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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CHIBUEZE J. DALLAH,

Cross-complainant and Appellant,

v.

EDWARD KONOPACKI,

Cross-defendant and Appellant.

E053286

(Super.Ct.No. RIC456695)

OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge.  
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part.

Alan S. Yockelson; and Joseph G. Maiorano for Cross-defendant and Appellant.

Law Offices of Darlene Allen and Darlene Allen for Cross-complainant and Appellant.

This appeal and cross-appeal arise from a dispute concerning the construction of a self-service carwash facility. Chibueze Dallah and Sharon Dallah (collectively “Owners”), sued Edward Konopacki (Contractor), who was doing business as EK

Construction Co., for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) indemnity, and (4) declaratory relief. Contractor sued Owners for (1) breach of contract, (2) indemnity, and (3) declaratory relief.

Following a bench trial, the trial court found Contractor breached the contract with Owners by not completing the self-service carwash facility in a “timely and workmanlike manner” and awarded Owners \$116,315, plus interest, costs, and attorney’s fees. The trial court also found Owners breached their contract with Contractor “by not paying for all the work completed.” The trial court awarded Contractor \$76,853, plus interest, costs, and attorney’s fees, resulting in a net judgment in favor of Owners in the amount of \$39,462.

Contractor raises four issues on appeal. First, Contractor asserts the trial court erred by ruling on claims that were not part of Owners’ complaint, e.g. considering negligence or construction defect issues. Second, Contractor contends the trial court erred by awarding damages to Owners for construction defects that were not alleged in the complaint. Third, Contractor asserts the trial court erred by permitting Owners to present the testimony of an expert witness. Fourth, Contractor contends the trial court should have granted his motion for a new trial because the verdict was not supported by substantial evidence.

In their cross-appeal, Owners assert the trial court erred by not issuing a proposed statement of decision in response to Owners’ objection to the court’s tentative decision. We affirm the judgment against Owners and reverse the judgment against Contractor.

## **FACTUAL AND PROCEDURAL HISTORY**

Owners owned a parcel of property in Riverside. Chibueze Dallah (Owner) hired Contractor to construct a six-bay self-service, and two-bay automatic car wash on the property. Owner and Contractor entered into a contract on May 25, 2005. The contract reflected Owner would pay Contractor a total of \$698,760. The construction was supposed to be completed by January 1, 2006. The contract required Contractor to “construct the structure in conformance with the plans . . . in a workmanlike manner.” The contract included a provision for attorney’s fees and costs against the defaulting party.

Contractor subcontracted the masonry work to Galindo Masonry, Inc. (Galindo). The scope of Galindo’s work included creating the foundation footings, slab, curbs, driveways, block walls, and grout. The construction was not completed by January 2006. Contractor believed Owner was misappropriating money from a “contingency fund” that was set up for the construction, so Contractor “pulled off the job” until the accounting was “figured out.” Owner believed the work was not completed on schedule because Contractor failed to hire a sufficient amount of employees and Contractor was working on two other projects at the same time.

On July 14, 2006, Owner and Contractor amended the original contract. In the amendment, (1) Owner agreed to immediately pay Contractor \$35,700; (2) Contractor agreed to pay \$20,000 to various suppliers of materials; (3) Owner would pay \$3,000 for extra labor to complete the project; (4) Contractor would return to work by July 17, 2006; (5) Contractor and Owner waived claims against one another that may have

occurred prior to July 17, 2006; (6) the new completion date for construction was scheduled for August 7, 2006; and (7) if the work were not completed before August 8 then Contractor would pay \$300 per day on Owners' construction loan until the work was completed.

The construction was not completed by August 8. "[I]n August or September" Contractor stopped working on the car wash construction and did not return to the project. In October or November, the City of Riverside gave Owners a conditional certificate of occupancy, so the car wash could be used. Work that needed to be completed after Contractor left the project included (1) repairing a defective backflow device, which returned water to the City's system; (2) electrical work; (3) a canopy or patio cover for the vacuum area; (4) creating an attic storage space; and (5) a concrete walkway.

Owner found various problems with the work Contractor performed such as (1) Contractor moved soil around the property, which resulted in the carwash building being too tall; (2) the driveways into two of the bays were not level, which caused cars to "bounce"; (3) the drains for rainwater needed to be adjusted; (4) green algae developed on the walls of the automatic carwashes, which could be fixed by installing new walls or resurfacing the walls every year; (5) the automatic carwash bay walls were also discolored with white marks; and (6) the electrical work for the vacuum areas was not properly completed, so credit card machines were unable to be installed.

Cemex supplied cement and concrete for the carwash construction. Cemex was not paid for \$30,000 worth of materials. Cemex had a mechanic's lien recorded against

Owners' carwash property due to the non-payment. On September 8, 2006, Cemex filed a complaint to foreclose on the mechanic's lien. The complaint named Contractor, Owners, and Galindo as defendants.

Owners filed a cross-complaint against Contractor for (1) indemnity, (2) declaratory relief, (3) breach of contract, and (4) breach of the covenant of good faith and fair dealing. Owner alleged Contractor breached the contract "by failing and refusing to complete the construction project under the terms of the agreement, failing to make the payments toward the construction loan under the amendment, and failing to pay plaintiff for materials provided for the project." Additionally, Owner alleged Contractor "failed to complete the electrical work, concrete approach, block wall, waterproofing, draining, and camera installation, among other items . . . ." Contractor filed a cross-complaint against Owners for (1) breach of contract, (2) indemnity, and (3) declaratory relief. On August 6, 2010, Owners filed a second cross-complaint against Contractor for negligence.

In September 2010, Cemex's complaint was dismissed after Owners settled with Cemex out of court for \$30,000. Galindo was dismissed due to filing for bankruptcy. Thus, only Owners and Contractor remained in the lawsuit. Contractor objected to Owners' second cross-complaint. The trial court found the second cross-complaint was untimely, not properly joined, and filed without leave from the court. The trial court said it would take evidence "without regard" to the second complaint.

Trial began on September 9, 2010. The following morning, Contractor informed the court that Owners brought an expert witness to court. Contractor objected to the

expert witness testifying because, while the expert appeared on the witness list, Contractor was not given an opportunity to depose the expert, the expert was not designated as an expert, and the operative cause of action was breach of contract—not negligence. Contractor argued that Owners failed to sue for construction defect and lost their negligence cause of action so there was “no reason” for an expert to testify.

Owners argued the expert testimony was needed to demonstrate Contractor breached the contract by not performing his work in a “workmanlike manner,” in particular, Contractor failed to place a waterproofing barrier under the foundation that would have prevented algae from forming. Further, Owners asserted there was not a request or demand for exchanging expert witness information, and Owner had mentioned the possible expert witness at his deposition.

The trial court said it would limit the expert to testifying about whether the project was completed in a “workmanlike manner.” The trial court granted Contractor permission to depose the expert during the lunch recess, but Contractor declined. The expert, James Feagin, testified at trial. Feagin was an expert in “masonry concrete.” Feagin visited Owners’ carwash and saw the algae on the walls of the automatic carwash bays.

Feagin explained that the salts and sulfate from the cement “bleed out” through the cement itself. The bleed out creates a “white film” on the dark brown blocks. Moisture usually causes the bleed out. Thus, the bleed out typically means there is moisture in the wall. The moisture can cause the steel rebar in the wall to rust and deteriorate. Feagin determined the moisture was coming from below the walls. He

cored a hole in the foundation slab looking for a vapor barrier. Feagin found a vapor barrier, but noticed “[t]he slab was not poured according to the plans.” Feagin believed the moisture was traveling up the walls because the vapor barrier was not “flush against the slab.” Feagin explained the block walls act like sponges, absorbing the moisture.

Feagin believed the best way to repair the problem would be to remove the entire slab, clean the foundation, and seal it. Feagin did not believe the moisture was from the water used to wash cars, because (1) that water would be only on the surface of the walls, and (2) the self-service bays did not have the same problems as the automatic bays.

The trial court found Contractor “breached his contract with [Owners] by not completing the carwash in a timely and workmanlike manner.” The trial court awarded Owners damages for (1) replacing the backflow device, (2) finishing the attic, (3) replacing concrete, (4) rewiring, (5) engineering, (6) replacing a breaker, (7) purchasing a patio cover, (8) fixing or replacing a damaged camera, (9) removing the slabs, (10) repouring the slabs, (11) cleaning the foundation, and (12) sealing the foundation.

## **DISCUSSION**

### **A. CLAIMS**

Contractor asserts the trial court erred by ruling on claims that were not part of Owners’ complaint, e.g. considering negligence or construct defect issues. We agree.

Contractor’s contention presents a legal issue with undisputed facts, which we review de novo. (*Hensel Phelps Const. v. San Diego Unified Port Dist.* (2011) 197

Cal.App.4th 1020, 1037.) A court may grant a cross-complainant “any relief consistent with the case made by the [cross-]complaint.” (Code Civ. Proc., § 580, subd. (a).) “[A] breach of contract cause of action[] must be pleaded with specificity.” (*Levy v. State Farm Mut. Auto Ins. Co.* (2007) 150 Cal.App.4th 1, 5-6.)

In the breach of contract cause of action, Owner alleged Contractor “breached the agreement by failing and refusing to complete the construction project under the terms of the agreement, failing to make the payments toward the construction loan under the amendment, and failing to pay [Cemex] for materials provided for the project. [Contractor] has failed to complete the electrical work, concrete approach, block wall, waterproofing, draining, and camera installation . . . .” The complaint does not allege with specificity that Contractor breached the contract by failing to complete the work in a workmanlike manner. The complaint does not raise any assertion regarding the manner in which the work was conducted—just that certain work was not done or was not finished.

When the trial court issued its ruling on Owners’ cross-complaint, it wrote, “[Contractor] breached his contract with [Owners] by not completing the car[wash] in a timely and workmanlike manner.” The trial court found Owners were owed money for replacing the backflow device; finishing the attic; replacing the concrete; rewiring; engineering; replacing a breaker; removing and repouring the slabs; and for purchasing a camera that had been damaged, and a patio cover which was needed to mask the building’s problematic height. Other than “finishing the attic” it appears that much of the damages were awarded for fixing the work done by Contractor—not for items

Contractor failed to complete, as reflected by the “re” in front of the various verbs, e.g. rewiring, replacing, removing, and repouring.

Since Owner alleged Contractor breached the contract by not finishing certain items, it is not proper to enter a judgment against Contractor for items he completed in an unprofessional manner, because that was not the allegation in the complaint.

Therefore, we conclude the trial court erred.

In Owners’ first argument they contend the trial court did not err in its judgment because the trial court erred in dismissing Owners’ second cross-complaint, which included a negligence cause of action. Worded differently, the trial court’s error was harmless because Owners tried to sue for negligence but the trial court improperly dismissed the negligence cause of action. Assuming for the sake of argument that Owners are correct in asserting their second complaint was improperly dismissed, the trial court’s error would not be harmless because of due process problems. A trial court cannot issue a judgment on allegations that were dismissed before trial started because Contractor had no means of knowing such allegations were being litigated. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563 [“notice is a fundamental aspect of due process”].) Accordingly, we are not persuaded the trial court’s error was harmless.

Second, Owners assert the judgment was not outside the scope of the complaint because construction contracts include an implied warranty against incomplete and defective construction. This argument is also problematic for due process reasons. Owners’ cross-complaint did not identify an implied warranty concerning defective

construction as the portion of the contract that was breached. Rather, the cross-complaint reflects Contractor allegedly breached the contract by not completing electrical work, concrete work, a block wall, waterproofing, draining, and installing a camera. Since an implied warranty against defective construction was not the basis for the breach of contract action, we find Owners' argument to be unpersuasive.

Owners assert that within the cross-complaint they alleged Contractor breached the contract, "by failing and refusing to complete the construction project under the terms of the agreement," and this allegation incorporates the failure to complete the construction in a workmanlike manner. This argument is not persuasive because breach of contract allegations must be pled with specificity. (*Levy v. State Farm Mut. Auto Ins. Co.*, *supra*, 150 Cal.App.4th at p. 5.) The specifics of the pleading reflect Contractor breached the agreement by not finishing certain aspects of the project; as set forth *ante*, the specifics do not relate to the manner in which the work was completed. Thus, we are still confronted with the problem of the pleading not matching the judgment—focusing on the general, or vague, allegations does not resolve this issue due to the pleading requirements.

This same reasoning applies to Owners' argument concerning the allegation of Contractor breaching the implied covenant of good faith and fair dealing—the argument fails because the pleading is too vague and we must look to the specifics of the cross-complaint, which only concern a failure to finish the work.

Third, Owners assert the trial court did not err because the court could properly award "any and all relief which may be appropriate under the scope of the pleading and

within the facts alleged and proved, irrespective of the theory upon which they may be alleged. [Citation.]” Owners’ argument is not persuasive because the judgment is not within the scope of the pleading or the specific facts alleged in the pleading.

Fourth, Owners contend Contractor had advance notice of Owners’ negligence cause of action because Owners filed their second cross-complaint in August 2010, prior to trial commencing. Owners’ argument is not persuasive because the trial court found the second complaint was untimely, not properly joined, and filed without leave from the court. The trial court said it would take evidence “without regard” to the second complaint. Thus, there was no way for Contractor to know he needed to defend himself against allegations of negligence, construction defect, or work performed in an unprofessional manner.

Fifth, Owners assert Contractor’s argument fails because he did not demonstrate that he suffered prejudice. Due process violations are reversible per se. (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [denial of jury trial]; *Fremont Indemnity Co. v. Workers’ Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [denial of cross-examination].) Notice is a fundamental aspect of due process. (*McMaster v. City of Santa Rosa* (1972) 27 Cal.App.3d 598, 602.) In this case, a judgment was entered against Contractor concerning the manner in which Contractor performed his work without Contractor having been given notice that the manner of his work was an issue being litigated. This failure to provide notice is a due process violation and therefore reversible per se.

To the extent it could be argued the error is not reversible per se, we conclude the error was prejudicial. (See *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928 [“[P]rocedural due process violations, even if proved, are subject to a harmless error analysis”].) When a trial proceeds on allegations that were not raised in the cross-complaint or answer,<sup>1</sup> prejudice “easily result[s] because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses.” (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910.) The expert witness’s testimony is an example of the prejudice suffered by Contractor due to trial proceeding on allegations not raised in the cross-complaint—Contractor was given only a lunch recess to depose the expert, and the larger portion of the damages award appears to relate to allegations that were not set forth in the cross-complaint. The lack of notice concerning the workmanship allegations placed Contractor at a prejudicial disadvantage for (1) cross-examining the expert on allegations not raised in the cross-complaint, and (2) arguing against damages for allegations not raised in the cross-complaint. Thus, we conclude the error resulted in a miscarriage of justice. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 947.)

B. CONTRACTOR’S REMAINING CONTENTIONS

Contractor contends the trial court erred by (1) awarding damages to Owners for construction defects that were not alleged in the complaint, (2) permitting Owners to

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<sup>1</sup> Contractor’s answer to the cross-complaint set forth a general denial to all Owners’ allegations and raised affirmative defenses in generic terms. For example, “Any purported obligation on the part of the answering Cross-Defendant to perform was excused due to a failure of conditions.”

present the testimony of an expert witness, and (3) not granting his motion for a new trial because the verdict is not supported by substantial evidence. We will reverse the judgment entered against Contractor for the reasons set forth *ante*, thus, these three contentions are moot because we can offer no further relief. (*Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 364 [a case is moot when a ruling can have no practical impact or provide any effectual relief].)

C. TENTATIVE DECISION

1. *PROCEDURAL HISTORY*

The trial court issued a written tentative decision on September 14, 2010. Contractor filed objections to the court's tentative decision. Owners also filed objections to the tentative decision. In the objections, Owners asserted the trial court failed to address their indemnity cause of action in the tentative decision. Owners also reminded the trial court that Owner wanted to be reimbursed \$26,000 for money paid to Galindo, and that Contractor did not provide receipts for three alleged payments. The trial court's final written judgment was drafted by Owners' attorney and filed in February 2011. The final judgment refers the reader to the tentative decision to find the reasons supporting the judgment.

2. *ANALYSIS*

Owners contend the trial court erred by not issuing a proposed statement of decision in response to Owners' objections to the court's tentative decision. We disagree.

The rule concerning a request for a statement of decision is as follows: “Within 10 days after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues. The principal controverted issues must be specified in the request.” (Cal. Rules of Court, rule 3.1590(d).)

Owners filed objections to the trial court’s tentative decision. In the objections, Owners explained why they believed the court’s tentative decision was inadequate. Owners did not file a request for a statement of decision—only objections. Thus, the trial court did not err by not issuing a statement of decision, because a statement of decision was never requested. (Cal. Rules of Court, rule 3.1590(d).)

Owners contend the trial court erred because their objections were, in substance, a request for a statement of decision. Owners assert, “the Objection to Tentative Decision was sufficient to trigger the requirement of a proposed statement of decision from the trial court.” It is unclear how exactly the trial court should have inferred Owners wanted a statement of decision issued, since Owners never requested the trial court take any action nor used the words “statement of decision” in their written objections. While Owners assert it is reasonable to infer they wanted a statement of decision given the substance of their objections, a more reasonable inference is that Owners wanted to preserve issues for appeal and were simply setting forth their objections for the record with no further action required by the trial court. Thus, we find Owners’ argument to be unpersuasive.

**DISPOSITION**

The judgment against Edward Konopacki is reversed. The judgment against Chibueze J. Dallah and Sharon K. Dallah is affirmed. Edward Konopacki is awarded his costs on appeal.

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MILLER  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.