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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

JQD INC., et al.,
Cross-complainants and Appellants,
v.
IRISH BEACH CLUSTERHOMES
ASSOCIATION et al.,
Cross-defendants and Respondents.

A138145

(Mendocino County Super. Ct.
No. SCUJ-CVG-10-56629)

This appeal is the latest chapter in ongoing litigation involving the Irish Beach Clusterhomes, a common interest development located in Medocino County that was originally owned and later subdivided by respondents William and Tona Moores.¹ Under recorded covenants, conditions and restrictions, the development is governed by the Irish Beach Clusterhomes Association (IBCA). In 2010, a debt collection agency owned by Janet Q. Dennis and Jack Q. Dennis (JQD Inc., doing business as Pro Solutions) recorded assessment liens on behalf of IBCA against 12 homeowners in the development.² Contesting the validity of the assessments, the Homeowners sued Pro Solutions and the

¹ To avoid confusion, and intending no disrespect, reference to individual members of the Moores family shall be by first name. William and Tona are hereafter referred to collectively as the Moores.

² We refer to Janet Dennis, Jack Dennis, JQD, Inc., and their employee Jessica Koller collectively as Pro Solutions. The homeowners are Christian Bertoli, Patricia Bertoli, Michael Farrell, Dean Freedlun, Susan Freedlun, Kent Keebler, Sandra Trujillo, Mark Walker, Deborah Walker, Gayle Arrowood Weaver, Lynne Weaver, and Thomas Weaver (collectively the Homeowners).

Moore for damages and declaratory relief. Pro Solutions filed a cross-complaint for indemnity against IBCA and William. Concluding that neither William nor IBCA had a duty to defend or indemnify Pro Solutions with respect to the action filed by the Homeowners, the trial court granted judgment on the pleadings. Pro Solutions appeals from the judgment on its cross-complaint, arguing that the trial court abused its discretion by denying leave to amend. We agree and reverse the judgment in part.

I. FACTUAL AND PROCEDURAL BACKGROUND³

The Homeowners own improved lots in what is known as “Unit 8” in the Irish Beach Clusterhomes development. The entire property was originally owned by the Moores. After the Moores subdivided it, the development was to be governed by IBCA; however, from its inception in 1980, IBCA held no formal meetings through 1997 and had no budgets or assessments through 2003. The development contains 16 lots and a common area. Ten unimproved lots are owned by the Moores or their daughter, Jessica Olson. Six homes were built on the remaining lots. The Moores kept one and sold the five remaining developed lots.

The Prior Litigation

In 2003, a fire destroyed two homes in the development, one owned by the Moores and the other by homeowners Farrell and Trujillo. Although IBCA was moribund, William informally asked Farrell to act as IBCA’s president to pursue an insurance claim on its behalf. Farrell did so, but tensions arose, causing two factions to form: one comprised of the Moores and Olson, the other comprised of the remaining homeowners. In May and June 2004, at meetings attended only by the Moores and Olson, 11 votes

³ The underlying facts in this case are taken from the allegations of the Homeowners’ first amended complaint (FAC) and Pro Solutions’ cross-complaint, as well as the documents referenced and attached thereto and any facts which we may judicially notice. In order to provide context, we take portions of our statement of facts from, and take judicial notice of, the record and opinions in prior appeals involving some of the same parties (*Bertoli v. Dennis* (Jan. 5, 2015, A137221) [nonpub. opn.] (*Bertoli*); *Irish Beach Clusterhomes Association Board of Governors v. Farrell* (Jan. 21, 2009, A120147) [nonpub. opn.] (*Irish Beach Board of Governors*)).

were cast (one for their home and their 10 vacant lots) to elect the IBCA Board of Governors (Board of Governors) and William as its president. Certain assessments were also levied.

In March 2005, the Board of Governors and William, purporting to act as its president, sued Farrell and Trujillo to collect assessments imposed by IBCA (2005 Complaint), as well as to obtain a judicial declaration of the parties' rights to manage and operate IBCA. Farrell, who disputed William's authority to act on behalf of IBCA, filed a cross-complaint (2005 Cross-Complaint) against the Board of Governors and the Moores in their individual capacities. The case came to trial before the Honorable Lloyd Von Der Mehden. Judge Von Der Mehden concluded that, under the covenants, conditions and restrictions, only lots that had been improved with a home were entitled to vote. Applying that methodology, the court ruled the actions taken at the May and June 2004 meetings were invalid; "plaintiffs" were to take nothing on their complaint; and "cross-defendants" were enjoined from imposing any assessments against Farrell. The court also ruled that William individually had breached his fiduciary duties to IBCA, but awarded only nominal damages of \$1.

The Board of Governors and William, acting as its president, filed the appeal resulting in our *Irish Beach Board of Governors* decision. In that appeal they argued the trial court interpreted IBCA's governing documents incorrectly when it ruled that only those lots that had been improved with a home were entitled to vote. We did not reach the issue, however, because it was conceded on appeal that the Board of Governors was not a legal entity capable of bringing or defending suit. Accordingly, we held that the judgment was void "to the extent it [was] in favor of or against the '[IBCA] Board of Governors' and 'William Moores, President.' "

Events After the Irish Beach Board of Governors Opinion

At some point after our opinion in *Irish Beach Board of Governors* was filed, IBCA imposed additional assessments against the improved lots. When the assessments went unpaid by the Homeowners, William, acting as "Chairman" of IBCA, hired Pro Solutions to collect what the Homeowners alleged to be "unauthorized and invalid"

assessments. Pro Solutions, acting as the collection agent for IBCA, sent notices to each of the Homeowners of IBCA's intent to lien. The Homeowners protested the debt collection attempts and advised Pro Solutions, through counsel, of their position that IBCA was not a legally existing entity and that Pro Solutions had no legal authority to collect debts on its behalf. Despite the Homeowners' protest, Pro Solutions continued its collection efforts and filed notices of lien assessments against the Homeowners' properties.

The Homeowners' Litigation

In July 2010, the Homeowners filed a complaint against Pro Solutions based on its attempts to collect the assessments despite having been warned that IBCA "did not exist." The complaint asserted causes of action for abuse of process, intentional infliction of emotional distress, slander of title, and unfair business practices. The Homeowners also sought declaratory and injunctive relief. Pro Solutions successfully moved for an order joining IBCA, the Moores, and Olson as indispensable parties to the Homeowners' complaint.

The Homeowners filed their FAC, in which they alleged that the *Irish Beach Board of Governors* opinion determined that IBCA did not exist. The Homeowners further alleged: "By Judicial Decree, [IBCA] no longer exists, and as such, is without the power to levy assessments on the properties within the Subdivision. [¶] . . . There has never been a valid vote of the owners within the Subdivision to reconstitute [IBCA] and thus, [IBCA] no longer exists by such judicial holding. [¶] . . . Any actions taken by [IBCA] or assessments levied by [IBCA] are invalid and unenforceable. [¶] . . . The nonexistent [IBCA] continued to operate and attempted to levy assessments on the Subdivision properties in spite of the court ruling that [IBCA] did not exist."

The FAC also added a seventh cause of action, for declaratory relief, against the Moores, Olson, and IBCA, in addition to Pro Solutions. Specifically, the Homeowners alleged in the seventh cause of action: "[T]he assessments which Defendants seek to collect are invalid because the [IBCA] no longer exists, and that by the principals [*sic*] of res judicata and collateral estoppel [the Moores] and [Olson], as individual owners of

unimproved lots without structures, have no right to vote . . . , whereas Defendants . . . dispute this contention and contend that the assessments are valid and enforceable and will attempt to foreclose on [Homeowners'] real properties if the assessments are not paid.” The Homeowners sought “a declaration of the rights and duties of the parties, including a declaration that the assessments . . . are invalid and that owners of unimproved lots have no rights to vote by earlier decision.”

After its answer was filed, Pro Solutions filed its second motion for judgment on the pleadings, in which the Moores joined, which was granted without leave to amend. The trial court reasoned that the Homeowners' FAC was insufficient to state a cause of action because: (1) the *Irish Beach Board of Governors* decision did not make any determination regarding the legal existence of IBCA; (2) “[t]he only references in the general allegations to voting rights within the homeowners association are found in Paragraphs 11 and 15 and are insufficient to put a reasonable person on notice of a claim that either [IBCA] had been improperly formed or that the assessments were invalid due to voting irregularities involving the Moores family”; and (3) “whatever findings [Judge Von Der Mehden] may have made regarding the voting rights of the Moores family must be limited to the only entity that was a party to that action: the . . . Board of Governors.” The trial court also concluded that the conduct underlying the first four causes of action, alleged against Pro Solutions, was protected by the litigation privilege. Judgment was entered against the Homeowners and in favor of the Moores and Pro Solutions. The Homeowners filed a timely notice of appeal from the judgment resulting in our opinion in *Bertoli, supra*, A137221.

In *Bertoli*, we agreed with the trial court that the tort causes of action alleged against Pro Solutions were barred by the litigation privilege, but we agreed with the Homeowners that their FAC stated causes of action for declaratory relief. Accordingly, we reversed only that portion of the judgment sustaining the motion for judgment on the pleadings as to the fourth and seventh causes of action for declaratory relief.

Pro Solutions' Cross-Complaint

Pro Solutions had also filed a cross-complaint against IBCA for contractual and equitable indemnity. A copy of the assessment collection service contract between Pro Solutions and “Unit #8 Cluster Home Association, Irish Beach Clusterhomes” (Agreement) was attached as an exhibit. The Agreement was signed by William, as IBCA’s “Chairman,” and provided: “This Delinquent Assessment Contract and Designation of Trustee Agreement is entered into between Pro Solutions and [IBCA]. This document shall be referred to as the ‘Agreement.’ [¶] [IBCA] retains Pro Solutions to collect delinquent assessments, fees, costs and related charges owed to [IBCA] by its members or former members. [¶] . . . [¶] [IBCA] shall provide Pro Solutions with copies of all its governing documents . . . and with accurate information necessary for Pro Solutions to perform this Agreement. . . . [¶] . . . [¶] [IBCA] appoints Pro Solutions or its agent as its Trustee for the purpose of carrying out this Agreement and conducting foreclosure sales. [IBCA] authorizes Pro Solutions or its agent to execute and record all documents necessary to pursue the collection of delinquent assessments on behalf of [IBCA].”

The Agreement also contained an indemnity clause, which provided:

“Pro Solutions [is] NOT RESPONSIBLE FOR MISTAKES CAUSED BY [IBCA]: [¶] Pro Solutions has the right to rely on and shall not be responsible for the accuracy of information provided by [IBCA] or its manager relating to the amount of assessments, interest or late charges owed and the names and addresses of the Owners who are delinquent. [IBCA] shall name Pro Solutions an additional insured under its Directors and Officers insurance policy and shall maintain the current or successor policies in effect at all times during the effective dates of this agreement. Upon request [IBCA] shall provide Pro Solutions with a copy of the subject D&O policy and shall further upon request provide evidence that the coverage under the subject policy is still in effect. The minimum coverage limits of the subject policies shall be \$1,000,000,00. If there is no conflict of interest, [IBCA] shall be entitled to use its own attorney to defend Pro Solutions in the event of litigation.

“ . . . [IBCA] shall defend, indemnify and hold harmless, Pro Solutions from any and all claims, actions, liabilities and damages, including attorney’s fees and costs, caused in whole or in part by the negligent or willful misconduct of [IBCA], any member of [IBCA] or any other party, EXCEPT to the extent same are caused by the negligent or willful misconduct of Pro Solutions, and shall indemnify and hold Pro Solutions harmless from all claims, actions, liabilities and damages, including attorneys fees and costs, asserted or threatened by or on behalf of any member of [IBCA] or any other party not under Pro Solutions[’] direct and exclusive control, arising out of or related to any act committed by Pro Solution[s] in good faith while carrying out the policies and/or instructions of [IBCA].” (Italics added.)

Pro Solutions’ cross-complaint was subsequently amended to add William as a cross-defendant. Pro Solutions’ first amended cross-complaint (FACC) alleged in its cause of action for express contractual indemnity: “[Pro Solutions] entered into a written contract on January 15, 2010 to perform professional debt collection services as an agent for [IBCA] to collect debts owed The written contract contained an indemnity provision whereby [IBCA] agreed to indemnify [Pro Solutions] against any and all liability arising from these collection efforts. [¶] . . . [¶] [Pro Solutions has] been sued [by the Homeowners] in the instant suit for various torts concerning [Pro Solutions’] debt collection efforts in fulfillment of its written contractual obligations to [IBCA]. Under the terms of the written contract as identified above, and attached in full hereto as EXHIBIT A, [Pro Solutions] is entitled to indemnification and relief from [IBCA], including attorney’s fees, costs, and expenses associated with defense of the primary complaint as well as the prosecution of the instant cross-complaint.” Pro Solutions sought to recover, among other things, both “full and complete indemnity . . . for any potential liability in the [Homeowners’] suit” and “full and complete compensation for all attorney’s fees and costs incurred in this suit”

William moved for judgment on the pleadings, arguing in part that, under the Agreement, Pro Solutions could not seek indemnity against William or IBCA for its own active negligence or intentional acts. William also asserted that neither he nor IBCA had

a duty to defend Pro Solutions under the Agreement and that equitable indemnity could not substitute for a failed contractual indemnity claim. IBCA joined in William's motion. Pro Solutions opposed the motion, maintaining that IBCA and William, as IBCA's alter ego, had both contractual and equitable duties to defend and indemnify Pro Solutions.

After hearing argument, the trial court granted the motion without leave to amend. The trial court's minute order provided: "The agreement identifies as the contracting parties *only* Pro Solutions and 'Unit 8 Cluster Home Association – Irish Beach Clusterhomes.' The language of the agreement does not mention or refer, either directly or indirectly, to either [William] or [Tona]. . . . Although [William] executed the agreement, his signature is followed by the note: 'for Unit #8 Cluster Homes Association.' [¶] [The Moores] correctly assert that the contractual indemnity clause . . . must be characterized as a *general* indemnity clause. . . . While contracting parties *may* provide for the protection of indemnity even in the case of *active* negligence by the indemnitee, if the parties do not specifically provide for indemnity for active negligence, the scope of the indemnity is limited to *passive* negligence. (*E. L. White Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, 506–507.) The allegations of the [Homeowners' FAC], for which Pro Solutions is seeking an order of indemnity, allege conduct that can only be characterized as intentional or actively negligent at best. [¶] . . . [¶] The agreement imposes on [IBCA] a duty to *defend* Pro Solutions only in the event of losses 'caused by the negligent or willful misconduct of [IBCA]' The [Homeowners' FAC] contains no allegations of 'negligent or willful misconduct' on the part of [IBCA]." (Italics & final ellipsis in original.)

Pursuant to the trial court's instructions, a formal written order was submitted and judgment was entered in favor of William and IBCA. Pro Solutions filed a timely notice of appeal from the judgment.

II. DISCUSSION

On appeal, Pro Solutions abandons its equitable indemnity cause of action and challenges only the trial court's conclusion, with respect to Pro Solutions' express contractual indemnity cause of action, that neither IBCA nor William owed a duty to

defend it in the underlying Homeowners' action. Specifically, Pro Solutions contends that (1) the trial court misconstrued both the Agreement and the allegations of the underlying Homeowners' FAC; (2) the trial court improperly failed to address its alter ego theory as against William; and (3) alternatively, if the allegations of its FACC were insufficient, the trial court abused its discretion in denying leave to amend. We agree on all points and remand the matter so that Pro Solutions may have the opportunity to amend its FACC.

A. *Standard of Review*

“A motion for judgment on the pleadings is analogous to a general demurrer, but is made after the time to file a demurrer has expired. (Code Civ. Proc., § 438, subd. (f)(2); *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602.) The trial court's judgment on the order granting a motion for judgment on the pleadings is reviewed independently under the de novo standard of review. [Citation.] “[W]e treat the properly pleaded allegations of [the] complaint as true, and also consider those matters subject to judicial notice. [Citations.] “Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties.” [Citation.] “Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.” [Citation.]’ [Citations.]” (*International Assn. of Firefighters Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1196, parallel citation omitted.) “We may also take notice of exhibits attached to the complaints. If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. [Citation.]” (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447, superseded on other grounds as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521.) The judgment of dismissal will be affirmed if it is proper on any grounds stated in the motion, whether or not the trial court relied on any of those grounds. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

The trial court's interpretation and application of the indemnity agreement is also a question reviewed de novo. (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1535.) When the trial court's interpretation does not turn

on the credibility of extrinsic evidence, “we review the trial court’s application of law independently.” (*Ibid.*; accord, *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.G.* (1970) 3 Cal.3d 434, 445.)

Where a demurrer is sustained or a motion for judgment on the pleadings is granted, the trial court’s denial of leave to amend is reviewed for abuse of discretion. (*Rodriguez v. County of Los Angeles* (2013) 217 Cal.App.4th 806, 810.) “[L]eave to amend is properly granted where resolution of the legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations. [Citation.]” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) “ ‘[T]o meet the plaintiff’s burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.’ [Citations.]” (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 260.) “Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not. Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect has not been given.” (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303–304.)

B. *Adequacy of the Record on Appeal*

It is an appellant’s burden to show reversible error based upon an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) “ ‘A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent’ [Citation.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712, italics omitted.) In the absence of a proper record on appeal, the judgment is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

As William correctly points out in his respondent’s brief, in which IBCA joins, Pro Solutions elected to use an appendix in its notice designating the record on appeal,

but no appendix was ever filed. Instead, when its opening brief came due, Pro Solutions sought to “augment” the clerk’s transcript to include the reporter’s transcript from the hearing on the motion for judgment on the pleadings, as well as the relevant motion and opposition papers.⁴ Our colleagues in Division Two granted that request. Thus, many of the relevant documents have been supplied to us through the augmentation requested by Pro Solutions and by William in his respondent’s appendix. However, neither the respondent’s appendix nor the augmented clerk’s transcript contains the judgment or Pro Solutions’ notice of appeal, which are required to be contained in either the clerk’s transcript or appellant’s appendix. (Cal. Rules of Court, rules 8.122(b)(1)(A)–(B), 8.124(b)(1)(A).)

Although we have discretion to dismiss Pro Solutions’ appeal in these circumstances, we do not do so here because copies of the judgment and the notice of appeal are otherwise in the court file. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1261, fn. 5; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 363, fn. 7 [although appellant’s election to provide appendix and subsequent failure to submit record on appeal “gives us grounds to dismiss the appeal . . . , we elect to consider it because [the respondent] submitted an adequate record”]; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [“violation of the rules of court may result in . . . waiver of the arguments made therein, the imposition of fines and/or the dismissal of the appeal”].)

C. *IBCA’s Contractual Indemnity Agreement and Duty to Defend*

The primary focus of Pro Solutions’ appeal is on the express contractual indemnity agreement between it and IBCA. “Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Citation.]” (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) Where, as in this case, the parties’ contract deals specifically with the issue of indemnity, the extent of the

⁴ Ultimately, no reporter’s transcripts were provided because no reporter was present on the relevant dates.

duty to indemnify is determined by the contract itself. (*Ibid.*; see *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*)). The contracting parties enjoy “great freedom to allocate such responsibilities as they see fit.” (*Crawford*, at p. 551.)

Indemnity agreements “may require one party to indemnify the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims. (See Civ. Code, § 2772 [‘Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.’]).⁵ They may also assign one party, pursuant to the contract’s language, responsibility for the other’s legal defense when a third party claim is made against the latter. [Citation.]” (*Crawford, supra*, 44 Cal.4th at p. 551, italics & fn. omitted.)

As a general matter, we interpret indemnity agreements using the same rules applicable to other contracts. (*Crawford, supra*, 44 Cal.4th at p. 552.) “In interpreting an express indemnity agreement, the courts look first to the words of the contract to determine the intended scope of the indemnity agreement. [Citation.] The intention of the parties is to be ascertained from the ‘clear and explicit’ language of the contract, and if possible, from the writing alone. [Citations.] Unless given some special meaning by the parties, the words of a contract are to be understood in their ‘ordinary and popular sense,’ focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made. [Citations.]” (*City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 247–248.)

Although such agreements resemble liability insurance, for reasons of public policy, the rules of construction applicable to noninsurance indemnity agreements differ from those applicable to liability insurance policies. (*Crawford, supra*, 44 Cal.4th at p. 552.) Ambiguities in a policy of insurance are construed against the insurer because the insurer has received premiums to provide the agreed protection. Outside of the insurance context, “it is the indemnitee who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share

⁵ Undesignated statutory references are to the Civil Code.

of the financial consequences of its own legal fault. [Citations.]” (*Ibid.*, italics omitted.) As a consequence, if a party seeks indemnity for its own active negligence or regardless of the indemnitor’s fault, the indemnity agreement’s “language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee. [Citations.]” (*Ibid.*)

Section 2778 “sets forth general rules for the interpretation of indemnity contracts, ‘unless a contrary intention appears.’^[6] If not forbidden by other, more specific, statutes, the obligations set forth in section 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise. . . . [¶] [T]he statute first provides that a promise of *indemnity* against claims, demands, or liability ‘embraces the *costs of defense* against such claims, demands, or liability’ insofar as such costs are incurred reasonably and in good faith. (§ 2778, subd. 3, italics added.) Second, the section specifies that the indemnitor ‘is bound, on request of the [indemnitee], *to defend* actions or proceedings brought against the [indemnitee] in respect to the matters embraced by the indemnity,’

⁶ Section 2778 provides: “In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: [¶] 1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; [¶] 2. Upon 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; [¶] 3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion; [¶] 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so; [¶] 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former; [¶] 6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former; [¶] 7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.”

though the indemnitee may choose to conduct the defense. (*Id.*, subd. 4, italics added.)” (*Crawford, supra*, 44 Cal.4th at p. 553.) “By virtue of these statutory provisions, the case law has long confirmed that, unless the parties’ agreement expressly provides otherwise, a contractual indemnitor has the obligation, *upon proper tender* by the indemnitee, to accept and assume the indemnitee’s active defense against claims encompassed by the indemnity provision. Where the indemnitor has breached this obligation, an indemnitee who was thereby forced, against its wishes, to defend itself is entitled to reimbursement of the costs of doing so.” (*Id.* at p. 555, italics added.)

In its opening brief, Pro Solutions contends that its FACC adequately alleged IBCA’s duty to defend it in the Homeowners’ litigation. William and IBCA disagree, pointing out that Pro Solutions’ FACC does not allege tender or a subsequent refusal to defend. In its reply brief, Pro Solutions concedes the inadequacy of its allegations, but contends that “the real issue is whether or not [Pro Solutions’ FACC] could be amended to plead a duty of defense” Pro Solutions maintains that it can allege both tender and IBCA’s refusal to defend.

Before we conclude that the trial court abused its discretion in denying leave to amend, however, we must address IBCA’s and William’s argument that amendment would be futile because IBCA, as a matter of law, does not owe Pro Solutions a duty to defend the Homeowners’ FAC. The trial court came to a similar conclusion. In its order granting the motion for judgment on the pleadings, the trial court wrote: “[T]he contractual indemnity clause recited in the [FACC] must be characterized as a *general* indemnity clause. . . . The allegations of the [Homeowners’ FAC], for which Pro Solution[s] is seeking an order of indemnity, allege conduct [by Pro Solutions] that can only be characterized as intentional or actively negligent at best. [¶] . . . [¶] The agreement imposes on [IBCA] a duty to *defend* Pro Solutions only in the event of losses ‘caused by the negligent or willful misconduct of [IBCA]’ The [Homeowners’ FAC] contains no allegations of ‘negligent or willful misconduct’ on the part of [IBCA].” (Underlining omitted.) William and IBCA contend that the trial court correctly concluded that the duty to defend was defeated by the Homeowners’ tort allegations

against Pro Solutions. Pro Solutions, on the other hand, argues that the trial court erred both in concluding the Homeowners' FAC contained no allegations of negligence or willful misconduct by IBCA or its members and by assuming that the tort allegations against Pro Solutions were determinative.

We begin by reviewing our Supreme Court's decision in *Crawford, supra*, 44 Cal.4th 541. *Crawford* concerned an indemnity clause in a construction subcontract with a developer for the manufacture and supply of windows for a residential project. Specifically, the subcontractor agreed "(1) 'to indemnify and save [the developer] harmless against all claims for damages, . . . loss, . . . and/or theft . . . growing out of the execution of [the subcontractor's] work,' and (2) 'at [its] own expense to *defend any suit or action* brought against [the developer] *founded upon* the claim of such damage[,] . . . loss, . . . or theft.'" (*Id.* at pp. 547–548, ellipses in original.) After completion of the project, a group of homeowners sued both the developer and subcontractor, on tort and breach of contract theories, for damages resulting from allegedly improper design, manufacture, and installation of the windows. The developer cross-complained against the subcontractor, seeking declaratory relief with respect to its indemnity and defense rights. After trial on the homeowners' claims, the subcontractor was absolved of any liability. In the subsequent trial on the developer's cross-complaint, the developer sought to recover amounts it had previously paid to the homeowners in settlement, and attorney fees and expenses under the duty-to-defend provisions. (*Id.* at pp. 548–549.)

The question on appeal was whether the subcontractor was required to defend its indemnitee, the developer, in suits brought against both parties "insofar as [the] plaintiffs' complaints *alleged* construction defects arising from the subcontractor's negligence, even though (1) a jury ultimately found that the subcontractor was not negligent, and (2) the parties have accepted an interpretation of the subcontract that gave the builder no right of *indemnity* unless the subcontractor was negligent." (*Crawford, supra*, 44 Cal.4th at p. 547.) The *Crawford* court applied the principles of section 2778 to the indemnity agreement and concluded: "[T]hese provisions expressly, and unambiguously, obligated [the subcontractor] to defend, from the outset, any suit against [the developer] insofar as

that suit was ‘founded upon’ claims *alleging* damage or loss arising from [the subcontractor’s] negligent role in the . . . project. [The subcontractor] thus had a contractual obligation to defend such a suit *even if it was later determined*, as a result of this very litigation, that [the subcontractor] was not negligent.” (*Crawford*, at p. 553, final italics added.) The court explained: “A contractual promise to ‘defend’ another against specified claims clearly connotes an obligation of active responsibility, from the outset, for the promisee’s defense against such claims. The duty promised is to render, or fund, the service of providing a defense on the promisee’s behalf—a duty that necessarily arises as soon as such claims are made against the promisee, and may continue until they have been resolved.” (*Id.* at pp. 553–554, italics omitted.)

“[S]ubdivision 4 of section 2778, by specifying an indemnitor’s duty ‘to defend’ the indemnitee upon the latter’s request, places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee’s defense, if tendered, against all claims ‘embraced by the indemnity.’” (*Crawford, supra*, 44 Cal.4th at p. 557; accord, *Buchalter v. Levin* (1967) 252 Cal.App.2d 367, 374.) “Implicit in this understanding of the duty to defend an indemnitee against all claims ‘embraced by the indemnity,’ as specified in subdivision 4 of section 2778, is that the duty arises immediately upon a proper tender of defense by the indemnitee, and thus before the litigation to be defended has determined whether indemnity is actually owed. This duty, as described in the statute, therefore cannot depend on the outcome of that litigation. It follows that, under subdivision 4 of section 2778, claims ‘embraced by the indemnity,’ as to which the duty to defend is owed, include those which, at the time of tender, *allege* facts that would give rise to a duty of indemnity. Unless the indemnity agreement states otherwise, the statutorily described duty ‘to defend’ the indemnitee upon tender of the defense thus extends to all such claims.” (*Crawford*, at p. 558, fn. omitted.)

Because the indemnity clause at issue in *Crawford* “not only failed to limit or exclude [the subcontractor’s] duty ‘to defend’ [the developer], as otherwise provided by subdivision 4 of section 2778,” but confirmed this duty in express language, “The duty ‘to defend’ expressly set forth in [the] subcontract clearly contemplated a duty that arose

when such a claim was made, and was not dependent on whether the very litigation to be defended later established [the subcontractor's] obligation to pay indemnity.” (*Crawford, supra*, 44 Cal.4th at p. 558, fn. omitted.)

Contrary to William's and IBCA's meritless assertion, the Agreement here, similar to that in *Crawford*, expressly confirms IBCA's duty under section 2778 to “defend” Pro Solutions. (*Crawford, supra*, 44 Cal.4th at p. 558.) Thus, IBCA's duty to defend Pro Solutions does not turn on the ultimate results of the Homeowners' litigation, but rather upon the terms of the Agreement and the Homeowners' allegations *at the time of tender*. (*Ibid.*) Nonetheless, IBCA's duty to defend Pro Solutions extends only “to the matters embraced by the indemnity.” (§ 2778, subd. 4; *Crawford, supra*, 44 Cal.4th at p. 555.) In cases such as this, where the indemnity and defense clauses are identical, “[t]here is no defense obligation beyond the indemnity obligation.” (*City of Bell v. Superior Court, supra*, 220 Cal.App.4th at p. 251.) And “there is no duty for the [indemnitor] to defend any claims which do not, at the time of tender, allege facts which would, at least potentially, fall within the scope of the duty to indemnify.” (*Ibid.*) Thus, we consider whether the Homeowners' claims at the time of tender allege facts that, at least potentially, would give rise to a duty of indemnity. (*Ibid.*; *Crawford*, at p. 558; *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 20.)

The Agreement provides in relevant part: “[IBCA] shall defend, indemnify and hold harmless, Pro Solutions from *any and all claims, actions, liabilities and damages . . . caused in whole or in part by the negligent or willful misconduct of [IBCA], any member of [IBCA] or any other party, EXCEPT to the extent same are caused by the negligent or willful misconduct of Pro Solutions . . .*” (Italics added.) Thus, IBCA is required to indemnify and defend Pro Solutions if any claims, actions, liabilities and damages (1) are caused in whole or in part by the negligent or willful misconduct of IBCA, any member, or any other party; and (2) are not caused by Pro Solutions' negligence or willful misconduct.

We turn to the Homeowners' allegations. As the *Crawford* court recognized in dicta, there are “practical difficulties of sorting out multiple, and potentially conflicting,

duties to assume the active defense of litigation then in progress.” (*Crawford, supra*, 44 Cal.4th at p. 565, fn. 12.)⁷ Further complicating matters here is the fact that we are not aware of when Pro Solutions tendered its defense to IBCA. (See *Crawford*, at p. 558 [“claims . . . as to which the duty to defend is owed, include those which, at the time of tender, allege facts that would give rise to a duty of indemnity” (italics omitted)].) Nonetheless, although IBCA and William emphasize that the Homeowners sued only Pro Solutions in their original complaint, the parties appear to ultimately agree that the Homeowners’ FAC is the proper frame of reference.

We agree with Pro Solutions that the trial court misconstrued the Homeowners’ FAC as “contain[ing] no allegations of ‘negligent or willful misconduct’ on the part of [IBCA]” and ignored “the second trigger of the duty to defend”—negligent or willful misconduct by any member of IBCA. In paragraphs 14 through 18 of their FAC, the Homeowners allege acts by IBCA or the Moores that, at least potentially, would give rise to a duty of indemnity. Therein, the Homeowners alleged: “By Judicial Decree, [IBCA] no longer exists, and as such, is without the power to levy assessments on the properties within the Subdivision. [¶] . . . There has never been a valid vote of the owners within the Subdivision to reconstitute [IBCA] and thus, [IBCA] no longer exists by such judicial holding. [¶] . . . Any actions taken by [IBCA] or assessments levied by [IBCA] are invalid and unenforceable. [¶] . . . The nonexistent [IBCA] continued to operate and attempted to levy assessments on the Subdivision properties in spite of the court ruling that [IBCA] did not exist. [¶] . . . [IBCA] hired [Pro Solutions] to collect the unauthorized and invalid assessments.”

⁷ The *Crawford* court further stated: “If any party moves for summary judgment or adjudication (Code Civ. Proc., § 437c) with respect to the duty to defend against litigation still in progress, the court may proceed as it deems expedient. For example, the court may resolve legal issues then ripe for adjudication, such as whether any of the contracts at issue include a duty to defend, and, if so, whether the underlying suit or proceeding as to which a defense is sought falls within the scope of any of the parties’ contractual duty to defend.” (*Crawford, supra*, 44 Cal.4th at p. 565, fn. 12.)

The above allegations underlie the causes of action for declaratory relief, alleged originally against IBCA, Pro Solutions, and the Moores, and which remain pending against the latter two.⁸ William and IBCA do not contend that the duty to defend does not extend to the equitable claims raised in the Homeowners' FAC. And unlike most liability insurance policies, the indemnity clause is not limited to claims for damages, but rather its plain language is broad enough to cover equitable claims. Thus, the FAC asserted, at least potentially, "claims . . . caused in whole or in part by the negligent or willful misconduct of [IBCA], [or its] member[s]"

Next, we consider the contractual exception to the duty to indemnify and defend. William and IBCA contend "that the parties did not intend for a duty to defend, or payment of defense costs, to arise where Pro Solutions' own actions form the basis of *any* claims, actions, liabilities and damages asserted against Pro Solutions." (Italics added.) Instead, they claim that IBCA is released from its duty to " 'defend, indemnify, and hold harmless' Pro Solutions from claims caused by IBCA's negligence or willful misconduct" if claims "were *also* caused by Pro Solutions' negligence or willful misconduct." (Italics added.) Pro Solutions, on the other hand, maintains that the Homeowners' tort allegations against Pro Solutions are not determinative. Specifically, it contends: "[T]he explicit exception to [the] contractual defense and indemnity right has nothing to do with the *allegations* of the FAC, but rather a finding of liability against [Pro Solutions] that its negligent or willful misconduct *caused* the damages." (Boldface omitted.)

If the Homeowners' FAC alleged only causes of action arising solely out of Pro Solutions' negligent or willful misconduct, we would agree with IBCA and William that the exception applied and IBCA has no duty to defend Pro Solutions. However, their proposed interpretation nullifies the language obligating IBCA to indemnify and defend individual "claims."

⁸ In *Bertoli, supra*, A137221, we concluded that the trial court erred in granting the motions for judgment on the pleadings with respect to only the Homeowners' two declaratory relief causes of action.

In their original complaint and FAC, the Homeowners asserted causes of action for abuse of process, intentional infliction of emotional distress, slander of title, and unfair business practices, based on Pro Solutions' attempts to collect the assessments despite having been warned that IBCA "did not exist." These causes of action clearly rest, at least in part, on actions taken by Pro Solutions following notice of IBCA's alleged lack of authority to impose the contested assessments. However, even if the Homeowners' tort claims were caused by the negligent or willful misconduct of Pro Solutions, the allegations do not defeat Pro Solutions' request for defense. The language of the indemnity and defense clause makes clear that IBCA has a duty to defend "any and all *claims* . . . caused in whole or in part by the negligent or willful misconduct of [IBCA], [or] any member . . . EXCEPT to the extent *same* are caused by the negligent or willful misconduct of Pro Solutions." (Italics added.) Despite the existence of the tort causes of action, the FAC also contained claims alleged to have been caused by the negligence or willful misconduct of IBCA or its members, and no allegations in the FAC tie these latter causes of action to Pro Solutions' negligence or willful misconduct.

Due to the existence of the declaratory relief causes of action in the FAC, and their underlying allegations, we cannot say that as a matter of law IBCA had no duty to defend Pro Solutions with respect to at least those claims. Furthermore, if we focus solely on the current state of the underlying litigation, we cannot say that as a matter of law IBCA had no duty to defend Pro Solutions because the tort allegations against Pro Solutions have been eliminated by judgment on the pleadings. The trial court erred in concluding that IBCA had no duty to defend Pro Solutions as a matter of law and abused its discretion in granting judgment on the pleadings without leave to amend on Pro Solutions' express indemnity cause of action against IBCA.

D. *Alter Ego Liability*

William, in his individual capacity, is not a party to the Agreement. Pro Solutions concedes that, as a stranger to the Agreement, William cannot be individually liable for its breach. However, Pro Solutions contends that William is liable on an alter ego theory.

“The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff’s interests. [Citation.]” (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) Although the application of the alter ego doctrine depends on the circumstances of each case, two general requirements exist: (1) a “ ‘unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist’ ” and (2) “ ‘if the acts are treated as those of the corporation alone, an inequitable result will follow.’ ” (*Ibid.*) “ ‘Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.’ [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.]” (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538–539.)

William does not dispute the theoretical application of the alter ego doctrine in this context. (See Corp. Code, § 18630 [“a member or person in control of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account the differences between a nonprofit association and a corporation”].) However, he is correct that Pro Solutions’ FACC does not include allegations supporting the theory. Pro Solutions concedes as much.

In its opposition to the motion for judgment on the pleadings, Pro Solutions suggested that it could amend its FACC to allege that William, as developer of IBCA, could be liable for defense costs on an alter ego theory. The trial court did not address the alter ego issue, stating “[Pro Solutions has] provided no indication to the court of whether a curing amendment is ever [*sic*] possible.” However, Pro Solutions’ opposition brief suggested it could meet the first requirement of the doctrine because William created and controlled IBCA, and William lent money to IBCA to prosecute the

2005 Complaint without consent or vote by its members.⁹ Furthermore, we agree that Pro Solutions’ and the Homeowners’ allegations, if true, could establish the requisite “inequitable result,” if William is found to have acted without authority and only IBCA is responsible for Pro Solutions’ defense costs. We conclude that Pro Solutions should be granted leave to amend its FACC to plead facts showing William’s alter ego liability. The trial court erred in refusing leave to amend.

III. DISPOSITION

The judgment and the order sustaining judgment on the pleadings without leave to amend is reversed. The matter is remanded to the trial court with instructions to enter a new order granting William’s and IBCA’s motion for judgment on the pleadings with leave to amend in conformity with this opinion. Pro Solutions shall recover its costs on appeal.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

⁹ Pro Solutions also repeats the proposed amendments in its appellate briefs, which is sufficient to meet its burden of showing how the complaint can be amended. (*Dudley v. Department of Transportation, supra*, 90 Cal.App.4th at p. 260.)