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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MICHAEL CONTI,

Plaintiff and Appellant,

v.

TYCO ELECTRONICS CORPORATION,

Defendant and Respondent.

H037607

(Santa Clara County

Super. Ct. No. CV184968)

Michael Conti was an at-will employee of Tyco Electronics Corporation for almost one year. After being terminated, he sued Tyco, claiming he was entitled to receive a discretionary bonus of \$52,400. He alleged claims of estoppel and breach of the implied covenant of good faith and fair dealing. The court granted Tyco's motion for summary judgment; Conti appeals from the judgment entered on that order. He challenges the ruling only on the breach of implied covenant cause of action.

Conti claims on appeal that under Tyco's bonus plan, an eligible employee terminated without cause was "[i]mplicitly . . . eligible for a pro-rata share of the bonus." He argues that because the company did not establish that he was terminated for cause, summary adjudication of the implied covenant claim was improper. We conclude, for reasons unrelated to whether Conti was terminated for cause, that there was no triable issue of material fact as to whether Tyco committed a breach of the implied covenant. Those reasons are (1) the fact that prorated bonuses for employees terminated without

cause were entirely discretionary under the company's plan, and therefore Conti did not have a clear entitlement to receive a prorated bonus even if his termination was without cause; and (2) the absence of any evidence to even suggest that Tyco terminated Conti to unfairly frustrate his claimed right to a bonus. We will therefore affirm the judgment.

FACTUAL BACKGROUND

I. *Conti's Hiring*

Tyco hired Conti on October 9, 2008, at a base salary of \$142,000. He was to be based in the company's Redwood City plant, working as "Director, Lean Integration,"¹ for the Aerospace, Defense and Marine business unit. Conti's commencement date, as confirmed in the offer letter he read, understood, and signed, was October 27, 2008.

At the time he was hired, Conti was informed that he was eligible to participate in the company's bonus plan. The offer letter provided: "[Y]ou will be eligible to participate in our Annual Incentive Plan (AIP). The target bonus potential for your position will be 20% for on-plan business performance with a maximum payout of 40% for fiscal year 2009. Determination of award levels will be based on the Company's financial performance and your individual contribution and are [*sic*] subject to the plan provisions." The third page of the offer letter, written entirely in italics, stated: "Employees have the right to terminate their employment at any time with or without cause or notice, and the Company reserves for itself an equal right. This document sets forth the entire agreement with respect to your employment. The terms of this offer may only be changed by written agreement, although the Company may from time to time, in

¹ According to Conti (as stated in his declaration in opposition to the summary judgment motion): " 'Lean Integration' is a term that refers to procedures adopted to improve manufacturing by savings in labor, material and improved quality. 'Lean' is a production practice that considers the expenditure of resources for any goal other than the creation of value for the end customer to be wasteful and thus a target for elimination."

its sole discretion, adjust the salaries and benefits paid to you and its other employees.” Conti dated and signed the document below this language and the word “Accepted.”

II. *The AIP*

The AIP provided that it was “designed to drive performance, ensure consistency and reinforce accountability.” The plan described the manner in which bonuses would be calculated after the close of the fiscal year, using operating income, margin, and other financial considerations, and comparing financial results for the fiscal year against targets established at the beginning of the year. The company intended that any bonus “[b]e reflective of [the employee’s] individual contributions over the year.” In that regard, the plan provided that, in addition to the organization’s financial performance, the “award may be influenced by [the employee’s] personal achievement of certain goals, overall behavior and performance on the job.”

An AIP “bonus certificate” (capitalization omitted), bearing a date of March 9, 2009, was signed by a representative of Tyco, appeared to bear Conti’s signature, and provided in part: “Participant hereby acknowledges receipt of this certificate and accepts the designation as a Participant under the [*sic*] subject to all the terms and conditions set forth in said Plan.” Conti testified that he had no memory of signing the certificate and therefore denied signing it.²

The plan vested the company with sole discretion to determine the ultimate amount of any bonus paid to a participant. It provided (in italics): “Notwithstanding the formulae described in this brochure, Tyco Electronics reserves the right, in its sole

² Conti testified that he did not get a copy of the AIP. The court, however, concluded, based upon the signed certificate, that Conti “probably received” a copy of the AIP. Conti does not urge that any alleged failure to receive a copy of the AIP is a fact relevant to his claim, and we thus conclude that any controversy on this point is a dispute as to an *immaterial* fact. (See *Seibert Security Services, Inc. v. Superior Court* (1993) 18 Cal.App.4th 394, 404, fn. 2 [“existence of a dispute concerning an *immaterial* fact does not deprive the court of the power to grant summary judgment”].)

discretion, to make adjustments in determining annual incentive awards and any payouts under the plan for individuals, business units and/or all plan participants.” Similarly, the AIP authorized the reduction of individual bonuses down to zero for “poor employee performance.” And elsewhere in the AIP, it was noted that “[t]he plan is discretionary in nature . . . Payment of any annual incentive award is voluntary and occasional and does not create any contractual or other right to receive future payments. *All decisions with respect to any annual incentive award payments will be at the sole discretion of Tyco Electronics.*” (Italics added.) Conti testified that he understood the payment of a bonus in his case was “discretionary to [his supervisor] Mark [Oggero] and company performance.”

The plan also provided that “[n]o annual incentive award payout” would be made in the event of “[v]oluntary termination before AIP awards are paid or termination for cause.” In the event an employee was terminated without cause, “[a] prorated incentive award *may* be paid unless otherwise specified in an applicable severance plan or agreement.” (Italics added.)³

III. *Conti’s Performance and Termination*

Conti understood months before he was terminated that his supervisor, Oggero, was dissatisfied with his job performance. On one occasion in July 2009, Oggero told him, “ ‘You’re not very good at this [lean implementation].’ ” Oggero suggested that Conti consider returning to work for his prior employer, a medical device company. But Conti submitted his declaration in opposition to the motion indicating that his performance had been satisfactory; additionally, in his deposition, he stated that his

³ There is some language in the plan which may suggest that an employee who separates from the company *under any circumstances* before the AIP payout date forfeits any potential discretionary bonus. Tyco seizes on this language in arguing that the mere fact that Conti was not an employee on the date bonuses were paid in December 2009 bars his claim, a position which we address and reject in part II.C.1. of the Discussion, *post*.

performance had been “stellar.” Conti declared that he had helped develop a plan to implement lean in Tyco’s Redwood City facility, and that after a July 2009 audit of the plant, one of the company’s auditors “said that [the Redwood City plant] had made significant headway in an impossible situation.” Conti declared that the reason the situation was impossible was that the plant was dirty, its machinery poorly maintained, and the workers were “sloppy and undisciplined,” and that many “production workers would sit with their legs up on a desk and do nothing or as little as possible.” He indicated further that he was praised for his efforts in implementing lean at the plant after a second audit in late September 2009.

On October 6, 2009, Oggero telephoned Conti and said that his employment was “not working out.” At that time, the local human resources manager, Lynne Pereira, came into Conti’s office. Conti asked why he was being terminated, and “[s]he said it was for cause” and because of “ ‘performance issues’ ” When he asked her to explain this, “[s]he said that was all she knew.”

On October 9, 2009 (the effective date of termination), Conti was provided a change in employment status form indicating “Released Performance” under the heading “Reason for Termination.” At that time, Pereira told him that he was ineligible for a bonus because he had been terminated for cause.

Tyco’s fiscal year spanned from September 29, 2008 through September 25, 2009. According to its director of Global Human Resources, the company “paid out bonuses to employees eligible under the terms of the AIP for fiscal year 2009 on December 11, 2009.”

PROCEDURAL BACKGROUND

Conti filed suit against Tyco in October 2010, alleging two causes of action labeled “estoppel” and “implied covenant.” (Capitalization omitted.) He alleged that he had entered into an employment contract with Tyco on October 9, 2008, which did not provide that he was an at-will employee. Conti alleged further that his contract included

eligibility to participate in Tyco's AIP; Tyco concealed from him that he would be terminated irrespective of his job performance; and Tyco terminated him before he had been employed one year, based upon the pretext that his job performance was inadequate, while the true reason was to reduce costs. Conti sought judgment for \$52,400, the amount of the unpaid bonus to which he claimed an entitlement.

In May 2011, Tyco moved for summary judgment, or, in the alternative, for summary adjudication, attacking both causes of action of the complaint. Conti opposed the motion. The court granted summary judgment on July 29, 2011, concluding that there were no triable issues of material fact as to either the estoppel cause of action or the breach of implied covenant claim alleged in the complaint. As to the latter claim, the court held, *inter alia*, that, assuming the existence of a contract, "there was no breach [because] under the express terms of the AIP_[,] Plaintiff was not entitled to any bonus because he was terminated for cause and was not an active employee on the date bonuses were paid for fiscal year 2009 (Dec. 11, 2009)." A judgment was entered in favor of Tyco; Conti filed a timely appeal.

DISCUSSION

I. *Summary Judgment and Standard of Review*

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)). As such, the summary judgment statute, Code of Civil Procedure section 437c,⁴ "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203

⁴ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

(*Caldwell*.) A summary judgment motion must demonstrate that “material facts” are undisputed. (§ 437c, subd. (b)(1).) “The materiality of a disputed fact is measured by the pleadings.” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250; see also *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on other grounds *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490.)

“A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (§ 437c, subd. (f)(1).) Like summary judgment, the moving party’s burden on summary adjudication is to establish evidentiary facts sufficient to prove or disprove the elements of a claim or defense. (§ 437c, subds. (c), (f).)

The moving party “bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must “ ‘show[] that one or more elements of the cause of action . . . cannot be established’ by the plaintiff.” (*Id.* at p. 853, quoting § 437c, subd. (o)(2).) A defendant meets its burden by presenting affirmative evidence that negates an essential element of the plaintiff’s claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence “that the plaintiff does not possess, and cannot reasonably obtain, needed evidence” supporting an essential element of its claim. (*Aguilar*, at p. 855.)

Since both summary judgment and summary adjudication motions involve pure questions of law, we review independently the granting of summary judgment or summary adjudication of a claim to ascertain whether there is a triable issue of material fact justifying the reinstatement of the action. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) In doing so, we “consider[] all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted

inferences the evidence reasonably supports. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

In our independent review of the granting of summary judgment or summary adjudication, we conduct the same three-step procedure employed by the trial court. First, “we identify the issues framed by the pleadings because the court’s sole function on a motion for summary judgment is to determine whether there is a ‘triable issue as to any material fact’ (§ 437c, subd. (c)), and to be ‘material’ a fact must relate to some claim or defense *in issue* under the pleadings. [Citation.]” (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) Second, we examine the motion to determine whether it establishes facts justifying judgment in the moving party’s favor. (*Chavez v. Carpenter, supra*, 91 Cal.App.4th at p. 1438.) Third, we scrutinize the opposition—assuming movant has met its initial burden—to “decide whether the opposing party has demonstrated the existence of a triable, material fact issue [to defeat summary judgment or summary adjudication]. [Citation.]” (*Ibid.*; see also *Burroughs v. Precision Airmotive Corp.* (2000) 78 Cal.App.4th 681, 688.) Since the moving party here is the defendant, our de novo review tests whether defendant has “conclusively negated a necessary element of plaintiff[’s] case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial. [Citation.]” (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 736.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

II. *Summary Adjudication of Breach of Implied Covenant Claim*

A. *Parties’ Contentions*

Conti argues that the court erred in finding no merit to the breach of implied covenant cause of action. He reasons that “if an employee is discharged without cause before completion of all of the terms of the bonus agreement, the employee may receive at least a pro rata share of the promised bonus.” Tyco’s AIP provided for such an

eventuality. Since, Conti argues, Tyco did not establish that Conti was terminated for cause, or, even assuming it did so, that such termination was in good faith, there were triable issues of material fact with respect to his breach of implied covenant claim.

Tyco responds that summary adjudication was proper for several salient reasons. First, it asserts that “Conti’s undisputed at-will employment [status] negates his claim for breach of the implied covenant . . .” Second, Tyco argues that, because Conti was not an active employee when AIP bonuses were paid (in December 2009), he was ineligible to receive a bonus under the express terms of the plan. Third, it contends that, because Conti knew that he had been terminated for performance reasons—and termination for cause made him ineligible to receive a bonus under the terms of the plan—his claim had no merit. Fourth, Tyco argues that “whether there was good cause for the termination is irrelevant to his implied covenant claim in light of Conti’s own testimony that any bonus payment he might receive was subject to the discretion of Oggero and ‘company performance’ and his understanding that he was terminated for performance reasons. [Citation.]”⁵

B. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

Because “the pleadings set the boundaries of the issues to be resolved at summary judgment” (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648), we first review the nature of the claim at issue, i.e., the breach of the implied covenant of good faith and fair dealing.

1. *Applicable Law*

“ ‘Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’ [Citation.]” (*Foley v. Interactive Data Corp.*

⁵ Because, as we discuss, *post*, the Supreme Court has held that a breach of the implied covenant claim may be utilized to enforce an at-will employee’s right to benefits to which he or she is clearly entitled (*Guz, supra*, 24 Cal.4th at p. 353, fn. 18), we reject out of hand Tyco’s first stated ground for affirmance.

(1988) 47 Cal.3d 654, 683 (*Foley*), quoting Rest.2d Contracts, § 205; see also Cal. U. Com. Code, § 1304 [each contract under Commercial Code “imposes an obligation of good faith in its performance and enforcement].) Thus, such an implied covenant contained in every contract includes the implied provision “that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” [Citations.]” (*Foley*, at p. 684, quoting *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.) It is an implied-in-law doctrine that arises out of the contractual relationship between the parties and “exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the benefits of the agreement actually made. [Citation.]” (*Guz, supra*, 24 Cal.4th at p. 349, citing *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.) But while the implied covenant “requires mutual fairness in applying a contract’s terms, it cannot substantively *alter* those terms.” (*Guz, supra*, 24 Cal.4th at p. 327; see also *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 [good faith covenant may not contradict express terms of contract].) The covenant “cannot ‘be endowed with an existence independent of its contractual underpinnings.’” [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz*, at pp. 349-350.)

Labor Code section 2922⁶ creates a presumptive at-will relationship between employer and employee—namely, that an employee may be terminated at any time for any or no reason.⁷ Thus, where the employment relationship is at-will either because the

⁶ “An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.” (Lab. Code, § 2922.)

⁷ Of course, even in an at-will employment context, an employer may not terminate an employee for a reason that violates fundamental public policy. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887.)

parties' agreement expressly so provides or the statutory presumption cannot be rebutted, the implied good faith covenant cannot be used to alter that relationship. As the Supreme Court has explained: "The mere existence of an employment relationship affords no expectation, protectible by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms. Thus if the employer's termination decisions, however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant. [¶] This logic led us to emphasize in *Foley* that 'breach of the implied covenant cannot logically be based on a claim that [the] discharge [of an at-will employee] was made without good cause.' (*Foley, supra*, 47 Cal.3d 654, 698, fn. 39.) . . . [¶] The same reasoning applies to any case where an employee argues that even if his employment was at will, his arbitrary dismissal frustrated his contract benefits and thus violated the implied covenant of good faith and fair dealing. Precisely because employment at will allows the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In such a case, 'the employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never provided for a continuation of its benefits in the first instance.' [Citation.]" (*Guz, supra*, 24 Cal.4th at p. 350.)

In a footnote, the court in *Guz* observed that under certain circumstances not presented in the case before it, a breach of the implied covenant claim might be utilized to enforce a right to benefits in an at-will employment relationship. The court stated: "[T]he covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit *to which the employee was clearly entitled*, such as compensation already earned." (*Guz, supra*, 24 Cal.4th at p. 353, fn. 18, italics added.)

2. Conti's Complaint

“Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract. [Citation.]” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885, fn. omitted.) Here, Conti pleaded that his employment contract provided that he would be eligible to participate in the AIP, quoting the offer letter. After incorporating by reference some of the allegations of his first cause of action for estoppel, Conti alleged in the second cause of action that “[t]here is a covenant of good faith and fair dealing that Tyco would not terminate the employment of Plaintiff to avoid having to pay a bonus.”

It is axiomatic that a party seeking relief based upon a breach of the implied covenant—like a party seeking relief for breach of the express provisions of a contract (*Levy v. State Farm Mut. Auto. Ins. Co.* (2007) 150 Cal.App.4th 1, 5-6 [facts concerning defendant's breach of contract must be pleaded with specificity])—must allege the defendant's breach of the covenant. (See *Wolf v. Walt Disney Pictures* (2008) 162 Cal.App.4th 1107, 1123 [plaintiff was required to show implied covenant breach by proof that defendant either lacked subjective good faith belief in validity of its act or act was intended to and did frustrate common purpose of agreement].) Conti did not specifically allege the element of breach as part of his implied good faith covenant claim. In connection with his estoppel claim, however, he alleged that Tyco had asserted his termination was based upon inadequate performance, but that this was a pretext, and the actual reason was his supervisor's “desire[] to reduce costs.” But this allegation was not incorporated into Conti's breach of implied good faith covenant cause of action. Although Conti's pleading is technically deficient because breach was not alleged with particularity, based upon a liberal reading of the complaint,⁸ we infer that the essence of

⁸ The requirement that courts liberally construe the evidence presented by the party opposing summary judgment notwithstanding (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64), we are under no duty to liberally construe the allegations of the

that claim is that Tyco breached the implied covenant by terminating him specifically to circumvent paying him a bonus under the AIP. Or, borrowing from the language in *Guz*, Conti asserts that Tyco breached the implied covenant of good faith and fair dealing by “unfairly frustrating [Conti’s alleged] right to receive the benefits [i.e., the AIP bonus] of the agreement actually made. [Citation.]” (*Guz, supra*, 24 Cal.4th at p. 349.)

C. *Propriety of Summary Judgment*

1. *Conti’s Termination Before Payout Date*

Tyco argues that Conti was ineligible to receive a bonus under the express terms of the AIP because, indisputably, he was not an active employee when bonuses were paid in December 2009. We disagree.

An employee’s eligibility for incentive compensation, such as bonuses, offered by the employer, “is properly determined by the bonus plans’ specific terms and general contract principles.” (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 522 (*Neisendorf*); see also *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 621 (*Schachter*)). Thus, the *Neisendorf* court, applying the specific provisions of two bonus plans, rejected the plaintiff’s assertion that bonuses were due notwithstanding the terms of the bonus plans that rendered her ineligible to receive a bonus due to her having been terminated for unsatisfactory performance before their payout dates: “We find nothing in the public policy of this state concerning wages that transforms *Neisendorf*’s contingent expectation of receiving bonuses into an entitlement. . . . [¶] There was no promise made to *Neisendorf* that she would earn the . . . bonuses simply by working for LS&Co. during

complaint here. (*Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 522 [while court must liberally construe claims alleged in complaint in addressing demurrers and judgments on the pleadings, in contrast, no such duty applies to summary judgments].) Because Tyco did not base his motion on a challenge to the sufficiency of the complaint, and the parties are in apparent accord that the basis of Conti’s breach of implied covenant claim is that Tyco terminated him to prevent his receiving a bonus, we elect to overlook this pleading deficiency in considering the merits of the claim.

the fiscal year. LS&Co. expressly tied the payment of [both] . . . bonuses to a measurable benchmark. The language of both bonus plans required that she not be terminated for cause before the payout date.” (*Neisendorf*, at pp. 522-523; see also *Schachter*, at p. 621 [employee must satisfy condition precedent specified in plan to receive incentive compensation]; *Lucian v. All States Trucking Co.* (1981) 116 Cal.App.3d 972, 975 [rejecting plaintiffs’ bonus claims where plans made person who voluntarily left company before payout date ineligible and employees had voluntarily left company before payout date].)

Here, there is AIP language supporting Tyco’s position. In two locations of the plan, it is stated that a participant, to be eligible for a bonus, “must be an active employee on the day awards are paid.” But there is AIP language contradicting this blanket notion that—like a raffle condition that “you must be present to win”—an eligible participant under all circumstances must be an active employee on the bonus payout date. On the same page (entitled “Changes in Employment Status”) in which the language on which Tyco relies appears, the plan provides that a participant will not receive a bonus in the event of “[v]oluntary termination before AIP awards are paid or termination for cause,” but that in the event of “[t]ermination without cause,” “[a] prorated incentive award may be paid unless otherwise specified in an applicable severance plan or agreement.”

From a review of the particular terms of the AIP (see *Neisendorf*, *supra*, 143 Cal.App.4th at p. 522), Tyco’s all-or-nothing position is untenable. Contrary to its assertion, there *are* circumstances in which a participant who is not an active employee on the payout date would be eligible to be considered for a discretionary bonus under the AIP. We disagree with Tyco’s implicit argument that the language in the AIP seemingly requiring under all circumstances a participant to be an active employee when bonuses are paid trumps other language providing for a discretionary pro-rata bonus for employees terminated without cause. To hold otherwise would have us turn our backs on a significant contract interpretation principle, namely, that if contract may be reasonably

construed to avoid a forfeiture, the court's duty is to interpret it in this fashion. (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 771; see also Civ. Code, § 1442 [contractual conditions involving forfeitures strictly construed against "party for whose benefit it is created"].) Therefore, Tyco was not entitled to summary disposition of the breach of implied covenant claim simply because Conti was not an active employee on December 11, 2009.

2. *Whether Conti Was Terminated for Cause*

Tyco also contends that the fact that Conti understood he was terminated for cause defeats his claim. It also argues that he was, in fact, terminated because of poor performance, a circumstance which precludes his receipt of a bonus. We disagree that simply because Conti testified in deposition that he was told his termination was performance-related (and declared that Pereira told him he was being terminated for cause), it was proper to grant summary adjudication of the breach of implied covenant claim. Moreover, the record does not establish Tyco's contention that summary adjudication was proper because it was established that Conti was actually terminated for cause.

As noted, under the AIP, a participant terminated without cause "may be paid" a prorated bonus. The phrase "without cause" is not defined in the AIP.⁹ But treating it, as the parties seemingly do, as the opposite of a "for cause" termination, we note that generally, in the context of a relationship where an employee may be terminated only for good cause, it is the trier of fact who decides whether cause existed for the termination unless the undisputed facts show that the employer had good cause, thereby warranting

⁹ Likewise the phrase "for cause" in language indicating that a participant terminated for cause is ineligible to receive a bonus is not defined in the AIP. Although the meaning of the term is somewhat elusive, the Supreme Court has held that "good or just cause . . . is *not*: reasons that are 'trivial, capricious, unrelated to business needs or goals, or pretextual.'" [Citation.] (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 96.)

summary judgment. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 841; see also *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 42-43.) Here, although Conti was an at-will employee who could be terminated for any or no reason (save one that violated fundamental public policy), the circumstances of his termination become relevant because of the AIP provision permitting a participant terminated without cause to be considered for a discretionary prorated bonus.

It is without dispute that Conti was told by Tyco that he was being terminated for cause (or for performance reasons). Tyco in its brief, however, incorrectly treats the issue of whether Conti *was* terminated for cause as identical to whether *it stated to him* that he was being terminated for cause. Although there is no dispute that Tyco stated to Conti that he was terminated for cause, whether Conti was *in fact* terminated for cause (i.e., whether Tyco falsely told Conti he was being terminated for performance reasons) is in dispute. Tyco presented no evidence whatsoever concerning Conti's job performance, let alone evidence of alleged deficiencies in his work. Conti, through his declaration and excerpts of his deposition, indicated that his job performance was "stellar," and provided specifics—including evidence that he was told in July 2009 by a Tyco auditor that he "had made significant headway" in implementing a lean project plan, and was told in September 2009 by a Tyco auditor that he had "exceeded the required activities from the project plan"—indicative that his work was satisfactory. While we might otherwise disregard as self-serving Conti's deposition testimony indicating his opinion that his work was "stellar" (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 [plaintiff's "subjective beliefs" and "uncorroborated and self-serving declarations insufficient in opposing summary judgment]), where, as here, it is accompanied by additional facts supporting his claim that his performance was satisfactory and there is, at best, scant contradictory evidence showing poor performance (i.e., Oggero's statement to Conti that he was "not very good at" his job), there was a triable issue of fact as to whether his termination was for cause, or without cause.

Based upon the foregoing, we conclude that summary adjudication of the breach of implied covenant claim was not appropriate here based upon either of Tyco's arguments: (1) that Tyco advised Conti it was terminating him for cause; or (2) that there was no controversy concerning whether Conti was *in fact* terminated for cause.

3. *Evidence of Tyco's Frustration of Conti's Recovery of Bonus*

The premise of Conti's claim for breach of the implied good faith covenant was that his supposed for-cause termination was a pretext, and that the true reason for his firing was Tyco's desire to avoid paying him a bonus. Applying *Guz, supra*, 24 Cal.4th at page 349, Conti was required to plead and prove that Tyco breached the implied covenant of good faith and fair dealing by "unfairly frustrating [his] right to receive the benefits [i.e., the AIP bonus] of the agreement actually made. [Citation.]"

Tyco presented evidence that (1) the payment of bonuses under the AIP was discretionary; (2) the plan makes a participant discharged for cause ineligible to receive a bonus; (3) the plan provides that a prorated bonus "*may be paid*" (italics added) to a participant terminated without cause; (4) Conti understood that his potential receipt of a bonus was dependent upon the company's financial performance and the discretion of his supervisor, Oggero; (5) Conti was terminated October 9, 2009, for what Tyco stated were performance reasons; and (6) Tyco paid out bonuses pursuant to the AIP on December 11, 2009. Against this backdrop, we analyze whether Conti made a sufficient showing to warrant proceeding to trial under his frustration-of-benefits theory.

As provided in the plan, the payment of a bonus to any eligible participant was entirely discretionary. The AIP provided in no uncertain terms, under the heading, "Important Information": "The plan is *discretionary in nature* and may be amended or terminated by Tyco Electronics (by action of our Board of Directors) at any time. Payment of any annual incentive award is *voluntary* and occasional and does not create any contractual or other right to receive future payments. *All decisions with respect to any annual incentive award payments will be at the sole discretion of Tyco Electronics.*

Your participation in the plan shall not create a right to further employment with your employer and shall not interfere with the ability of your employer to terminate your employment relationship at any time, with or without cause.” (Italics added.)

Consistently with the discretionary nature of the plan, the AIP specified that a prorated bonus “*may be paid*” to a participant terminated without cause. (Italics added.)

In the context of Conti’s breach of implied covenant claim, it is extremely noteworthy that bonus payments under the AIP, in contrast to a plan under which bonus payments are conditioned solely on the employees’ remaining with the company on the payout date, are entirely discretionary with the company. While the Supreme Court in *Guz* acknowledged that an at-will employee may in an appropriate case assert a breach of implied covenant claim where the employer fires the employee “to cheat the worker out of another contract benefit” (*Guz, supra*, 24 Cal.4th at p. 353, fn. 18), it made clear that such a benefit must be one “to which the employee [is] clearly entitled, such as compensation already earned.” (*Ibid.*) Here, even assuming Conti was terminated in October 2009 *without* cause, his so-called “entitlement” to a prorated bonus under the terms of the plan is chimerical. Under such a circumstance, he was entitled only to be *considered* for a bonus at the sole discretion of Tyco. This is hardly a benefit “to which the employee [is] clearly entitled, such as compensation already earned.” (*Ibid.*; see also *Neisendorf, supra*, 143 Cal.App.4th at p. 522 [rejecting contention that “contingent expectation” of receipt of bonuses constituted “an entitlement”].) Thus, the discretionary nature of the bonus under the AIP, of itself, appears to preclude Conti from recovering under his breach of implied covenant theory.

Even were Conti able to overcome this hurdle, he presented no responsive evidence linking Tyco’s act of terminating him—which it had the legal right to do for any reason or no reason because of his at-will status (*Guz, supra*, 24 Cal.4th at pp. 327,

335)—with any motivation to avoid paying him a bonus.¹⁰ Conti’s deficient showing is demonstrated further by what was *not* present in his opposition. For example, there was no evidence that during the term of his employment, Conti received any assurances or promises that he would receive a bonus after the close of the 2009 fiscal year. Nor for that matter was there evidence of any favorable employment reviews by Conti’s supervisor. To the contrary, the only showing was Oggero’s negative evaluation of Conti’s capabilities three months before his termination. And Conti’s opposition provided no evidence concerning the quantity and dollar values of the bonuses ultimately paid to eligible participants, the number of participants, if any, who received no bonus, and whether prorated bonuses were paid to any participants terminated without cause. Moreover, the fact that Conti was terminated more than two months before bonuses were paid does nothing to support his claim that his discharge was motivated by the company’s desire to avoid paying a bonus.

As our Supreme Court stated in the context of finding summary judgment appropriate to dispose of claims by office shooting victims against a gun manufacturer, “Although evidence of causation may be circumstantial, ‘it must be substantial’; it is insufficient where, as here, it leaves the question of causation ‘in the realm of mere speculation and conjecture. . . .’ [Citation.]” (*Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 490; see also *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 14-15; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [“responsive evidence that gives rise to no more than mere speculation” is not substantial evidence].) By parity of reasoning here, while evidence showing that Tyco’s reason for terminating Conti was

¹⁰ The unsupported allegation in his complaint that Tyco terminated him due to its desire to avoid paying a bonus is of no value in determining whether summary adjudication was proper. (See *College Hospital, Inc. v. Superior Court (Crowell)* (1994) 8 Cal.4th 704, 720 [party cannot rely on pleadings as evidence in support of or in opposition to summary judgment].)

motivated by a desire to avoid paying him a bonus may be circumstantial, it nonetheless must be substantial and not leave the link between the two speculative and conjectural. Here, Conti presented no evidence to support his bonus-payment-avoidance theory. Because Conti failed to show evidence of breach, and also did not show that the prorated bonus was a benefit to which he was clearly entitled, summary adjudication of the breach of implied covenant claim was proper.

4. *Conclusion*

We have concluded that the summary adjudication of Conti's claim for breach of the implied covenant of good faith and fair dealing was proper because the defendant met its burden, and Conti did not show that (1) he was deprived of a benefit (i.e., a prorated bonus under the AIP) to which he was clearly entitled, or (2) Tyco committed a breach, i.e., that Tyco terminated Conti's at-will employment to unfairly frustrate his right to receive a bonus under the AIP. (*Guz, supra*, 24 Cal.4th at p. 349.) Although the Supreme Court acknowledged that the implied covenant may protect an at-will employee where the termination is accomplished as "a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled" (*id.* at pp. 353, fn. 18), such is not the case before us.¹¹ The reasoning of the court below supporting its conclusion that there was no showing of a breach of the implied covenant included that Conti "was terminated for cause and was not an active employee on the date bonuses were paid . . ." While our reasoning differs, our conclusion is the same and therefore,

¹¹ We need not decide whether, as a blanket rule, an at-will employee who is a participant in a discretionary bonus plan such as the one offered by Tyco here is precluded from recovery if he or she is terminated without cause and has presented evidence showing that the termination was specifically motivated to avoid paying the bonus. There may be instances in which the facts belie the discretionary nature of the plan (e.g., the existence of a history of bonus payouts to all participants, regardless of individual performance). We only decide here that on the record before us, Conti cannot maintain a breach of implied covenant claim.

based upon our de novo review, summary adjudication of the breach of implied covenant claim was proper. (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85 [“we review the [summary judgment] ruling of the trial court, not its rationale”].)

DISPOSITION

The judgment entered on the order granting summary judgment is affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P.J.

Mihara, J.