A147481
(Contra County Superior Court Case No. MSC15-01014)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
Division 2

NADER EGHTESAD,
Appellant/Plaintiff,
vs.

STATE FARM GENERAL INSURANCE COMPANY,
Respondents/Defendants.

Appeal from a Judgment of Dismissal following Demurrer, of the Contra Costa County Superior Court
Hon. Jill Fannin, Judge, presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Trial Court erred in this case by failing to grant leave to amend when it sustained STATE FARM's demurrer to EGHTESAD's original complaint. Try as it might, STATE FARM cannot avoid the meaning of California Code of Civil Procedure § 472c(a), which keeps open the issue of whether a trial court erred in denying leave to amend following the sustaining of a demurrer, regardless of whether or not the plaintiff sought leave to amend in the trial court. The Trial Court sustained STATE FARM's demurrer without leave to amend.

The question on appeal then becomes whether EGHTESAD's original complaint could be amended to allege at least one valid cause of action against STATE FARM. The answer to that question is "yes." Unless an original complaint on its face reveals that it cannot possibly be amended, EGHTESAD's pro per form complaint, while it admittedly needed amending in some regards, did not reveal on its face any insurmountable obstacles to amendment to successfully allege claims against STATE FARM for breach of contract, fraud, and bad faith. EGHTESAD's opening brief and existing pleading provided sufficient guidance as to how to fill in any necessary pleading gaps.

In addition, EGHTESAD could name one of his fictitiously named

Doe defendants as his former tenant, who slandered EGHTESAD after defaulting on a settlement with EGHTESAD following an unlawful detainer action.

STATE FARM argued that EGHTESAD did not seek leave to amend, and did not even oppose STATE FARM's demurrer. STATE FARM failed to mention that EGHTESAD did not do so due to an auto accident he was injured in after STATE FARM filed its demurrer. The Trial Court granted one two-week continuance based on the accident, but continued the matter no further, even after EGHTESAD sought an additional extension based on his doctor's note about how long it would take him to recover from the accident. Since illness of the attorney, in this case EGHTESAD acting in pro per, is a prime factor in determining whether to grant a continuance based on his injury, the Trial Court faced a conflict between keeping judicial efficiency in its calendar and the policy favoring resolution of cases on their merits. In such conflicts, the policy favoring deciding cases on the merits prevails. The Trial Court should either have granted a further continuance or granted leave to amend. Leave to amend should have been granted and the Trial Court's dismissal must be reversed.

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DISCUSSION

A. CCP § 472c(a) represents a legislative exception to the rule regarding reliance only on matters in the record.

STATE FARM spends a significant portion of their brief arguing that CCP § 472c(a) does not allow EGHTESAD to argue on appeal that leave to amend should have been granted, even though EGHTESAD did not raise the issue in the Trial Court.[1] STATE FARM attempts to use the following language from *Kolani v. Gluska* (1998) 64 Cal.App.4th 402 to show why EGHTESAD cannot rely on matter not previously raised in the trial court to justify amendment under CCP § 472c(a): ""Documents and facts not presented to the trial court generally cannot be considered on appeal." *Kolani*, 64 Cal.App.4th at 412. STATE FARM takes the quote entirely out of context. The full quote reads as follows:

> We understand why the trial court acted as it did. We reiterate: Appellants did not ask the trial court for leave to amend. Generally, failure to raise an issue or argument in the trial court waives the point on appeal. For example, failure to object to evidence waives the objection. (Evid. Code, § 353, subd. (a).) Documents and facts not presented to the trial court generally cannot be considered on appeal. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 [227 Cal.Rptr. 491].) A persuasive argument can be made that a similar rule should govern where a party doesn't ask the trial

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[1] That does not include its arguments to that effect in its unsuccessful motion to strike portions of EGHTESAD's opening brief.

> court for leave to amend. Trial judges aren't usually expected to give the parties advice, or counsel them how to plead. A rule requiring a request to amend as a predicate for relief on appeal would conform to the sound general principle that matters not raised in the trial court are waived on appeal. However, the Legislature in Code of Civil Procedure section 472c, subdivision (a) enacted the contrary rule, and we are bound by it. *Kolani*, *supra*.

The above quote from *Kolani* shows that the rule set forth by CCP § 472c(a) is contrary to, or an exception to the general rule against relying on "documents or facts not presented to the trial court," one that courts are bound by. *Kolani*, *supra*. Use of the word "generally" provides another indication that the situation at issue does not fit into the usual rule.

STATE FARM's comments to the contrary, EGHTESAD is not asking this Court to "make out" EGHTESAD's arguments for him, but merely to consider the bases for amendments urged by EGHTESAD as allowed pursuant to CCP § 472c(a).

STATE FARM argues that no authority adopts this position (RB at p. 27). They are mistaken. In *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, the 2d District reversed a trial court grant of motion for judgment on the pleadings without leave to amend, to allow the plaintiff leave to amend their complaint to allege a cause of action under the Moore-Brown-Roberti Family Rights Act ("CFRA," Gov't Code §§

12945.1, 12945.2). *Dudley*, 90 Cal.App.4th at 257. In so holding, the Court in *Dudley* held that:

> In the context of a general demurrer, "[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 omitted) *Dudley*, 90 Cal.App.4th at 260.[2]

The factual and procedural history in *Dudley* show no attempt by the plaintiff in that case to amend her claim in the trial court. *Dudley*, 90 Cal.App.4th at 257-259. If she had, there would have been no reason for the above holding.

In addressing the issue in *Dudley* of whether the complaint could be amended, the 2d District held that:

> The complaint does not allege Dudley had the requisite hours of service in the 12 months before she began taking medical leave in mid-1996; however, Dudley states *in her opening brief* that if given the opportunity to amend, she can allege that fact. Thus, it appears Dudley's complaint can be amended to allege the second element of a cause of action for retaliation in violation of CFRA. *Dudley*, 90 Cal.App.4th at 262 (emphasis added).

Argument in the Opening Brief in *Dudley* states that she can allege facts

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[2] The rules applying to a demurrer also apply to a motion for a judgment on the pleadings, since the latter is treated as a demurrer for purposes of appeal. *Dudley*, *supra* (citation omitted).

comprising a necessary element of her claim in an amended pleading, just as argument in EGHTESAD's Opening Brief states the same thing.

CCP § 472c(a) is also consistent with CCP § 430.80(a), which provides that:

> If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, that party is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.

In *McKinny v. Bd. of Trustees* (1979) 31 Cal.3d 79, defendants never raised the issue that plaintiffs lacked standing to the trial court but raised the issue on appeal. *McKinney*, 31 Cal.3d at 90. The Supreme Court held that:

> Although this argument was not raised in the trial court, it is properly before us. It is elementary that a plaintiff who lacks standing cannot state a valid cause of action; therefore, a contention based on a plaintiff's lack of standing cannot be waived under Code of Civil Procedure section 430.80 and may be raised at any time in the proceeding. *McKinny*, *supra*.

What is good for the goose is good for the gander.

STATE FARM argues that *Lewis v. You Tube, LLC* (2015) 244 Cal.App.4th 118 supports its position. Again, STATE FARM is mistaken. In *Lewis*, the plaintiff sued You Tube for breach of contract, seeking either damages or specific performance. *Lewis*, 244 Cal.App.4th at 120. Lewis'

complaint was dismissed without leave to amend following You Tube's demurrer and Lewis' opposition. *Lewis*, *supra*.

After You Tube filed its respondent's brief on appeal, Lewis filed a motion to supplement the record with her declaration. *Lewis*, 244 Cal.App.4th at 123. The motion was denied by the appellate court under CCP § 909, since trial by jury was available and had not been waived, the information in the declaration was available to Lewis when she filed her complaint, and she was seeking reversal, not affirmance, of the judgment. *Lewis*, 244 Cal.App.4th at 123-124. Her motion to augment the record under Rule of Court 8.155 was denied because her declaration was not previously part of the court record. *Lewis*, 244 Cal.App.4th at 124.

Lewis' appellate brief stated that she could amend her complaint to add allegations providing specifics of her damages and reasons why specific performance was an available remedy, but referred to her declaration for details. *Lewis*, 244 Cal.App.4th at 128. While the Court noted that the declaration is not part of the record on appeal, it went on to say that:

> More importantly, since we have concluded that the limitation of liability clause of the Terms of Service applies to her claim for damages and none of the provisions of the Terms of Service can serve as the basis for specific performance, Lewis cannot amend her complaint to state a cause of action for breach of contract. *Lewis*, *supra*.

The Court in *Lewis* therefore addressed the merits of whether the complaint could be amended as a more important factor than whether the declaration was part of the record on appeal.

STATE FARM's citation of *Kendall v. Barker* (1988) 197 Cal.App.3d 619 simply has no bearing on this case. *Kendall* involved an appeal from a grant of relief from a default pursuant to CCP § 473(b) in which counsel's declaration in support of the motion made no reference to reasonable diligence by that party, making statements in the brief explaining what steps counsel took in showing reasonable diligence improper for being outside the record. *Kendall*, 197 Cal.App.3d at 624-625. Since no demurrer was involved in *Kendall*, CCP § 472c(a) was not at issue.

STATE FARM's citation of Rules of Court 8.204(a)(1)(C) and 8.204(e)(2)(C) are futile for the same reasons they were futile when this Court denied STATE FARM's motion to strike: Rule 8.204, as a rule of court, cannot contradict a statute, such as CCP § 472c(a). *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 548 ("the Judicial Council may only adopt rules not inconsistent with law").

B. EGHTESAD's complaint can be amended to allege valid causes of action against STATE FARM.

STATE FARM's first argument is that it is not in privity with

EGHTESAD on the lease between EGHTESAD and his tenant (RB at pp. 17-18). STATE FARM's argument is disingenuous. EGHTESAD's complaint never intended to allege that STATE FARM was a party to the lease, merely that the lease obligated EGHTESAD's tenant to add EGHTESAD as an additional insured to the tenant's fire and liability insurance on the leased space, and that the tenant followed through and had his insurer, STATE FARM, add EGHTESAD as an additional insured to the policy, meaning that STATE FARM was contractually obligated to indemnify EGHTESAD for a covered occurrence (AA 8 (¶ BC-1), 16 (¶ 16.27)). *Montrose Chem. Corp. of Calif. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 663. Lessors have a separate insurable interest as an additional insured under the same policy. *Alexander v. Security-First Nat. Bank* (1936) 7 Cal.2d 718, 723.

While the contract cause of action does not actually name STATE FARM as the insurer issuing the policy at stake, the suit against STATE FARM implies that STATE FARM is the insurer who agreed to add EGHTESAD to the fire and liability policy by naming STATE FARM as the only insurance defendant in the suit and alleging STATE FARM's breach of its obligation to cover EGHTESAD's claim (AA 6). The complaint alleged that STATE FARM breached its contract with

EGHTESAD on the policy (AA 8, ¶ BC-2). Paragraph FR-2.b of EGHTESAD's fraud claim specifically identifies the insurance agent who spoke with EGHTESAD on the phone as a STATE FARM agent, confirmed that EGHTESAD was added as an insured and that STATE FARM issued a *policy* (AA 9, ¶ FR-2.b), as STATE FARM argued was necessary, indicating that EGHTESAD's contract claim either did not need amending, or that it can be amended to allege STATE FARM as the insurer on the issued policy. Paragraph BC-3 alleged that EGHTESAD performed all obligations except those he was excused from performing (AA 8, ¶ BC-3). EGHTESAD alleged damages in ¶ BC-4 for monies to repair the building owned by EGHTESAD (AA 8, ¶ BC-4). STATE FARM's arguments to the contrary, EGHTESAD provided both "allegations indicating the possibility of amendment" and "legal authority showing the viability of new causes of action," as called for by STATE FARM.

- Nor, supposedly, could STATE FARM object to the legal principles EGHTESAD cited in his Opening Brief, that: An insurance agent has the ostensible or actual authority to bind the insurer to coverage. *Marsh & McLennan of Calif., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117-118, Civ. §§ 2298-2300;

- Oral contracts for the issuance, endorsement, or renewal of a policy are valid and enforceable regardless of whether a policy is ever issued. *Kazanteno v. California-Western States Life Ins. Co.* (1955) 137 Cal.App.2d 361, 370; that
- If the STATE FARM agent failed to procure the necessary insurance for EGHTESAD, that agent could be held liable to EGHTESAD for that negligence or fraud for any misstatement. *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908-909; or that
- The insurer may also be liable for the agent's misrepresentations. *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1099.

All of those claims could be alleged in an amended complaint, just based on the allegations contained in EGHTESAD's complaint. All of these arguments were raised in EGHTESAD's Opening Brief (AOB at pp. 23-25), making inapposite STATE FARM's citation of *Nordstrom Com. Cases* (2010) 186 Cal. App. 4th 576, 583 ("The failure to timely pay base wages was not an issue presented by the coordinated complaints in the Nordstrom Commission Cases, and was not raised in Taylor's opening brief on appeal.").

C. EGHTESAD's Complaint can be amended if needed to state a cause of action for fraud against STATE FARM.

STATE FARM argues, *inter alia*, that EGHTESAD's complaint failed to allege in sufficient detail, the representation, concealment, or fraudulent promise as the basis of his fraud claim (RB at p.21). Yet STATE FARM overlooks the fact that EGHTESAD alleged that the misrepresentation or promise of coverage came from STATE FARM's agent in a phone call between EGHTESAD and STATE FARM's agent before EGHTESAD entered into the lease with his tenant Martinez (AA 8, BC-1, AA 9, FR-2.b, AA 16, ¶ 16:27).

STATE FARM cites *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153 for support for the proposition that EGHTESAD had fatally failed to specifically allege who made the misrepresentation to him. Yet *Tarmann* involved denial without leave to amend the plaintiff's *fifth amended complaint*. *Tarmann*, 2 Cal.App.4th at 155. By contrast, the pleading subject to STATE FARM's demurrer here is EGHTESAD's *initial* complaint (AA 6-16). Unlike the plaintiff in *Tarmann,* EGHTESAD has had *no opportunity* to amend his complaint to provide greater specificity as to who the STATE FARM agent is who made the representations to EGHTESAD (AA 56). Nothing in EGHTESAD's pleading shows on its

face that his fraud claim has no possibility of amendment. *King v. Mortimer* (1948) 83 Cal.App.2d 153, 158 ("Since the demurrer went to the original complaint it would seem to follow under the recent decisions that, unless it shows on its face that it is incapable of amendment, denial of leave to amend constituted an abuse of discretion, (Citations omitted) irrespective of whether leave to amend is requested or not. (Code Civ. Proc., § 472c)"). Nothing in EGHTESAD's complaint shows that he cannot cure the justifiable reliance defect by checking the box and explaining that STATE FARM's representation of coverage induced him to rent his premises to his tenant, resulting in uncovered damage to his building (AA p. 10, Fr.-5, Fr.-6) Moreover, EGHTESAD's statement in his Opening Brief that he can allege particularities as to who said what to whom and when (AOB at pp. 25-26) is far more detailed than the general offer to amend the pleading to allege conspiracy to commit fraud discussed in *Cooper v. Equity Gen. Insurance* (1990) 219 Cal.App.3d 1252, 1264. In addition, the pleading at issue in *Cooper* was an amended cross-complaint. *Cooper*, 219 Cal.App.3d at 1256-1257. The cross-complainant in *Cooper*, unlike EGHTESAD, had an opportunity to amend.

D. EGHTESAD's Complaint is susceptible to amendment to allege bad faith by STATE FARM in denying EGHTESAD's claim for repairs to his building.

STATE FARM argues that EGHTESAD's complaint cannot be amended to allege bad faith against STATE FARM for two reasons: First, because EGHTESAD's complaint did not and cannot allege breach of contract against STATE FARM, a prerequisite for a bad faith claim; second, because EGHTESAD is relying on statements in his Opening Brief, not presented to the trial court, pursuant to CCP § 472c(a), evidencing STATE FARM's acts of bad faith. Once again, STATE FARM's arguments fall short.

First, since, as shown *supra,* EGHTESAD either alleged a valid contract claim or his complaint can be amended to so allege, EGHTESAD can likewise assert a bad faith claim based on the STATE FARM policy naming EGHTESAD as an additional insured (BC-1, p. 8). Second, as EGHTESAD has shown above and in his Opening Brief, CCP § 472c(a) is a legislative "carve-out" allowing the issue of leave to amend following a demurrer to be argued to the appellate court even if not previously raised in the trial court.

E. EGHTESAD's slander claim is capable of being amended.

STATE FARM argues first that the facts EGHTESAD relies on for his slander claim against his former tenant Pablo Martinez were not previously raised in the trial court and are therefore outside the record and

cannot be relied on in this appeal. Once again, STATE FARM runs afoul of CCP § 472c(a).

Second, STATE FARM argues that EGHTESAD did not specifically allege the substance of the defamatory statements made against him. However, from the documents EGHTESAD previously referred to in the Opening Brief, EGHTESAD can state the nature and substance of those statements against him, specifically thievery. EGHTESAD never had any opportunity to amend his complaint to properly allege a defamation claim (AA 56).

As to timing, EGHTESAD can allege that he was not aware of anyone "badmouthing" him until 2015, when he discovered that his business lost advertising revenue from Les Schwab. EGHTESAD can allege, based on information and belief, that the comments did not begin until sometime after April 2014, after Martinez defaulted on the unlawful detainer settlement he made with EGHTESAD and EGHTESAD entered a judgment against him pursuant to the terms of the stipulation (Exhibit 1 to EGHTESAD Request for Judicial Notice–the same document referred to in Opening Brief).

In addition, EGHTESAD can argue that under *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, that so long as the amendment to

add the new claim against the new defendant arises from the same general set of facts the amended complaint relates back to the original complaint. *Smeltzley*, 18 Cal.3d at 935-936. As in *Smeltzley*, EGHTESAD also named Doe defendants (AA 6). Paragraph 8 of the complaint alleged slander (AA 7). EGHTESAD, acting in pro per, inexplicably failed to include the tort form attachment that included allegations for slander (AA 6-16). EGHTESAD had no opportunity to amend.

F. STATE FARM's recitation of EGHTESAD's trial court litigation delays failed to take into account the policy favoring deciding cases on the merits rather than judicial efficiency when the two policies collide, the latter's injuries in an automobile accident suffered after the demurrer was filed, and that the Trial Court provided no leave to amend the original complaint.

STATE FARM's recitation of litigant "neglect" at pages 14-15 of its brief paints a highly incomplete picture and utterly ignores the mandate set forth in *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709:

> "Judges are faced with opposing responsibilities when continuances for the hearing of summary judgment motions are sought. On the one hand, they are mandated by the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.) to actively assume and maintain control over the pace of litigation. On the other hand, they must abide by the guiding principle of deciding cases on their merits rather than on procedural deficiencies. [Citation.] Such decisions must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency. [Citation.]" *Lerma*, 120 Cal.

App. 4th at 717-18 (citations omitted).

STATE FARM's recitation also ignores the injuries suffered by EGHTESAD in a November 6, 2015 automobile accident that took place after STATE FARM filed its demurrer (AA 41, 43-45, 50). As *Lerma* points out, "'a review of the standards governing requests for continuance of trial dates is instructive.' Among the factors to be considered are the death or illness of the attorney. (Citation omitted)" *Lerma*, 120 Cal.App.4th at 716.

Finally, despite the fact that this was EGHTESAD's original complaint (AA 6-16) and nothing on its face showed that it was incapable of being amended, the Trial Court denied leave to amend (AA 56).[3] This would not be an overly complicated case to try.

CONCLUSION

For all of the above-stated reasons, the Trial Court judgment dismissing EGHTESAD's complaint without leave to amend must be reversed, with leave given to EGHTESAD to amend his complaint.

Dated: April 10, 2020 Respectfully submitted,

LAW OFFICES OF

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[3] STATE FARM's omissions also include this Court's order setting aside the March 2019 order of dismissal (Exh. 2 to Request for Judicial Notice).

JOHN T. SCHREIBER

By /s/_____
John T. Schreiber, attorney for
Appellant NADER EGHTESAD

CERTIFICATE OF WORD COUNT

The text of this brief contains 3,813 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: April 10, 2020

/s/
John T. Schreiber

Re: Eghtesad v. State Farm,
First District Court of Appeal, Div. 2, Case No. A147481
Contra Costa County Superior Court Case No. MSC15-01014

PROOF OF SERVICE

I, John T. Schreiber, declare:

I declare that I am a citizen of the United States and employed in Contra Costa County, State of California, over the age of eighteen years, and not a party to the within action. My business address is 2127 Goldenhill Way, Benicia, California 94510. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On April 10, 2020, I served the within:

APPELLANT'S REPLY BRIEF

on the parties in this action by placing a true copy thereof in a sealed envelope, and each envelope addressed as follows:

The Honorable Jill Fannin, Judge
Contra Costa County Superior Court
P.O. Box 911
Martinez, CA 94553

[xx] (By Mail) I caused each such envelope to be served by depositing same, with postage thereon fully prepaid, to be placed in the United States Postal Service in the ordinary course of business at Walnut Creek, California. Said envelope was placed for collection and mailing on that date following ordinary business practices.

[ ] (By Personal Service) I caused each such envelope to be delivered by hand to the address(es) listed above.

[ ] (By Facsimile) I caused the said document to be transmitted by Facsimile machine to the address(es) whose fax number is indicated above.

Executed at Benicia, California on April 10, 2020. I declare under penalty of perjury that the foregoing is true and correct.

/s/
John T. Schreiber