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 OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL First APPELLATE DISTRICT, DIVISION 2	COURT OF APPEAL CASE NUMBER: A147481
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 131947 NAME: JOHN T. SCHREIBER FIRM NAME: LAW OFFICES OF JOHN T. SCHREIBER STREET ADDRESS: 2127 Goldenhill Way CITY: Benicia STATE: CA ZIP CODE: 94510 TELEPHONE NO.: (925) 708-0263 FAX NO.: E-MAIL ADDRESS: jschreiber@schreiberappeals.com ATTORNEY FOR (*name*): Nader Eghtesad	SUPERIOR COURT CASE NUMBER: MSC15-01014
APPELLANT/ PETITIONER: Nader Eghtesad RESPONDENT/ REAL PARTY IN INTEREST: State Farm General Insurance Company	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Nader Eghtesad

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 26, 2019

John T. Schreiber
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Treatises

INTRODUCTION

Appellant NADER EGHTESAD (hereafter 'EGHTESAD") seeks review of the Trial Court's dismissal of EGHTESAD's complaint based on sustaining the demurrer without leave to amend filed by Respondent STATE FARM GENERAL INSURANCE COMPANY (hereafter "STATE FARM"). EGHTESAD, proceeding *in pro per*, did not file opposition to STATE FARM's demurrer. He did not do so based mainly on an automobile accident EGHTESAD was in shortly before the filing deadline for the opposition. The Trial Court granted a two-week continuance due to the accident but EGHTESAD provided additional evidence in the form of a doctor's note saying that due to the injuries he suffered in the accident, he was unable to sit for long and did not expect EGHTESAD to recover for three months. The Trial Court proceeded at the hearing at the end of the two weeks to rule on STATE FARM's demurrer, sustaining STATE FARM's demurrer without leave to amend.

In so ruling the Trial Court erred. The Trial Court dismissed the case without granting EGHTESAD the opportunity to amend his complaint. hWhile EGHTESAD had not filed an opposition to the demurrer based on his injuries from his auto accident, the Trial Court proceeded to rule on the merits of STATE FARM's demurrer, and was therefore subject to the well-

established rules governing demurrers and the liberal policy favoring leave to amend. A trial court must grant leave to amend if there is any reasonable possibility that the complaint can be amended to assert any valid cause of action. Unless an original complaint shows on its face that it cannot be amended, it is error to sustain a demurrer without leave to amend. The Trial Court here dismissed an original complaint that on its face presented no indication that it could not be amended to allege a valid cause of action.

In addition, under California Code of Civil Procedure § 472c(a) and related case law, even if the plaintiff does not seek leave to amend in the trial court, the issue of whether leave to amend should have been granted remains open on appeal.[1]

The face of the pleading revealed EGHTESAD's attempts to allege breach of contract and fraud against STATE FARM for denial of coverage for repairs on EGHTESAD's property, after a STATE FARM agent added EGHTESAD as an additional insured to his tenant's fire and liability policy. The insured can allege additional facts to flesh out these claims, as well as for bad faith on STATE FARM's part, as EGHTESAD can allege that an initial STATE FARM adjuster came to the property after EGHTESAD

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[1] All further references to California's Code of Civil Procedure shall be to "CCP."

submitted his claim to STATE FARM and prepared an estimate for the damages, only to have STATE FARM send a second adjuster out, who this time denied the claim. At the pleading stage of the proceedings EGHTESAD should have had the opportunity to plead and prove that in sending out the 2d adjuster, STATE FARM unreasonably rejected the first adjuster's conclusion at their insured's expense.

Additionally, by proceeding to rule on the demurrer while EGHTESAD was still recovering from his injuries suffered in his auto accident, the Trial Court placed the policy favoring judicial efficiency over the policy favoring resolution of cases on the merits. Injury to a party or counsel is grounds for a continuance of trial; this was a potentially dispositive motion justifying similar treatment. When these two policies collide, the policy favoring resolution on the merits prevails over that favoring judicial efficiency. The judgment of dismissal without leave to amend must be reversed and leave to amend granted to EGHTESAD.

STATEMENT OF THE CASE

A. Factual History.

1. EGHTESAD entered into a lease with a tenant on EGHTESAD's property in Martinez, CA.

On or about August 11, 2010, EGHTESAD leased almost 10,000

square feet, spread over two floors of his building on Ferry Street in Martinez, California, to a Pablo Martinez (Appellant's Appendix at p. 11, 15-16).[2]

2. The lease required the tenant to name EGHTESAD as an additional insured on tenant's fire and liability policy.

Paragraph 16:27 of the lease provided that Martinez "agree to have full coverage fire insurance for amount of 450,000,00 and minimum 1,000,000,00 insurance liability and add landlord on the policy (AA 8, ¶ BC-1, AA 16, ¶ 16:27)."

3. Tenant's STATE FARM agent confirmed with EGHTESAD prior to entering into lease that EGHTESAD will be additional insured on tenant's fire and liability policy.

Before signing the lease EGHTESAD spoke by phone with the tenant's STATE FARM agent confirming that he, EGHTESAD, was listed as an additional insured on tenant's fire and liability insurance policy as called for in the lease (AA 8, ¶ BC-1). The lease was dated August 11, 2010, so the conversation with the STATE FARM agent would have been shortly before August 11, 2010 (AA 16).

4. The lease took effect.

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[2] All further references to the Appellant's Appendix filed herewith shall be to "AA," followed by the page number where the citation is located.

After receiving those assurances from the STATE FARM agent EGHTESAD signed the lease on or about August 11, 2010 (AA 8, BC-1, AA 15-16).

5. The Tenant was evicted for non-payment of rent.

In April 2012 EGHTESAD regained possession of the premises from Mr. Martinez, who owed over $20,000 in back rent on the leased property after EGHTESAD filed for unlawful detainer against Mr. Martinez. The parties agreed that EGHTESAD would regain possession of the premises as of April 1, 2012, and that Martinez would make monthly payments to EGHTESAD. If Martinez failed to make the timely payments, EGHTESAD was authorized to enter a stipulated judgment for the entire amount due at once, less any payments made (Request for Judicial Notice, Exh. 1).

6. EGHTESAD filed a claim with STATE FARM for damages to the premises following tenant's departure.

After Martinez vacated the premises, EGHTESAD discovered that Martinez had extensive work done to the premises, including putting plumbing and wiring and making the second floor residential among other things, all without a permit, making repairs necessary.[3]

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[3] It is counsel's impression that EGHTESAD has not only his recollections

7. STATE FARM initially accepted EGHTESAD's claim and sent an adjuster to the premises, where the adjuster prepared an estimate, but denied coverage for the damages to the property after sending another adjuster to the property, ignoring the conclusions of the first adjuster.

EGHTESAD filed a claim with STATE FARM which the latter accepted and sent out an adjuster, who provided an estimate. STATE FARM then sent out a second adjuster, who informed EGHTESAD that STATE FARM would not cover the claim, despite the first adjuster 's conclusions.[4]

8. EGHTESAD's former tenant slandered EGHTESAD to individuals in Martinez, California, causing EGHTESAD to lose business.

EGHTESAD later discovered that Martinez had been saying false, hurtful things about EGHTESAD to other individuals in Martinez, California. The statements were oral and made to individuals, not published in books, periodicals, nor broadcast on local nor regional, let alone national media. EGHTESAD had subsequently started a local newspaper in Martinez and that new business was trying to obtain local advertisers. Among the third persons Martinez slandered EGHTESAD to

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but documents evidencing this sequence of events.

[4] Again, it is counsel's impression that EGHTESAD has not only his recollections but documents evidencing this sequence of events.

was the manager of the Martinez Les Schwab tire shop, who refused to advertise and who also tried to prevent other local Les Schwab locations from advertising with EGHTESAD's business.[5]

B. Procedural History.

1. EGHTESAD filed a Complaint against STATE FARM and Does 1-20 for breach of contract and fraud but from the boxes checked in the complaint, might have intended additional claims.

On or about June 9, 2015, EGHTESAD filed a complaint against STATE FARM and DOES 1-20 for breach of contract and fraud (AA 6-16). However, Paragraph 8 of the complaint also indicated that other claims besides fraud and breach of contract might be asserted (AA 7, ¶ 8). EGHTESAD filed the complaint in *pro per* (AA 6).

2. STATE FARM filed general and special demurrers to the Complaint.

In response, STATE FARM filed a general and special demurrer to the complaint on the general grounds that EGHTESAD failed to state facts

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[5] EGHTESAD is mindful of the obligation of appellant to cite to the record. At the same time, again, due to the brevity of the existing pleading and the fact that it was the original pleading, it is difficult for EGHTESAD to cite to a record as to these matters for which he can amend his complaint to so allege, but which have not yet been alleged and put into the record. As with footnotes 3 through 7 of this brief, it is counsel's understanding that EGHTESAD can either recall these facts or has factual evidence of them.

comprising causes of action for fraud, for failure to allege fraud with sufficient particularity, intent to defraud, and justifiable reliance, defamation, and breach of contract, for lack of a contractual duty owed by STATE FARM, and specially on grounds of uncertainty and unintelligibility (AA 23-24).

3. The Trial Court continued the hearing on demurrer to November 19, 2015 and the deadline to file opposition to November 9, 2015.

At an October 27, 2015 case management conference the Trial Court *sua sponte* continued the hearing on STATE FARM's demurrer to November 19, and the deadline for filing opposition to demurrer to November 9, 2016 (AA 39). At that case management conference EGHTESAD had sought a sixty day extension to allow him time to settle with the defendant and to obtain counsel (AA 39).

4. On November 6, EGHTESAD was involved in a serious auto accident and therefore sought a continuance, which the Trial Court granted as "one final continuance," until December 3, with a November 25 deadline for filing the opposition to demurrer.

On November 6, 2015 EGHTESAD was involved in a serious automobile accident and was treated for injuries at Kaiser Permanente in Walnut Creek (AA 40-45). EGHTESAD sought a 90-day continuance (AA 40). The emergency room treatment notes accompanying the request

showed that EGHTESAD was ordered off work until November 9, the deadline for filing opposition (AA 45). In the tentative ruling before the November 19 hearing date on the demurrer the Trial Court granted "one final continuance" of the demurrer hearing to December 3, and the deadline for filing opposition to November 25 based on the auto accident and the off work order (AA 48).

5. EGHTESAD submitted a further request for a continuance based on the injuries he suffered in the auto accident, along with an untimely CCP § 170.6 peremptory challenge.

On November 18, EGHTESAD obtained a note from his doctor stating that the car accident exacerbated his back pain, left him unable to sit for extended periods of time and stated an expected recovery date of 3 months (AA 50). That day EGHTESAD signed another request for continuance based on that doctor's note, but did not file the request until November 30 (AA 49-50). On November 30 EGHTESAD also filed a peremptory challenge based on CCP § 170.6, which was not accepted based on untimeliness (AA 51-55). The Trial Court did not continue the matter again (AA 56).

6. Trial Court sustained STATE FARM'S unopposed demurrer to the complaint without leave to amend.

At the continued December 3, 2015 hearing date on STATE

FARM's demurrer the Trial Court affirmed its tentative ruling sustaining the unopposed demurrer to the complaint without leave to amend (AA 56). In reaching its decision the Trial Court specifically stated that it reviewed STATE FARM's demurring papers (AA 59:18-22). STATE FARM's counsel subsequently prepared at the Court's direction an order after hearing and a separate judgment of dismissal, the latter of which provided notice of entry on January 8, 2016 (AA 56, 59, 61-65).

7. Statement of appealability.

EGHTESAD timely appealed on January 20, 2016 (AA 66). The appeal followed the Trial Court's dismissal of the complaint after the demurrer was sustained without leave to amend (AA 63). The dismissal is appealable. *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn.1.

DISCUSSION

A. Standards of Review.

"`On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, appellate

courts must assume the truth of all facts properly pleaded by the plaintiff and matters properly judicially noticed. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." CCP § 452. Reviewing courts also assume the truth of all facts that may be inferred or implied from those expressly alleged. *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403. "This rule of liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant. " *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal. App. 4th 1228, 1238. Nor, in reviewing the propriety of a demurrer, does the court concern itself with plaintiff's ability to prove the allegations, nor "'the difficulties involved in making such proof.'" *Nguyen v. W Digital Corp.* (2014) 229 Cal.App.4th 1522, 1537 (citation omitted).

1. If a demurrer is sustained without leave to amend, the appellate court decides whether there is a reasonable possibility that any defect(s) can be cured by amendment, even if raised for the first time on appeal after not being raised below.

If the demurrer is sustained without leave to amend, the appellate court decides whether there is a reasonable possibility that the defect can be cured by amendment. If so, the trial court has abused its discretion and the

reviewing court reverses. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. That rule applies, *even if it raised for the first time on appeal, even if not raised by plaintiff below*. CCP §472c(a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746; *Economic Empowerment Foundation v. Quackenbush* (1998) 57 Cal.App.4th 677, 684, fn.5. This rule is consistent with the concept that the issue of whether a pleading states facts sufficient to state a cause of action is never waived. CCP § 430.80(a). Where, as here, the demurrer was to the original complaint, the well-established rule is that unless the complaint shows on its face that it is incapable of being amended, denial of leave comprises an abuse of discretion (AA 6). *King v. Mortimer* (1948) 83 Cal.App.2d 153, 158.

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227. That policy applies not only to a complaint's defects in form, but to substantive issues as well. J. Lee Smalley Edmon & J. Curtis E.A. Kamow, *Cal. Prac. Guide Civ. Pro. Before Trial* (The Rutter Group 2019), Ch. 7(1): "Attacking the Pleadings," ¶ 7:129 at p. 7(I)-58. In *Angie M*., that lack of opportunity arose following plaintiff's first amended complaint but leave was still given to amend the first amended complaint to describe the severity of the plaintiff's emotional

distress in alleging intentional infliction of emotional distress. *Angie M.*, *supra*. Here, since the complaint in question was the original complaint (AA 6), no opportunity to cure any defect was given (AA 59, 63).

Review of rulings on continuances is governed by the abuse of discretion standard. *Denton v. City of San Francisco* (2017) 16 Cal.App.5th 779, 791. "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393 (citations omitted). "If the trial court is mistaken about the scope of its discretion the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. (Citation omitted) But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." *City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297-98.

2. In situations in which the policy favoring trial on the merits collide head-on the policy favoring judicial efficiency, the strong public policy favoring disposition on the merits outweighs judicial efficiency.

Instead of granting leave to amend or a continuance beyond the

December 3, 2015 hearing date, the Trial Court dismissed EGHTESAD's complaint without granting leave to amend, despite the very real injuries EGHTESAD suffered in his November 6, 2015 auto accident (AA 41, 43-45, 50). In *Denton v. City of San Francisco* (2017) 16 Cal.App.5th 779, this Court reversed summary judgment entered in defendants' favor after defendants backed out of a settlement reached days before opposition and hearing on summary judgment was scheduled and the plaintiff reaffirmed his understanding that a settlement had been reached. Defendants withdrew the notice of settlement, and successfully applied ex parte to reinstate the hearing for summary judgment, which it granted without affording the plaintiff the opportunity for a continuance to oppose the motion. Denial of continuance comprised an abuse of discretion. *Denton*, 16 Cal.App.5th at 792-794. *Denton* cited *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, in which the appellate court reversed summary judgment in the defendant's favor after the trial court denied requests for a continuance of a summary judgment motion when plaintiff's counsel had just had cancer surgery. *Lerma*, 120 Cal.App.4th at 713-714.

The following language from *Lerma* is instructive here: First, "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." *Lerma*, 120 Cal.App.4th at 716 (citation omitted). The record is undisputed that EGHTESAD suffered injuries in his November 6, 2015 accident (AA 41, 43-45, 50).

The second portion of instructive language from *Lerma* is as follows:

> "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).

The Trial Court likewise erred here by placing the policy favoring moving cases through the docket ahead of that favoring disposition on the merits.

B. Whatever defects there may have been in EGHTESAD's complaint were curable by amendment and the Trial Court erred by denying leave to amend EGHTESAD's original and only complaint.

EGHTESAD's complaint clearly was prepared by a *pro per* litigant yet set forth factual allegations that did not foreclose claims in his favor on these facts (AA 6-16). At least two of the claims, for STATE FARM's breach of contract and fraud, are clear enough to ascertain and if necessary,

simply need amending to flesh out sufficient allegations.

1. EGHTESAD can allege that STATE FARM breached its contract with him to insure him for the damage to his building done by his tenant.

In its demurrer STATE FARM argued that EGHTESAD did not allege the existence of a contract between EGHTESAD and STATE FARM (AA 31:1-5). Even the allegations contained in the complaint effectively refute STATE FARM's argument. STATE FARM argues that the lease between EGHTESAD and his tenant did not name STATE FARM as a party (AA 31:4-5). Paragraph 16:27 of the lease provided for the tenant to add EGHTESAD as an insured to a fire insurance and liability policy, with fire policy limits of $1,000,000 and liability limits of $450,000 (AA 16, ¶ 16:27).

Paragraph BC-1.a of the Complaint alleged not only the existence of the above agreement but also that the tenant complied with this lease term, meaning that EGHTESAD was added as an additional insured on the policy, and that the insurance agent, presumably from STATE FARM, confirmed with EGHTESAD by phone that EGHTESAD was an additional insured on the policy (AA 8, ¶ BC-1). Though not specifically stated, the pleading implies that STATE FARM was the insurer in question by the allegation in ¶ BC-2, which alleged a May 22, 2014 breach of duty on

STATE FARM's part to indemnify EGHTESAD for damages to his building (AA 8, ¶ BC-2). STATE FARM owed its additional insured EGHTESAD a duty to insure against covered risks. *Montrose Chem. Corp. of Calif. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 663. Lessors (like EGHTESAD) and lessees each named as insureds each have separate insurable interests in the same property. *Alexander v. Security-First Nat. Bank* (1936) 7 Cal.2d 718, 723. Paragraph 16.27 of the lease provided for EGHTESAD's lessee to procure specific coverage for EGHTESAD, the lessor (AA 16, ¶ 16:27). *Alexander*, *supra*.

An insurance agent has the 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. That authority may be actual or ostensible. Civ. §§ 2298-2300.

In addition, 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.

Moreover, 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. The insurer may also be liable for the agent's misrepresentations. *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1099.

2. The complaint can be amended to allege fraud against STATE FARM.

EGHTESAD's fraud claim is likewise susceptible to amendment assuming *arguendo* that it does not meet the heightened fraud pleading requirements. The elements of fraud, which give rise to a tort claim for deceit, are:1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud, i.e.induce reliance; 4) justifiable reliance; and 5) damage. *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93.

Even when heightened pleading requirements for fraud are involved, "'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts ofthe controversy,"'[citation]; "[e]ven under the strict rules of common lawpleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party...."'"" *Alfaro v. Cmty.Hous. Imp. Sys. & Planning Ass'n, Inc.* (2009) 171 Cal. App. 4th 1356, 1384.

Particularities as to what representations were made, by whom,

when, to whom, and how are all matters that EGHTESAD can provide on amendment, and can also provide guidance towards those particulars that lie more in STATE FARM's knowledge. One of the elements STATE FARM points to as missing, intent to defraud, was marked in the form complaint at ¶FR-2.d, FR-3.c (AA 9). The other, justifiable reliance, can be filled in at ¶ FR-5 (AA 10). Nothing on the face of the complaint forecloses the possibility that EGHTESAD can amend the complaint to supply the necessary factual allegations (AA 6-16). *City of Stockton*, 42 Cal.4th at 747.

3. The complaint may also be amended to assert a bad faith claim against STATE FARM arising out of its denial of EGHTESAD's claim.

Breach of contract and fraud may not be the only claims EGHTESAD can assert against STATE FARM. Out of the same set of facts as those claims EGHTESAD may able able to assert a bad faith claim against STATE FARM for unreasonably denying EGHTESAD's claim for repairs to the latter's property on May 22, 2014 (See AA 8,9, ¶¶ BC-2, FR-1). Based on documents reflecting communications between EGHTESAD and STATE FARM leading up to May 22, 2014, when STATE FARM denied the claim, STATE FARM initially accepted the claim, then sent out an adjuster, who provided an estimate. A few days later, STATE FARM

sent out another adjuster who took over the claim handling and said that STATE FARM did not have coverage for this claim.

> The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. "The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."

Wilson v. 21st Century Ins. Co. (2007) 42 Cal. 4th 713, 720.

As the *Wilson* Court pointed out:

> [D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim."

Wilson, 42 Cal. 4th at 721 (Citations omitted). STATE FARM could not simply ignore the evidence and report of the first adjuster in favor of the 2d adjuster's conclusion, which was more favorable to STATE FARM.[6] To the extent that EGHTESAD's recollections and documents support this claim EGHTESAD should have leave to amend his complaint to so allege.

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[6] It is counsel's impression that EGHTESAD has not only his recollections but documents evidencing this sequence of events.

4. EGHTESAD may be able to amend his complaint to allege slander against his former tenant.

The second page of EGHTESAD's complaint lists defamation/slander as a cause of action asserted in that document (AA 7, ¶ 8). STATE FARM demurred to the defamation claim as unintelligible (AA 32:1-9). A reason the claim seemed in dire need of clarification is because unlike EGHTESAD's contract and fraud claims, EGHTESAD did not include the additional form complaint pages for torts, which would include slander (AA 6-16).

Civ. § 46 defines slander:

> Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
>
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage.

EGHTESAD can allege that his former tenant Pablo Martinez made oral statements about EGHTESAD to individuals in Martinez, California, among them the manager of the Martinez location of the Les Schwab Tire Center, and that Les Schwab would not advertise for that reason in a business EGHTESAD opened in early 2015 called the Martinez Tribune.[7] It is EGHTESAD's understanding that Mr. Martinez's statements were made to selected individuals and were not published or broadcast in any book, periodical, or radio or television or online platform made available to the public.

The resulting refusal of Les Schwab to advertise with EGHTESAD's business would itself comprise slanderous statements under Civ. §§ 46, subdivs. 3, 5. Considering the policy of liberality in allowing leave to amend, EGHTESAD should have the opportunity to complete the allegations of his slander claim.

C. STATE FARM's citation of *Aronow* in its reply and supplemental reply misses the point.

In its Supplemental Reply in Support of its general and special demurrer to the complaint, STATE FARM cited *Aronow v. LaCroix* (1990)

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[7] Counsel bases these statements on representations of the client, and on counsel's understanding that the client also has documentation to support this claim.

219 Cal.App.3d 1039, 1048 for the proposition that "failure to address argument in opposition brief tacitly concedes its merits." (AA 36:19-22, 46:19-22) *Aronow* is inapposite. The issue in *Aronow* was whether, following multiple prior jury trial judgments in defendants' favor, those defendants, now plaintiffs in the later malicious prosecution action, could assert that the former plaintiff (now defendant) acted with malice in bringing a subsequent suit for slander. *Aronow*, 219 Cal.App.3d at 1048. One of the arguments was that one of the prior judgments precluded the slander claim. That prior judgment became final on appeal, and thus a proper predicate for claim preclusion, after the later *Aronow* case was on appeal following a court trial. *Aronow*, 219 Cal.App.3d at 1046-1047. The appellate brief in *Aronow* opposing that position solely argued the issue of privity, which the reply brief recognized as "tacitly conceding that the requirements of a final judgment on the merits determining identical issues have been fulfilled." *Aronow*, *supra*.

Aronow has no bearing here. First, nowhere in its demurrer does STATE FARM assert claim preclusion against EGHTESAD (AA 27-35). Second, the tacit concession is a rule established on appeal requiring that a party must specifically raise an argument in their brief, or risk a concession of that argument on appeal. Rule of Court 8.204(a)(1)(B); *Paulus v. Bob*

Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 685. The lack of argument STATE FARM asserted was in the trial court, not on appeal (AA 36, 46). Third, CCP § 472c(a) specifically allows a party who did not seek leave to amend their complaint in opposing a demurrer to raise that point on appeal. *City of Stockton*, *Quakenbush*, *supra*.

CONCLUSION

For all of the above-stated reasons, this Court must reverse the Trial Court's dismissal of EGHTESAD's complaint without leave to amend, and allow leave to amend to allow EGHTESAD, at a minimum, to amend his complaint to allege: breach of contract, fraud, and bad faith denial of his claim by STATE FARM; defamation against Pablo Martinez; as well as any other claims for which EGHTESAD has legal and factual support.

Dated: August 26, 2019

Respectfully submitted,

LAW OFFICES OF
JOHN T. SCHREIBER

By /s/_____
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CERTIFICATE OF WORD COUNT

The text of this brief contains 4,954 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: August 26, 2019

/s/
John T. Schreiber