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

4900 PATRICK HENRY DRIVE
ASSOCIATES,

Plaintiff and Appellant,

v.

KEITH ROOFING, INC.,

Defendant and Respondent.

H032721
(Santa Clara County
Super. Ct. No. 1-04-CV030380)

4900 Patrick Henry Drive Associates (plaintiff) sued Keith Roofing Company Inc. (Keith), for negligence and breach of contract in relation to the repair and replacement of the roof of a property located at 4900 Patrick Henry Drive, Santa Clara (the property), which plaintiff owned. Plaintiff alleged that during the replacement of the roof, Keith left significant portions of the roof of the property open to the elements and unsecured against the weather. In addition, plaintiff alleged that a storm caused large quantities of rainwater to enter the interior of the premises causing water damage and mold contamination. The trial court granted summary judgment to Keith upon finding that Keith had no duty of care to cover the roof under the circumstances of the case. Plaintiff appeals from the superior court's grant of summary judgment. For reasons that follow, we affirm the judgment.

Facts and Proceedings Below

Plaintiff hired Keith, a licensed roofing contractor, to remove the roof of 4900 Patrick Henry Drive. The contract called for Keith to inspect the substrate for dry rot damage, and if necessary, install new substrate and reroof the property.¹ Keith commenced the roofing work in July 2001. On approximately, August 2, 2001, while Keith was removing the old roof, Keith discovered that two glu-lam beams that supported the roof showed evidence of dry rot. Keith recommended that the dry rot situation be brought to the attention of a general contractor. Keith applied for a permit for repair of the rotted glu-lam beams. On October 16, 2001, plaintiff entered into a contract with Associated Engineering & Construction (Associated) to install new beams and new plywood. One of the terms of Associated's contract with plaintiff was that plaintiff would cover the cost of the permit fee. On November 12, 2001, Keith discovered that due to a rainstorm that occurred over the preceding weekend, water had entered the building and damaged the interior of the property. A crew from Keith began clean up work the next day. Keith did not complete its roofing work at the property until January 2002.

¹ In full, the contract provided that Keith would furnish "all labor and materials to complete Roof [at 4900 Patrick Henry Drive] in a good and workmanlike manner per plans and specifications [¶] Tear off one roof to decking and haul away. Inspect substrate for dry-rot or damage . . . and install new substrate at additional cost to the base contract amount. Reroof with 28 lb base and 2-11 lb glass ply interlaced with approximately 50 lbs. of hot asphalt. Furnish and install new vents and jacks. Mop roof surface with approximately 25 lbs. of hot asphalt per square and install 1-72 lb. mineral surface capsheet. Clean and remove all roof debris upon completion of work. NOTE: If asbestos or other hazardous material is present, and after notifying owner or agent, removal and disposal of such materials will be an additional cost to the base contract amount. NOTE: If bldg, has open beam ceilings, owner or tenant is responsible for covering interior to protect from roof debris and dust. NOTE: Owner or manager is responsible for notifying tenants of reroofing. NOTE: Job includes removing and reinstalling vision screens and A/C units."

On November 10, 2004, plaintiff commenced this lawsuit against Keith, Associated, and "MC Construction Specialities, Inc."² Plaintiff's complaint alleged two causes of action: negligence and breach of contract. As noted, plaintiff asserted that during the course of Keith's roofing replacement and Associated's repair of the structural elements of the roof, Keith and Associated "left significant portions of the roof open to the elements and unsecured against the weather." Thereafter, "a rainstorm caused large quantities of rain water to enter into the interior" of the property that the defendants "left open and exposed to the elements." According to plaintiff, the rain water that entered the property caused significant damage, including water damage and mold contamination.

Keith filed an answer to the complaint on March 11, 2005. On April 10, 2007, Keith moved for summary judgment or in the alternative summary adjudication on the ground, among others, that Keith "ceased working at the SUBJECT PROPERTY because [Keith] could not continue its scope of work at the SUBJECT PROPERTY until the necessary structural repairs were completed." In support of the motion, Keith submitted a declaration of Roger Bright, the President and CEO of Keith Roofing Inc., who claimed that Keith "was forced to cease its repair work on October 2, 2001, at 4900 Patrick Henry Drive once dry rot in the glu-lam beam was discovered." Furthermore, Keith was "not asked to perform roofing repair work between October 3, 2001 and November 11, 2001."

Plaintiff filed an opposition to Keith's motion for summary judgment/adjudication on July 12, 2007. On July 26, 2007, Judge Murphy heard argument from the parties and took the matter under submission. On July 27, 2007, Judge Murphy issued a written order granting summary judgment. In full, Judge Murphy's written order is as follows.

² Neither Associated, nor MC Construction Specialities, Inc. (MC Construction) is a party to this appeal. According to plaintiff, Associated asked MC Construction to prepare a bid for some minor dry rot work. MC Construction agreed to inject epoxy in the glu-lam beams after Associated notified MC Construction that the beams were ready.

"Defendant Keith Roofing Co., Inc.'s motion for summary judgment is GRANTED. After full consideration of the evidence, the separate statements submitted by each party, the authorities submitted by each party, as well as oral argument by each party, the court finds defendant Keith Roofing Co., Inc. did not have a duty to cover the roof under these circumstances. . . . Although defendant Keith Roofing Co., Inc. initially exposed the roof, it reached an agreement (at least implicitly) with plaintiff . . . that no further roofing work could be done until structural repairs were made. Plaintiff . . . furthered that understanding by hiring Associated Engineering & Construction to perform the structural repairs. (See Plaintiff's Response to Separate Statement, No. 8) Defendant Keith Roofing Co., Inc.'s duty to cover/protect the roof does not extend indefinitely and either ended or was suspended by the time it relinquished control of the roof to Associated Engineering & Construction to perform the structural repairs. Although plaintiff . . . contends defendant Keith Roofing Co., Inc. retained and/or exercised control over the structural repair activity, the evidence proffered by plaintiff . . . does not support this contention."

On August 13, 2007, plaintiff moved the court to reconsider/clarify the grant of summary judgment. The court held a hearing on October 11, 2007, at the end of which the court stated that it would "stand by its original decision and the wording in its original order." On November 5, 2007, the court issued a written order denying the motion to reconsider without explanation or clarification.³

Summary judgment was entered for Keith on March 10, 2008. Plaintiff filed a notice of appeal on March 13, 2008.

Plaintiff presents the following issues for this court to resolve.

1. Whether the superior court cited evidence that supports its summary judgment ruling as required by Code of Civil Procedure section 437(c), subdivision (g).

³ It appears that the order was prepared by Keith's attorney for the court to sign.

2. Whether the superior court erred as a matter of law in concluding that Keith, as a subcontractor working on an ongoing construction project, did not have a duty of care towards 4900 Patrick Henry Drive.

3. Whether the superior court committed reversible error by failing to find the existence of triable issues of material fact regarding whether Keith was guilty of negligence by failing to adequately cover the roof openings and safeguard the interior of 4900 Patrick Henry Drive from inclement weather at the time of the rainstorm.

4. Whether the superior court committed reversible error by failing to find the existence of triable issues of material fact regarding whether Keith was guilty of breach of contract by failing to adequately cover the roof openings and safeguard the interior of 4900 Patrick Henry Drive from inclement weather at the time of the rainstorm.

Standard of Review

In assessing the correctness of a trial court's grant of summary judgment, we apply familiar principles of appellate review. "[I]n moving for summary judgment, a 'defendant . . . has met' his [or her] 'burden of showing that a cause of action has no merit if' he [or she] 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.' Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

In resisting a defense motion for summary judgment, " '[t]he plaintiff . . . may not rely upon the mere allegations or denials' of his [or her] 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' . . ." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) "It is also well established that a litigant may not avoid summary judgment by attempting to generate disputes of fact as to issues which are not material to the legal theories and claims in issue: 'The

presence of a factual dispute will not defeat a motion for summary judgment unless the fact in issue is a material one.' [Citations.]" (*Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1551.)

"On appeal after a summary judgment has been granted, we review *de novo* the trial court's decision to grant summary judgment and are not bound by the trial court's stated reasons. [Citations.]" (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) "Like the trial court, we view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom. [Citation.]" (*Ibid.*) Independently, we review the trial court's decision to grant summary judgment, using the same three-step analysis as the trial court: (1) identifying the issues framed by the pleadings; (2) determining whether the defendant negated the plaintiff's claims; and (3) deciding whether the plaintiff demonstrated the existence of a triable, *material* factual issue. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

Discussion

Initially, plaintiff argues that the superior court's order does not cite evidence supporting its award of summary judgment. Accordingly, plaintiff contends that the requirements of Code of Civil Procedure section 437(c), subdivision (g) were not met. Implicitly, plaintiff's position is that for this reason this court should reverse the trial court's award of summary judgment to defendant.

We point out that the court's failure to provide a sufficient statement of reasons is *not* automatic ground for reversal: " 'It is the validity of the ruling which is reviewable and not the reasons therefore.' " (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448-449; *Unisys Corp. v. California Life & Health Ins. Guar. Ass'n.* (1998) 63 Cal.App.4th 634, 640.) The *de novo* standard for appellate review of an order granting summary judgment frequently means the lack of a proper order constitutes harmless error. (*Soto v. State of California* (1997) 56 Cal.App.4th 196, 199

[lack of a statement of reasons presents no harm where independent review establishes the validity of the judgment].)⁴

Here, however, as it will become apparent, we find that Judge Murphy's statement of reasons for granting summary judgment was sufficient.

Plaintiff's next two questions presented can be condensed into one. That is, did the superior court err in finding that Keith did not have a duty to cover the roof openings and safeguard the interior of 4900 Patrick Henry Drive once plaintiff contracted with Associated to repair the structural elements of the roof? If this court answers this question in the negative, there is no need to address question three.

Plaintiff argues, "it is beyond question that every participant in a construction project has a duty of care with respect to the work that it undertakes and, if negligent, may be held liable for damages caused by defects."

The threshold element of a negligence cause of action is the existence of a duty to use due care toward an interest of another that is entitled to legal protection against unintentional invasion. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57.) Whether this essential prerequisite has been satisfied in a particular case is a legal issue to be determined by the court. (*Ibid.*) Such a duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.)

At the outset, we note that this case, as our Supreme Court has put it so succinctly, "arises from the nebulous and troublesome margin between tort and contract law." (*Aas*

⁴ In *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.*, *supra*, 88 Cal.App.4th at page 449, the Court of Appeal explained when noncompliance with section 437c, subdivision (g), cannot be considered harmless error, holding that, if the issues are complex and the evidence conflicting and the trial court has "clearly decided credibility issues, at least through its apparent decision to disregard certain contradictions in the evidence," de novo review is inappropriate because "[w]ithout a sufficient statement of reasons from the court, we are precluded from undertaking a meaningful review of the issues."

v. Superior Court (2000) 24 Cal.4th 627, 635, superseded by statute on another point as noted in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 483, fn. 2.)

As our Supreme Court explained in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 (*Applied*), "[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy. [Citation.]" (*Id.* at p. 514.)

Our Supreme Court has described the essential difference between contract and tort law as follows: " 'As Professor Prosser has explained: "[Whereas] [c]ontract actions are created to protect the interest in having promises performed," "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy, and not necessarily based upon the will or intention of the parties" ' [Citation.]" (*Applied, supra*, 7 Cal.4th at p. 515, italics omitted.)

"The law imposes the obligation that "every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights." [Citation.] This duty is independent of the contract . . . "[A]n omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." ' [Citation.]" (*Applied, supra*, 7 Cal.4th at p. 515.)

"Liability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff or to a class of which the plaintiff is a member. [Citation.] . . . Whether a duty is owed is simply a shorthand way of phrasing what is 'the essential question -- whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.' ' [Citations.]" (*J'Aire Corp. v. Gregory, supra*, 24 Cal.3d at p. 803.)

In any given case, the imposition of a duty is " 'an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.' [Citation.]" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.)

Nevertheless, for over half a century, California has recognized the fundamental principle that " [a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation]." (*Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376 (*Roscoe Moss Co.*), [contract for the drilling of a well].) *Roscoe Moss Co.* involved a contract for the performance of services rather than the sale of goods. A contract to perform services may give rise to a duty of care that requires that such services be performed in a competent and reasonable manner. A negligent failure to do so may be both a breach of contract and a tort. (*Perry v. Robertson* (1988) 201 Cal.App.3d 333, 340; *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774.)

Certainly, a contractor's duty of care has been held to extend beyond the physical construction of the improvements to the protection of the owner against damages that reasonably could have been prevented if due care had been exercised. (*Fuentes v. Perez* (1977) 66 Cal.App.3d 163, 166 [while remodeling the plaintiff's home, the contractor left the roof uncovered even though he was warned of impending rain. He was held liable for the damage to the interior of the home resulting from the rain].)⁵

⁵ We are compelled to observe, however, that the only issue in this case was whether the plaintiff, who in the trial court had recovered damages for tortious breach of contract for property damage, was entitled to damages for emotional distress that proximately resulted from the tortious breach of contract. (*Fuentes v. Perez, supra*, 66 Cal.App.3d at pp. 165-166.)

Keith argues that no independent tort duty arose in this case. However, it is quite apparent from Judge Murphy's written order that he found that Keith had a duty of care arising from the contract, but it either "ended or was suspended by the time [Keith] relinquished control of the roof to Associated . . . to perform the structural repairs." Accordingly, we will proceed, for the sake of argument, under the assumption that Keith had a duty of care to plaintiff when the roofing work began.

Plaintiff contends that the question of whether Keith continued to have a duty to ensure that the property was protected from the elements during the November 2001 time frame was a disputed issue of material fact that should have precluded summary judgment. We disagree. As noted, the existence and scope of any such duty are legal questions for the court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

As we have observed, it is apparent from Judge Murphy's written order that he determined that any duty that Keith owed to plaintiff to ensure that the property was protected from the elements ceased, or was at least suspended, at the time plaintiff entered into a contract with Associated to repair or replace the structural elements of the roof. Plaintiff supplied the evidence supporting this conclusion; i.e., the contract entered into between plaintiff and Associated.

We cannot disagree with Judge Murphy in this assessment. A judge's conclusion that a duty is present or absent at a particular time is merely " "a shorthand statement . . . rather than an aid to analysis '[D]uty,' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." [Citation.]' Courts, however, have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow every negligent act' " (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 749-750.) " '[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should [or should not] be imposed for damage done.' [Citation.]" (*Id.* at p. 750.)

Here, assuming that Keith's duty of care arose from the contract to roof 4900 Patrick Henry Drive, once Keith was not able to continue working on some parts of the roof because structural elements of the roof had to be repaired or replaced, Keith's contract was, at a minimum, effectively suspended for the duration of that time, as to those parts of the roof. Although, initially, it was Keith that removed the roof and exposed the glu-lam beams, plaintiff did not present any evidence that Keith was able to continue working on the part of the roof that was removed while Associated was working on the glu-lam beams.⁶ In fact, by plaintiff's own admissions, Keith's completion of the roofing work was delayed by the need to have additional work performed on the structural elements of the roof and Associated covered and uncovered the holes in the roof several times during the time they were working to repair the glu-lam beams.⁷

We reiterate, " "Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." [Citation.]' [Citation.]" (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.)

While "foreseeability alone is not sufficient to create an independent tort duty" (*Erlich v. Menezes, supra*, 21 Cal.4th at p. 552), lack of foreseeability is enough to defeat a claim that one exists. (*Dillon v. Legg, supra*, 68 Cal.2d 728, 739 [in the absence of overriding policy considerations foreseeability of risk is of primary importance in establishing the element of duty].) To put it another way, if an injury is not reasonably

⁶ Furthermore, common sense dictates this conclusion.

⁷ Dianne O'Brien, a limited partner in 4900 Patrick Henry Drive Associates, was deposed and admitted that at times when she had gone to the property, sometimes after the end of the work day when the workers were gone, in the area where the glu-lam repair work was being conducted "they do cover it up." This implies that while the work on the glu-lam beams was going on, the holes in the roof were uncovered to give access to the beams from above.

foreseeable, the defendant cannot have had a duty to prevent that injury. (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306.)⁸

Foreseeability for purposes of duty cannot be divorced from the facts underlying the claimed injury. (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 998.) Nevertheless, "a court's task -- in determining 'duty' -- is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.)

Here, it was not reasonably foreseeable that when a roofing contractor has to stop work on parts of a roof in order for another independent contractor to repair the roof's structural elements, which necessitated that contractor accessing the beams from above, the roofing contractor's failure to secure tarpaulins or other material to the roof would cause water to enter the roof during a rainstorm. Accordingly, we conclude that Keith had no duty of care to plaintiff from the time plaintiff entered into a contract with Associated to repair the glu-lam beams in the roof of 4900 Patrick Henry Drive, until the

⁸ In *Sun 'N Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 695, the Supreme Court stated: "It is settled . . . that 'the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk' [Citations.]" In *Sturgeon v. Curnutt, supra*, 29 Cal.App.4th 301, 306 (*Sturgeon*), the court noted that foreseeability is the first of the duty-of-care considerations listed in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113. The *Sturgeon* court stated: "While we characterize foreseeability as a consideration, it is more than that. *If the court concludes the injury was not foreseeable, there was no duty. There is no need to discuss the remaining considerations.*" (*Sturgeon, supra*, 29 Cal.App.4th at p. 306, italics added.) Furthermore, case law indicates that the remaining considerations are not alternative bases for a finding of duty where foreseeability is absent. Rather, they come into play where foreseeability is present, but there is an issue as to whether foreseeability alone is sufficient to warrant imposition of liability. (See *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476.)

glu-lam beams were repaired. The contract between plaintiff and Associated prevents this court from concluding that Associated was Keith's subcontractor.

Furthermore, we are mindful that in this case, there was no breach of the terms of the contract per se. The terms of the contract called for Keith to reroof the property as per the specifications in the contract and there was no evidence before the superior court, or this court, that Keith did anything other than complete the contract as per the specifications contained therein. Accordingly, this is not a case where the roof itself was not proper and fit for its intended purpose. (Compare *Kuitem's v. Covell* (1951) 104 Cal.App.2d 482, 484, [roofing contractor installed roofing material and slabs insufficient and not of a proper type for a flat roof causing water to leak in through the roof covering, which resulted in warping and staining of hardwood floors].)

Finally, we turn to plaintiff's fourth question: Whether the superior court committed reversible error by failing to find the existence of triable issues of material fact regarding whether Keith was guilty of breach of contract by failing to adequately cover the roof openings and safeguard the interior of 4900 Patrick Henry Drive from inclement weather at the time of the rainstorm?

Plaintiff contends that triable issues of fact exist as to its breach of contract claim. However, as we shall explain, this court has determined, as did the superior court, that plaintiff's contract with Keith was effectively suspended during the time the rainwater entered 4900 Patrick Henry Drive. Thus, plaintiff has no breach of contract claim. Keith's contract with plaintiff was suspended because Keith had no ability to complete the roof repair at the site of the rotted glu-lam beams.

"Temporary impossibility usually *suspends* the obligation to perform during the time it exists." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 833, p. 921.)

"California law on temporary impossibility mirrors the Restatement Second of Contracts, section 269, which provides: 'Impracticability of performance or frustration of

purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.' On the other hand, '[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.' (Rest.2d Contracts, § 261.)" (*Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1017 (*Maudlin*).)⁹

The discovery of the rotted glu-lam beams made it temporarily objectively impossible for Keith to complete the reroofing of parts of 4900 Patrick Henry Drive, until the beams were repaired or replaced. Accordingly, Keith's duty to perform under the contract was suspended until the glu-lam beams were repaired. Since it was during the time the beams were being repaired that the water entered the property, Keith cannot be held liable for breach of contract with respect to the water intrusion.

⁹ As the court in *Maudlin* observed, "The Second Restatement consolidates the subjects of impracticability and frustration of purpose, substituting the term "impracticability" for "impossibility"" [Citation.]" (*Maudlin, supra*, 137 Cal.App.4th 1001, 1017, fn. 6.)

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

BAMATTRE-MANOUKIAN, J.