

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARCO CRANE & RIGGING CO.,

Cross-complainant and Appellant,

v.

JENSEN ENTERPRISES, INC.,

Cross-defendant and Respondent.

G046386

(Super. Ct. No. 07CC00066)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Haight Brown & Bonesteel, Morton G. Rosen, Carol Salmacia, Jules S. Zeman and Jeffrey A. Vinnick for Cross-complainant and Appellant.

Carlson, Calladine & Peterson, Asim K. Desai and Christopher J. Weber for Cross-defendant and Respondent.

\* \* \*

In 2008, the trial court granted the motion of cross-defendant and respondent Jensen Enterprises, Inc. dba Jensen Precast (Jensen) for summary adjudication of the causes of action for express indemnity and breach of written contract in cross-complainant and appellant Marco Crane and Rigging Co.'s (Marco) cross-complaint. The complaint was dismissed in 2011 at plaintiffs Gail and Gene Gran's request. Marco appeals from that dismissal, seeking to reverse the order granting adjudication on the cross-complaint. We affirm.

### FACTS AND PROCEDURAL BACKGROUND

In 2005, Jensen entered into a contract with S.C. Signs to provide K-rail (concrete barriers) on a construction site. Because it did not have a crane, Jensen telephoned Marco and orally arranged for a crane and operator.

On June 13, 2005, Marco sent its crane operator Blaine Curtis to the job site. Before the job began, Curtis and the ground crew held a safety meeting. Curtis believed the ground crew was employed by All American Asphalt and that he was working for that company as well. He did not expect anyone from Jensen to be at the job site.

As part of his job, Curtis was required to obtain a signature on a document he referred to as a "job ticket" but was actually entitled Short Term Lease Agreement (agreement). (Capitalization omitted.) He believed the foreman from All American Asphalt signed the document, but an employee of S.C. Signs, Jason Barrett, actually did so. Jensen later paid Marco's invoice, which contained no indemnity language or reference to the agreement.

While Curtis was operating the crane, it came into contact with the overhead electrical wires. Plaintiffs sued Marco for injuries allegedly sustained as a

result and Marco cross-complained against S.C. Signs and Jensen for equitable indemnity, express indemnity, and breach of written contract, negligence, contribution, and declaratory relief as to the duties to defend and indemnify.

Jensen moved for summary adjudication of the causes of action for express indemnity and breach of contract on the ground there was no enforceable contract between it and Marco. In its opposition, Marco argued Barrett was Jensen's ostensible agent and a contract existed because the language in the agreement was identical to that in at least 89 prior Short Term Lease Agreements provided to Jensen.

The court granted the motion, finding no enforceable agreement given the absence of evidence Barrett signed the agreement on Jensen's behalf and that Barrett could not be deemed Jensen's ostensible agent because Curtis believed Barrett was working for an entity other than Jensen. It declined to rule on Jensen's written evidentiary objections to, among other things, the 89 prior agreements.

## DISCUSSION

### *1. Appealable Timely Judgment*

Our first task is to determine if we have jurisdiction to consider this appeal. Although an order granting summary adjudication is a non-appealable interlocutory order, it is generally reviewable on appeal from the final judgment in the action. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 127-128.) Here, Marco appealed from the dismissal dated December 22, 2011 "and all [o]rders related thereto," including the order granting Jensen's summary adjudication motion on the express indemnity and breach of contract claims. But the dismissal entered on December 22, 2011 was as to the complaint and did not mention the cross-complaint. Although the record indicates the cross-

complaint was “disposed with disposition of [c]ourt-ordered dismissal” on January 9, 2012, no appeal has been taken from that dismissal.

We requested further briefing on, and had the parties address during oral argument, “whether the appeal may proceed in light of appellant’s failure to appeal from the judgment of dismissal of the cross-complaint.” Following oral argument, Marco obtained a judgment in Jensen’s favor from the superior court. We liberally construe Marco’s notice of appeal as a premature but valid appeal from that judgment. (Cal. Rules of Court, rules 8.100(a)(2); 8.104(d)(2).)

In its supplemental brief, Jensen argues Marco’s notice of appeal is untimely because the court granted Jensen’s and Marco’s motions for determination of good faith settlement on September 19, 2011, which dismissed “all equitable causes of action,” and “subsequently signed an [o]rder dismissing Marco[’s] . . . cross-complaint for equitable indemnity as against Jensen on October 3, 2011.” According to Jensen, the time for Marco to file its notice of appeal ran from the October 3 order because it disposed of all causes of action between them and expired on December 2, 2011. (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 430.)

But the register of actions Jensen cites in support does not contain either the September 19 minute order or the October 3 order and shows only that an order regarding Jensen’s good faith motion was entered. Nor is there any indication in the record the court dismissed *all* of the remaining causes of action in the cross-complaint at the time it granted the motions for good faith determination, contrary to Jensen’s claim. Even assuming the court dismissed the equitable indemnity claims as Jensen asserts, that leaves the negligence cause of action, which Jensen contends was “simply a mislabeled claim for indemnity.” But if that were the case there would be no need for the court to order the “[c]ross-[c]omplaint disposed with disposition of [c]ourt-ordered dismissal” on January 9, 2012.

In any event, despite Jensen's claim the order granting its motion for determination of good faith settlement was served on all parties, the record contain no indication when that was done so as to start the time running for Marco to file its notice of appeal. (Cal. Rules of Court, rule 8.104(a) [time to appeal is 60 days after service of notice of entry of judgment or 180 days after judgment, whichever is earlier].) Based on the record before us and absent a showing by Jensen when service was made, even if the court signed a written order dismissing the entire cross-complaint on October 3, 2011, the notice of appeal, filed on January 20, 2012, was well within the 180 days.

## 2. *New Argument on Appeal*

Marco does not challenge the court's findings the document signed by Barrett was not an enforceable contract or that Barrett was not Jensen's ostensible agent. Rather, for the first time on appeal it contends the agreement is enforceable "based on the parties' long term course of dealing" evidenced by the 89 prior agreements.

Although our review of a grant of summary adjudication is de novo (*Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1182), it "is limited to issues which have been adequately raised and supported in [the appellant's] brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned. [Citation.]" (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Marco has forfeited any error with respect to the actual grounds upon which the court granted summary adjudication by failing to address them.

Marco has also forfeited the course of dealing argument by failing to raise it in the trial court. Despite our de novo review, "we are not obliged to consider arguments or theories . . . not advanced by plaintiffs in the trial court. . . . 'Specifically, in reviewing a summary [adjudication], the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus,

possible theories that were not fully developed or factually presented to the trial court cannot create a “triable issue” on appeal.’ [Citation.] ‘A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ [Citation.]” (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.)

Marco asserts it was entitled on appeal to rely on a different legal theory based on undisputed facts. We decline to exercise our discretion to consider such an argument for the first time on appeal (*Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 696) and deem it forfeited (*DiCola v. White Brothers Performance Products, Inc., supra*, 158 Cal.App.4th at p. 677). This case was competently and thoroughly litigated on both sides and it would be unfair to Jensen and the trial court to reverse an order granting summary adjudication over four years ago in 2008 on a ground not raised in the opposition.

### 3. *Lack of Supporting Admissible Evidence*

Even if not forfeited, the course of dealing issue lacks merit because it is not supported by admissible evidence that either Jensen or its agent ever signed or received the 89 prior agreements on which Marco relies. Marco contends it did so by way of the declaration of its vice president Sam Meyer. We disagree.

Meyer attested that “based upon [his] personal knowledge, except for those matters stated to be on information and belief,” the language on the subject agreement “is *identical* to at least . . . 89[] previous . . . agreements[] provided to Jensen by Marco, and for which Jensen was listed as the ‘customer.’” (Capitalization omitted.) He further declared the 89 prior agreements were attached to Marco’s opposition, “all of which list

Jensen as the customer, and all of which were provided to Jensen or its agent by Marco.”  
(Capitalization omitted.)

Jensen objected to these statements on the grounds they lacked foundation and personal knowledge. The objections have merit. Contrary to Marco’s claim, the court’s decision not to rule on these objections did not waive them on appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 532 [written evidentiary objections properly filed before summary judgment hearing not waived by trial court’s failure to rule].)

Noticeably absent is any statement Jensen or its agent actually signed any of them. Also missing are foundational facts for Meyer’s conclusory statement the 89 prior agreements were provided to Jensen or its agent. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427 [real estate broker did not affirmatively show personal knowledge to support the statement in his declaration that a prospective buyer was “ready, willing and financially able” to purchase property].) Nothing in the prior agreements themselves shows they were transmitted to Jensen. Rather, although they indicate Jensen is the customer/lessee, the documents contain only the signatures of unidentified individuals, none of whom have been established as an employee or agent of Jensen.

Marco argues that, as its “vice president, . . . Meyer is familiar with [its] day-to-day business operations including the forms it uses when transacting business with its customers. [His] declaration makes specific reference to the parties who were the subject of the [a]greement and he necessarily reviewed them before he executed his declaration.” But none of this is contained in his declaration. A supporting declaration must be made on personal knowledge and “show affirmatively that the affiant is competent to testify to the matters stated.” (Code Civ. Proc., § 437c, subd. (d).) Meyer’s declaration does not make that showing. He does not attest he was personally present at the job sites or provide any other foundational basis for his statement the prior

agreements were provided to Jensen or its agent. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1376 [vice president's declaration an assignment indicated all beneficial interest in trust deed was transferred to a bank held insufficient to show she had personal knowledge bank was beneficiary].)

We reject Marco's claim Jensen's attorney's authentication of the subject agreement judicially estops it from seeking to exclude the 89 prior agreements because the language is identical. The mere fact the documents have the same language does not mean the 89 prior agreements were provided to Jensen or that they were signed by its agent.

Those circumstances distinguish this case from the ones primarily relied on by Marco for its course of dealing theory. In both *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1048, 1051, and *Rosendahl Corp. H. K. Ferguson Co.* (1962) 211 Cal.App.2d 313, 314, the defendant's employee signed the agreement containing the indemnity provision. Similarly, in *Insurance Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.* (9th Cir. 2000) 201 F.3d 1111, evidence was presented that identical shipping invoices had been sent to the hirer of a shipping carrier on 47 occasions. The court held that constituted a course of dealing sufficient to put the hirer on notice of the term limiting the carrier's liability. (*Id.* at p. 1114.) No similar admissible evidence exists in this case.

In its reply brief, Marco asserts for the first time Jensen's payment of the invoice "constitutes Jensen's acceptance of the indemnification provision." (Capitalization omitted.) But the invoice contained no indemnity language or reference to the agreement, and in any event Marco's failure to raise this point in its opening brief forfeits the issue. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.