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LOS ANGELES SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

EAST DISTRICT

BY FAX

CALMAT CO. dba VULCAN MATERIAL COMPANY, WESTERN DIVISION, a Delaware corporation, Plaintiff, vs. SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation; and DOES 1-1000, inclusive, Defendants.	CASE NO: KC062582J **DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER TO PLAINTIFF'S COMPLAINT** ***Pursuant to CCP § 430.10*** Hon. Dan T. Oki, presiding Date: March 8, 2012 Time: 8:30 a.m. Dept.: J Action Filed: November 22, 2011 Trial Date: None

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Defendant San Gabriel Valley Gun Club ("Defendant" or the "Club") submits the following Reply to Plaintiff Calmat Co. dba Vulcan Materials Company, Western Division's ("Plaintiff" or "Vulcan") Opposition to Defendant's Demurrer.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The facts pleaded in the Complaint on file herein show that Vulcan knowingly and repeatedly leased the Azusa Property to the Club for the express purpose of operating a shooting range. After over a half-century of silence, Vulcan is making claims under contracts and tort law theories that belie the terms of the relevant leases and California law. It is upon that background that the Club brought its Demurrer. The Demurrer should be sustained for the reasons stated in the Club's briefing.

II. THE CLUB'S DEMURRER SHOULD BE SUSTAINED

A. The Statutes of Limitations Have Not Been Sufficiently Tolled to Save Certain of Vulcan's Claims

In arguing that all of Vulcan's claims are preserved through tolling, Vulcan contends that the Club "conveniently ignores the applicable statutes which toll the statute of limitations in this instance." (Opp. at p. 3, lns. 26-27.) But the Club's moving papers did, in fact, presume that "Vulcan relie[d] on the federal tolling statute codified at 28 U.S.C. section 1367, subdivision (d)[.]" (Dem. at p. 3, lns 3-5; *see also* Dem. at p. 3, fn. 4, quoting the text of 28 U.S.C. § 1367 (d).) The Club's moving papers further explained how the court in *Kolani v. Gluska*, 64 Cal.App.4th 402, 409 (1998) interpreted the federal tolling statute of 28 U.S.C. § 1367 in conjunction with the "equitable tolling doctrine" found in state case law. (Dem. at p. 3-4.) Vulcan's claim that the Club has "ignored" the applicable tolling statutes is bewildering.

Vulcan is also incorrect in its conclusions both that the statutes of limitations were tolled until February 20, 2012 and that the federal tolling statute can provide more than thirty days following the dismissal of a federal complaint for refiling in state court.

1. Vulcan Is Mistaken as to the Effect of the Court's August 22, 2011 Order

Vulcan argues that the statutes of limitations for each of its causes of action remained tolled until at least February 20, 2012 because "[i]n interpreting the applicability of the Federal Tolling Statute, the California Court of Appeal [has] ruled that the tolling period does not end, and a federal case remains pending, until the time to appeal has expired." (Opp. at p. 4, lns. 15-17 (emphasis omitted) (citing *Okoro v. City of Oakland*, 142 Cal. App. 4th 306, 313 (2006).) Vulcan is mistaken.

In *Okoro*, the Court of Appeal noted that "federal Courts of Appeals have jurisdiction over only the final decisions of the district courts." *Okoro*, 142 Cal. App. 4th at 312-13. The *Okoro* court ruled that, for purposes of 28 U.S.C. § 1367, the particular action before that court remained pending "at least through the time for filing an appeal from the court's final order disposing of the entire action." *Id.* The order at issue in *Okoro* was *not* a"final order disposing of the entire action[,]" however, it was an order that "adjudicate[d] the rights and liabilities of fewer than all parties[, which is] is not final or appealable under [title 28 United States Code] § 1291[.]" *See id.*

Here, the federal court dismissal Order issued August 22, 2011, stands in stark contrast with the order discussed in *Okoro*. The Order of August 22, 2011 granted the Club's Motion for Summary Judgment, dismissing the Complaint and all Counterclaims in their entirety and as to all parties for lack of subject matter jurisdiction. (Exhibit 1 to Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition to Defendant's Demurrer and Motion to Strike at p. 12, line 24 to p. 13, line 1.) The federal court, thus, directed the "Clerk of the Court . . . to enter [the] Order, enter Judgment of dismissal without prejudice for lack of jurisdiction, furnish copies to counsel, and close [the] file." (*Id.* at p. 13, lines 8-10.)

Under 28 U.S.C. § 1291, the federal courts of appeals "have jurisdiction of appeals from all final decisions of the district courts . . . ." For purposes of section 1291, a decision of a district court is final and appealable if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (citations omitted). In this case, the August 22, 2011 Order of the federal court directed that all claims between the parties be dismissed and left nothing to the Clerk but to enter a judgment so holding. The August 22, 2011 Order, therefore, was appealable. It is immaterial whether the court ever entered a judgment on a separate document. As noted by the Ninth Circuit Court of Appeals, an order disposing of all issues and leaving nothing for the court to do but enter Judgment is appealable; a failure of the clerk to enter such a separate judgment extends the time for which an appeal may be filed, but it does not prevent filing of the appeal after the order and before entry of the separate judgment. *Peng v. Mei Chin Penghu*, 335 F.3d 970, 975 & n.4 (9th Cir. 2003).

Under *Kolani v. Gluska*, 64 Cal.App.4th 402 (1998), discussed further below, to obtain the benefit of the federal tolling statute codified at 28 U.S.C. section 1367, pendent state law claims must be refiled in state court within thirty days of their dismissal from federal court. *Okoro* holds that the thirty-day time frame for refiling cannot begin until there is a final, appealable order. Here, the August 22, 2011 Order was a final dismissal appealable on entry. In contrast, there was no appealable order in *Okoro* until thirty days before the time to appeal expired.

Here, even assuming the time to appeal the August 22, 2011 Order was arguably extended by the failure of the clerk to enter a separate judgment, that does not change the fact that *Kolani* requires refiling in state court within thirty days of a dismissal – not within thirty days of the clock beginning to tick for the filing of a timely notice of appeal. Indeed, the *Kolani* court itself held that the state case must be filed thirty days after a federal order of dismissal when the federal case did not have a judgment entered as a separate document. (See Civil Docket for Case #:2:94-cv-06499, Exhibit A to Accompanying Request for Judicial Notice in Support of Reply (showing a 6/20/1997 order granting summary judgment but no separate document representing the judgment).)

2. The Court Should Apply *Kolani*'s Strict Thirty-Day Time Period for Refiling

Vulcan further contends that even if the Federal Court's August 22, 2011 Order granting summary judgment ended the tolling period, Vulcan was entitled to a refiling time frame composed of two parts. I.e., 1) the 30-day period provided for by the Federal Tolling Statute, and, additionally, 2) the amount of time left on the statue of limitations "clocks" as of the date the Federal Complaint was filed (which varies by claim). In support of this argument, Vulcan cites to *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 303-305 (2001), a case that Vulcan contends: 1) was "recently" decided, and 2) contravenes the holding of *Kolani*.[1] (Opp. at p. 5, lns. 22-28).

Vulcan is correct that *Bonifield* and *Kolani* are at odds, but the Club did not ignore the *Bonifield* case, as Vulcan implies. (*See* Dem. at p. 4, n.5.) As the conflict between *Bonifield* and *Kolani* has yet to be resolved by the California Supreme Court, this Court is entitled to apply

[1] I.e., that the federal tolling statute permits refiling in state court only for thirty days following the dismissal of the federal case, regardless of how much time remained under the statutes of limitations before the filing of the federal complaint.

whichever holding it believes is correct. *Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 456 (1962). Neither *Bonifield* nor *Kolani* is recent. Vulcan is correct that "to date no subsequent California case has disagreed with the *Bonifield* decision." (Opp. at p. 6, line 16.) But it is equally true that to date *Bonifield* is the only decision to reject the holding of *Kolani*. In the eleven years since the later of the two cases was decided, only one case has considered the conflict between *Kolani* and *Bonifield*. That case, *Okoro*, specifically declined to resolve the conflict. *Okoro*, 142 Cal. App. 4th at 314, n.5.

Vulcan argues that *Bonifield* follows "common sense as it allows for the orderly transfer of cases from federal to state court . . ." (Opposition at p. 6, lines 17-18.) But for such transfers to be orderly, all that is necessary is that the rule is clear and consistently applied. The *Kolani* rule, as it allows only for a strict thirty-day refiling period, is the clearer of the two rules. It is also more easily applied as the court may simply add thirty days to the date of the federal dismissal to determine the deadline for a state-court refiling. And in any event, "common sense" and equity suggest that there was no reason to delay this action any further, inasmuch as Vulcan is: 1) making claims based on conduct that happened up to sixty-four years ago, and 2) making claims that are substantially similar to those raised in the prior federal action. In light of the foregoing, *Kolani* should be applied, and the Court should rule Vulcan's breach of contract, negligence, permanent nuisance, permanent trespass, and waste claims are time barred.

B. The Lease Terms Confirm Consent Bars Vulcan's Contract Cause of Action

Vulcan makes three arguments, without citation to any case law, in an unsuccessful attempt to salvage its contract claim. Vulcan argues

> the 1992 Lease specifically
>
> (1) precluded [Defendant] from committing waste or nuisance on the property and from interfering with the use and enjoyment of neighboring propert[ies],"
>
> (2) "obligated [Defendant] to comply with all applicable federal, state and local laws, including environmental laws," and
>
> (3) "required that [Defendant] maintain the property in good condition and repair and, upon termination of the lease, return the Final Leasehold Property in an orderly, safe and sanitary condition.'

(Opp. at p. 7-8) (alteration in original).

All three of the arguments above are plainly barred by the consent evidenced by the very purpose of the leases at issue. That is, spent ammunition being left at the Azusa Property, the obvious and natural result of the leases here, is not a private nuisance or a waste. That result was contemplated and contracted for as an aspect of the lease relationship between Vulcan (or one of its predecessors) and the Club. Because Vulcan's consent is plain on the face of the relevant lease(s), and because not one of the leases attached to the Complaint mentions the type of cleanup Vulcan now seeks, Vulcan's contract claim is demonstrably without merit.

Furthermore, as to arguments nos. 1 and 2, the Club had a duty not to commit waste, nuisance, or violate the law *notwithstanding* the cited lease provisions. And as argument no. 3, Vulcan fails to allege the Club did not return the property "in an orderly, safe and sanitary condition" *for a shooting range*. Vulcan's attempt to require a cleanup beyond returning the property to normal shooting range condition is not grounded in the text of a relevant lease documents. The foregoing proves why Vulcan's breach of contract claims cannot survive the Demurrer.

The Club is forced to further discuss this particular issue to correct an important misstatement made by Vulcan. The Opposition alleges the Club "blatantly refused" to "remediate the Azusa Property pursuant to the Lease terms." (Opp. at p. 7, lns. 3-6). The Club need only cite to its conduct, as relayed in the Complaint, to show that allegation to be untrue. The Complaint plainly shows that: 1) the Club submitted environmental site assessments to Vulcan (Compl., at p. 7, ¶ 38); 2) the Club gave Vulcan notice that "the cleanup of the site ha[d] commenced" in early 2007 (*id.* at p. 8, ¶ 41); and 3) the Club "hired a lead reclamation contractor" (*id.* at ¶ 43).

Finally, it is worth noting the Opposition fails to rebut the fact that Vulcan can only obtain remediation costs under the 1992 Lease, if at all, once *Vulcan* itself incurs such costs. Vulcan claims, again without citation, that "[n]othing in the Lease requires Plaintiff to expend funds to clean up the Azusa Property before filing suit for breach of contract[.]" (Opp. at p. 8, lns. 12-13). Vulcan's position is vitiated by the contractual text at issue:

> Landlord may at its option make those removals required above or do such work as shall be required to return the Premises to an orderly and safe, sanitary condition and the cost thereof to Landlord shall be immediately repaid by Tenant to Landlord.

(Compl. at Ex. H, pp. 6-7, ¶ 10). Because Vulcan knowingly leased property for the purpose of

allowing the Club to discharge firearms, Vulcan cannot now claim the natural and obvious result of the Club's tenancy is a contractual breach. And regardless, Vulcan has no legal authority to seek remediation costs not yet incurred. Thus, the Demurrer should be sustained as to Vulcan's breach of contract claim.

C. Vulcan's Contractual Indemnity Claim Fails Because No Predicate Third-Party Claim Is Pled

Vulcan argues its Contractual Indemnification claim is not precluded by Civil Code section 2778. Vulcan bases this argument on an assertion that, even if contractual indemnification applies only to third-party claims per section 2778, section 2778 allows for contrary interpretations of indemnification clauses where "a contrary intention appears" in the contract. (Opp. at p. 9, ln. 22, to p. 10, ln. 1.) Vulcan further claims that the inclusion of the word "expenses" in the indemnification clause at issue indicates an intention of the parties to require the Club to indemnify Vulcan even when no third-party claim exists. (Opp. at p. 9, lns. 2-7.) Vulcan does not even begin to explain how the mere inclusion of this word in the indemnification clause expresses an intention of the parties to forego the default rule of section 2778 and require indemnification outside the third-party context.

For the parties to have expressed an intention contrary to default interpretation rules of section 2778, that intention would have had to be expressed clearly and explicitly. *See* Civ. Code §§ 1638, 2778. Moreover, it is clear that the inclusion of word "expenses" does not express an intention contrary to the default interpretation rules of section 2778. Under Civil Code section 2778 (2), "[u]pon an indemnity against claims, or demands, or damages, or costs, expressly, or *in other equivalent terms*, the person indemnified is not entitled to recover without payment thereof . . . ." (Emphasis added.) The default interpretation rule of Section 2778(2), therefore, explicitly applies to terms equivalent to "costs," and "expenses" is such an equivalent term.

Vulcan's attempt to distinguish this case from *SPPI-Somersville, Inc. v. TRC Companies, Inc.*, C 04-2648 SI, 2009 WL 2390347 (N.D. Cal. Aug. 3, 2009) is similarly unpersuasive. (Opp. at p. 10, lines 21-27.) Vulcan argues that "[u]nlike the indemnity provision in [*SPPI*], the indemnity provision in this case explicitly applies to 'the Premises.'" (Opposition at p. 10, lines 23-24.) Vulcan is wrong on this point; the indemnification provision at issue in *SPPI* and the indemnity provision involved in

this matter contain nearly identical references to the "premises."

The relevant language from the indemnity provision in *SPPI* follows:

> Lessee agrees to hold Lessor and its present and future subsidiaries harmless from and to indemnify them against any and all damage to or loss of any buildings, structures or other property, or injury to or death of person, that directly or indirectly *may be caused by or arise or result from Lessee's occupancy or use of said premises*, or the enjoyment of any of the rights herein, or the breach by Lessee of any of Lessee's obligations hereunder, irrespective of any negligence of Lessor.

SPPI-Somersville, 2009 WL 2390347 at *7 (emphasis added).

In other words, in *SPPI*, the lessee agreed to indemnify the lessor from damages to properties other than the leased property caused by activities on the leased property.

In this case, the relevant indemnity provision follows:

> Tenant shall indemnify and defend Landlord and save him harmless from and against any and all claims, actions, damages, liability and expenses in connection with loss of life, bodily injury or damage to property *arising from or out of any occurrence in, upon or at the Premises . . .*

(Compl. at ¶ 31; Exhibit H to Compl. at ¶ 17 (emphasis added).)

Once again, the lessee agreed to indemnify the lessor for damages to properties other than the leased property caused by activities on the leased property. In both *SPPI* and this case, the "premises" language refers to the location of the activity that causes the harm – not to the property potentially being harmed.

Further, if the provision at issue was really intended to be a first-party indemnity provision, it would make superfluous the more specific provision in the 1992 Lease regarding repayment of costs incurred "to return the premises to an orderly and safe, sanitary condition." (Compl. at Ex. H, at p. 6-7, ¶ 10). Such an interpretation is not proper. Civ. Code § 1650 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."). Thus, there is ample evidence that the Demurrer should be sustained on this point; the indemnity provision at issue is simply not a first-party indemnity provision that could justify the contractual indemnity claim Vulcan is attempting to make herein.

D. Negligence Per Se Is Not a Separate Cause of Action

Vulcan contends that "many California courts, including the California Supreme Court, have recognized negligence per se as an independent cause of action and an alternative theory of liability." (Opp. at p. 11, lns. 4-5 (citing *Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal. 4th 1066, 1086-87 (1997); *Angelotti v. Walt Disney Co.*, 192 Cal. App. 4th 1394, 1400 (2006)).) Neither of the cases cited by Vulcan actually provide the authority Vulcan claims. In *Angelotti*, the court merely noted that the plaintiff's complaint alleged separate counts for negligence and negligence per se. *Id.* at 1400. The court did not, as Vulcan indicates, consider a challenge to negligence and negligence per se being stated as separate causes of action. Similarly, the court in *Randi W.* noted that the plaintiff had pleaded negligence per se as an "alternative theory of liability." *Randi W.* at 1086. The *Randi W.* court did not, however, rule that "negligence per se" actually is a cause of action distinct from negligence.

In contrast, as noted in the Club's moving papers, *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1285 (2006) did consider whether or not negligence per se exists as a cause of action distinct from negligence. The *Quiroz* court held that "to apply negligence per se is not to state an independent cause of action" but "[i]nstead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action." *Id.* at 1285-1286. If Vulcan had properly pleaded its negligence per se allegations, those allegations should have been included with Vulcan's negligence cause of action rather than pleaded separately. Because there is no reason for Vulcan to plead duplicative negligence claims, the Demurrer should be sustained as to Vulcan's negligence per se cause of action.

III. CONCLUSION

Based on the Club's arguments and Vulcan's failure to rebut them, the Club respectfully request the Demurrer be sustained in full.

Dated: March 1, 2012

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin
Attorneys Defendant San Gabriel Valley Gun Club

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 E. Ocean Boulevard, Suite 200, Long Beach, California 90802.

On March 1, 2012, I served the foregoing document(s) described as

DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER TO PLAINTIFF'S COMPLAINT

Pursuant to CCP § 430.10

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kenneth A. Ehrlich
Paul A. Kroger
JEFFER, MANGELS, BUTLER & MITCHELL, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067

__ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on March 1, 2012, at Long Beach, California.

X (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on March 1, 2012, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on March 1, 2012, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

Christina Sanchez
CHRISTINA SANCHEZ