

Court of Appeal Rules That Engineer Sued for Fraud and Malpractice May Assert Cross-Complaint Against Plaintiff Owners for Breach of Express Contractual Indemnity and Equitable Indemnity Under Certain Circumstances

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In both residential and commercial projects, architects and engineers often include provisions in their contracts which require that the owners indemnify the architect or engineer. But what if the claimant is the owner? Stated differently, can an architect or engineer as a defendant to an owner complaint file a cross-complaint against the owner for express indemnity?

There are a number of published cases in California which suggest that the filing of a complaint itself involves the right to petition by the plaintiff and would not trigger a basis for an independent cross-complaint for indemnity against the plaintiff owner by a defendant who is asserting express contractual indemnity. *See, Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4<sup>th</sup> 673 and *Long Beach Unified School District v. Margaret Williams, LLC* (2019) Lexus 1228. However, a different result occurred in the matter *C.W. Howe Partners, Inc. v. Greg Mooradian* (2019) Westlaw 6906652 ("Mooradian case"). The Mooradian case involved a residential construction project involving the demolition of an existing residence in Los Angeles and the construction of a "cutting edge" single family dwelling. The property owners, Greg Mooradian and Debra Mooradian, hired, among others, C.W. Howe Partners, Inc. and its principal, Carl William Howe (collectively, "Howe"), to provide engineering services for their residential project. The Mooradians, prior to hiring Howe, had retained Erla Dogg Ingjaldsdottir and Tryggvi Thorsteinsson of Minarc, Inc. (collectively, "Minarc") to design their home. Minarc had recommended the retention of Howe. Howe is a civil engineer licensed in California. The Howe contract (signed by Greg Mooradian) included a broad clause involving client responsibilities and indemnity.

After learning that Minarc were not licensed architects, the Mooradians fired Minarc and also fired their contractor, Core Construction, and Howe, and retained others to complete their home. The Mooradians then filed suit against Minarc (and its principals), Howe, Core Construction, and others. There were three Causes of Action against Howe, including Fraud, Negligent Breach of Contract, and Restitution and Injunctive Relief for Unfair Business Practices. Howe filed a Cross-Complaint against the Mooradians for Express Indemnity, Equitable Indemnity, Contribution, and Declaratory Relief, citing paragraph 4 of the Howe contract. Howe alleged the Mooradians had agreed to the indemnification provisions of the Howe Agreement, which obligated the Mooradians to indemnify, defend, and hold Howe harmless for any liability arising from the use of EPS panels, as asserted in the Mooradians' First Amended Complaint.

The Mooradians responded to the Howe Cross-Complaint by filing a Special Motion to Strike (or Anti-SLAPP Motion) pursuant to Code of Civil Procedure § 425.16. The Trial Court heard the Mooradians' Special Motion to Strike and, after taking the matter under submission, denied the Motion, ruling that the Mooradians had failed to establish the Howe Cross-Complaint arose from an act in furtherance of the Mooradians' right of petition (the Court also denied Howe's request for attorney's fees). The Mooradians filed a timely Notice of Appeal.

On appeal, the Court noted that there was a two-step process for anti-SLAPP motions, the first being whether the challenged claim arises from protected activity; and if the moving party makes the required showing, the probability of success on the claim. As to the first step, the Court noted that a claim arises from protected activity when that activity underlies or forms the basis for the claim. *See, Park v. Board of Trustees of California State University* (2017) 2 Cal.5<sup>th</sup> 1057. In analyzing the Howe Cross-Complaint, however, the Court ruled that, while a Cause of Action arising from litigation activity implicates the right to petition, the filing of the Mooradians' First Amended Complaint was not the wrongful act as claimed by Howe. Instead, the alleged wrongful act that formed the basis for the express indemnity obligation by Howe was the Mooradians' failure to indemnify, defend, and hold harmless Howe. The Court also distinguished other cases which have suggested that the filing of a complaint is a protected act which would bar a cross-complaint against the plaintiff.

The Mooradian case may have significant implications for litigation by owners who have entered into express indemnity agreements with their designer.

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