materials, installation, inspection, and/or construction of the Subject Properties. (Cross-Complaint, ¶¶ 16, 22.) GH Palmers claims and damages are a result of GH Palmer and GJMs own negligent conduct. Because GH Palmer was negligent in maintaining, installing, and operating the Aquatherm piping, Cross-Defendants have suffered damages by expending money on consultants fees to inspect, repair, and mitigate damages arising out of said negligent design, construction, repair, and maintenance and to defend this action. (Cross-Complaint, ¶¶ 16, 17, 24.)

GH Palmer argues the negligence claim fails because the duty and damages elements are not met. The court agrees with these observations. The crux of Defendants negligence claim is that GH Palmer had a duty as a developer of the Subject Properties to ensure that Defendants recommendations for the installation of Aquatherm green piping were observed. This position is unsupported by the law. Defendants do not cite any authority for the proposition that the user of a product owes a duty to the manufacturer to follow the manufacturers recommendations. Instead, Defendants appear to create a duty where none exists.

Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318 (Mega RV) is instructive. There, the Ertzes purchased a motor home from retailer Mega RV, which they claimed was defective. (Id. at p. 1322.) Mega RV cross-complained against HWHa component part manufacturerfor total or partial indemnification. HWH, in turn, cross-complained against Mega RV, asserting that Mega RV was negligent in the servicing of the Ertzes motor home, thereby causing HWH to incur damages (i.e., its attorneys fees in the underlying action). (Id. at p. 1338.) After a bench trial, the trial court awarded damages against Mega RV on HWHs cross-complaint. The Court of Appeal reversed, holding that [t]he most fundamental problem with this line of argument is that Mega RV did not owe a duty of care to HWH in connection with its servicing of the Ertzes motor home. (Id. at p. 1339.) The Court rejected the manufacturers position as a matter of law because [the manufacturer] did not suffer personal injury or injury to other property as a result of [the repairers] alleged tort. (Id. at p. 1338.)

Like Mega RV, GH Palmer did not owe a duty of care to Defendants to properly maintain, install, or operate the Aquatherm green piping at the Subject Properties. Defendants attempt to distinguish Mega RV by pointing to other alleged breaches of GH Palmers duty of care, including the duty to follow manufacturer instructions,[1] the duty to follow industry standards, and the broader duty

to act reasonably. But the point remains; Defendants do not establish that GH Palmer owed any duty to Defendants.[2] The failure to sufficiently allege the element of duty is fatal to the claim.

GH Palmers challenge to the element of damages is likewise meritorious. Defendants cannot suffer damages where no duty existed. Further, Defendants alleged damages are purely economic losses in the form of litigation costs, attorneys fees and consultants fees. (Cross-Complaint, ¶ 24.) In general, there is no recovery in tort for negligently inflicted purely economic losses, meaning financial harm unaccompanied by physical or property damage. (Sheen v. Wells Fargo Bank, N.A. (2022) 12 Cal.5th 905, 948.) An actor has no general duty to avoid the unintentional infliction of economic loss on another. (Id. (quoting Restatement (Third) of Torts: Liability for Economic Harm § 1); accord S. California Gas Leak Cases (2019) 7 Cal.5th 391, 414.) Consultant fees are also unrecoverable. This is so because Defendants allege that it paid for troubleshooting and repairs out of goodwill. (Opp., p. 9:16-17.) By definition, goodwill payments are voluntary payments. California law is clear that [p]ayments voluntarily made, with knowledge of the facts, cannot be recovered. (W. Gulf Oil Co. v. Title Ins. & Tr. Co. (1949) 92 Cal.App.2d 257, 265; accord, Steinman v. Malamed (2010) 185 Cal.App.4th 1550, 1557.) Accordingly, Defendants cannot recover damages. The negligence claim fails.

2.
Contribution (2nd Cause of Action)

Equitable contribution is the right to recover from a co-obligor who shares liability with the party seeking contribution. (Firemans Fund Ins. Co. v. Md. Cas. Co. (1998) 65 Cal.App.4th 1279, 1293.) A right of contribution requires: 1) two or more parties jointly at fault; 2) common liability between or among those parties because of that fault; and 3) one party paying an unequal portion of the common liability. (4 Restatement (Second) of Torts § 886A. Rev. 191, 240.) Contribution requires a joint obligation. (Civ. Code, § 1432.) An action to enforce the right of contribution is governed by equitable principles. (Overholser v. Glynn (1968) 267 Cal.App.2d 800, 807; Jans v. Nelson (2000) 83 Cal.App.4th 848, 855.) Contribution presupposes a common liability which is shared by joint tortfeasors on a pro rata basis. (Rollins v. State of California (1971) 14 Cal.App.3d 160, 165.)

Defendants alleges that [i]f it is determined that Cross-Complainant is liable to any party for any part of their alleged damages, then Cross-Defendants, and each of them, are jointly liable and obligated to contribute toward the payment or repayment of said damage according to their respective proportions. (Cross-Complaint, ¶ 26.)

GH Palmer argues the contribution claim fails because it is not ripe. The point is well taken. Code of Civil Procedure section 875 provides that [w]here a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided. (Code Civ. Proc., § 875, subd. (a).) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or paid more than his pro rata share thereof. (Code Civ. Proc., § 875, subd. (c), emphasis added.) In other words, [a] right of contribution can come into existence only after rendition of a judgment declaring more than one defendant jointly liable to the plaintiff. (Coca Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal.App.4th 1372, 1378.) Defendants cannot sustain their contribution claim where, as here, no money judgment has been rendered.

Defendants attempt to avoid this result by arguing that a contribution cause of action could arise because a judgment could result against a joint tortfeasors. But Defendants own conditional language confirms that they do not yet have a contribution claim. (See Cross-Complaint, ¶ 26.)

3.
Implied and Equitable Indemnity (3rd Cause of Action)

The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible. (Expressions at Rancho Niguel Assn v. Ahmanson Developments, Inc. (2001) 86 Cal.App.4th 1135, 1139 (italics in original).) To sustain a claim for equitable indemnity, there must be some basis for tort liability against the proposed indemnitor. (Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp. (2006) 143 Cal.App.4th 1036, 1040.) Generally, it is based on a duty owed to the underlying plaintiff [citations], although vicarious liability [citation] and strict liability [citation] 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. (BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 119 Cal.App.4th 848, 852.) [T]there can be no indemnity without liability. (Prince v. Pac. Gas & Elec. Co. (2009) 45 Cal.4th 1151, 1156.)

Here, the third cause of action fails for the same reason as the negligence claim: the missing element of duty. The Cross-Complaint likewise fails to show any other ground such as vicarious liability, strict liability, or a contractual relationship that might sustain Defendants indemnity cause of action. The third cause of action is deficient.

IV. CONCLUSION

Based on the foregoing, Plaintiff and Cross-Defendant GH Palmer, Inc.s Demurrer to Defendants and Cross-Complainants Aquatherm GMBH Aquatherm L.P., AETNA NA, L.C. fa Aquatherm NA, LCs Cross-Complaint is SUSTAINED.

Leave to amend is DENIED.

Demurring party to give notice.

Dated: August 16, 2024

Kerry Bensinger
Judge of the Superior Court

[1] Defendants cite Business & Professions Code section 7109 for the proposition that GH Palmer owed a duty to Defendants to follow product recommendations. Their reliance on Section 7109 is misplaced. As stated in section 7109, willful departure in any material respect from accepted trade standards or disregard of plans or specifications constitutes a cause for disciplinary action. Defendants do not cite any authority for the proposition that section 7109 creates a duty to a manufacturer to follow its instructions and recommendations.

As Plaintiff points out, Defendants appear to be relying a version of negligence per se by invoking a purported violation of Section 7109. However, to establish liability for negligence per se, the plaintiff must show [t]he death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent and that [t]he person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (Evid. Code § 669(a)(3)-(4); Jones v. Awad (2019) 39 Cal.App.5th 1200, 1210.) The Contractors State Licensing Law (which includes Section 7109) is designed to protect consumers and the public from dishonest or incompetent contractors. (ACCO Engineered Sys., Inc. v. Contractors State License Bd. (2018) 30 Cal.App.5th 80, 88.) Defendants have not alleged death or injury to its person or property and does not fall into the class of persons that Section 7109 was designed to protect.

[2] Defendants claims are most appropriately asserted as defenses to GH Palmers FAC. And indeed, Defendants have asserted GH Palmers comparative fault and contributory negligence as defenses. (See Answers to the FAC, filed on 2/23/24.) Under these circumstances, Defendants cannot reframe its defenses as affirmative causes of action.

## Case Info

**CASE NO.**
21STCV23784

**HEARING DATE**
August 16, 2024

**COUNTY**
Los Angeles County, CA

**DEPARTMENT**

31

**DOCKET FILING DATE**
June 25, 2021

## Parties

AETNA NA L.C.
(Defendant)

AETNA NA L.C. A UTAH CORPO...
(Defendant)

AQUATHERM GMBH
(Defendant)

AQUATHERM GMBH A GERMAN CO...
(Defendant)

AQUATHERM L.P.
(Defendant)

AQUATHERM L.P. A LIMITED P...
(Defendant)

COHEN ANNE
(Attorney For Defendant)

DUNN BRIAN C.
(Attorneys for Defendants)

EDIC WILLIAM S.
(Attorney For Defendant)

Elliot Chen
(Attorneys for Plaintiffs)

GH PALMER INC.
(Plaintiff)

GH PALMER INC. A CALIFORNI...
(Plaintiff)

GHP MANAGEMENT CORPORATION
(Plaintiff)

HAAS JASON L.
(Attorneys for Plaintiffs)

LUHRING SUSAN E.
(Attorneys for Defendants)

PALMERFLOWER STREET PROPER...
(Plaintiff)

PALMERFLOWER STREET PROPER...
(Plaintiff)

Robert Waxman
(Attorneys for Plaintiffs)

## Other rulings in case