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3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE EASTERN DISTRICT OF CALIFORNIA
5

6 THE 1849 CONDOMINIUMS
7 ASSOCIATION, INC., a California
8 nonprofit mutual benefit
corporation,

9 Plaintiff,

10 v.

11 GEOFFREY BRUNER and DOES 1
12 through 20, inclusive,

13 Defendant.
14

15 GEOFFREY BRUNER and DOES 1
16 through 20, inclusive,

17 Counterclaimant,

18 v.

19 THE 1849 CONDOMINIUMS
20 ASSOCIATION, INC., a California
21 nonprofit mutual benefit
corporation,

22 Counterdefendants.
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25 This matter comes before the Court on Third Party
26 Defendants Brad Neufeld, Phyllis Gottlieb, Debbie Bean, Joe
27 Unis, Mike Fleischer, Norm Kaufman, Cheryl Witherill and Robe
28 Witherill's ("Third Party Defendants'") Motion to Dismiss

No. 2:09-cv-03339-JAM-EFB

ORDER GRANTING THIRD PARTY
DEFENDANTS' MOTION TO DISMISS

1 Counterclaimant Geoffrey Bruner's ("Bruner's") Third Party
2 Complaint ("TPC") pursuant to Federal Rule of Civil Procedure
3 12(b)(6). Bruner opposes the motion.¹ For the reasons stated
4 below, Third Party Defendants' Motion is GRANTED.

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 For all times relevant hereto, the Third Party Defendants
7 were officers, members and/or managers of the Association, a
8 California non-profit mutual benefit corporation. TPC ¶¶ 3-11.
9 The Association managed the 1849 Condominium project
10 ("Project") in Mammoth Lakes, California. Id. ¶ 1. The Project
11 is governed by a Declaration of Covenants, Conditions and
12 Restrictions for the Project ("CC&R's"). Id. ¶ 1. The
13 Association delegated the authority to supervise the Renovation
14 Project to the Third Party Defendants. Id. ¶ 23. Bruner, a
15 resident of Clark County, Nevada, owns Unit No. 306 in the
16 Condominium Project. Id. ¶ 2.

17 In December 2007, the Association, through the Third Party
18 Defendants, presented a proposed renovation project
19 ("Renovation Project") to the unit owners for their approval.
20 Id. ¶ 13. The Renovation Project was to include the remodel,
21 repair, replacement, and/or renovation of the Phase 1 and 2
22 buildings in the Condo Project. Id. ¶ 15. The cost of the
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27 ¹ Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
L.R. 230(g).

1 proposed Renovation Project and the special assessment to the
2 unit owners was \$9,500,000 ("Assessment"). Id. ¶ 16. The unit
3 owners approved the Renovation Project and the associated
4 Assessment. Id. ¶ 17.

5 Since the approval of the Renovation Project, the
6 Association and Third Party Defendants charged the unit owners
7 the entire Assessment, but have not completed the project as
8 promised. Id. ¶ 18. The Association and Third Party Defendants
9 allegedly failed to construct several components of the
10 Renovation Project, unlawfully tabled, changed or removed
11 several aspects of the project, and mismanaged the project. Id.
12 Bruner asserts the Association and Third Party Defendants did
13 not seek competing construction bids to reduce the overall cost
14 of the project. Id. ¶¶ 21-22.

15 Furthermore, Bruner alleges the Renovation Project does
16 not comply with the CC&R's. Id. ¶ 19. Portions of the
17 Renovation Project are not within the scope of the Association
18 and Third Party Defendants' authority under the CC&R's. Id.
19 Additionally, the Association and Third Party Defendants failed
20 to properly allocate the Assessment among the unit owners in
21 accordance with the CC&R's. Id. ¶ 20.

22 The Association filed a Complaint ("Complaint") in Mono
23 County Superior Court on October 22, 2009 (Case No. 16857),
24 alleging Bruner failed to pay common area assessments. On
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1 November 30, 2009, the action was removed to this Court based on
2 diversity of citizenship pursuant to 28 U.S.C. § 1332. On
3 December 15, 2009, Bruner filed a Counterclaim against the
4 Association, alleging sixteen state law claims. Doc. # 5. Bruner
5 filed the TPC against the Third Party Defendants on December 30,
6 2009, alleging eighteen state law claims. Bruner's TPC is
7 against nine individuals, eight of whom filed the instant motion
8 to dismiss.² The TPC is identical to the Counterclaim against
9 the Association, except it adds two claims for indemnification
10 and contribution and the TPC is against the directors and
11 officers individually, as well as the Association's general
12 project manager and maintenance manager, and manager of its
13 Remodel Committee rather than the Association.
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15 II. OPINION

16 A. Legal Standard

17 A party may move to dismiss an action for failure to state
18 a claim upon which relief can be granted pursuant to Federal
19 Rule of Civil Procedure 12(b)(6). In considering a motion to
20 dismiss, the court must accept the allegations in the complaint
21 as true and draw all reasonable inferences in favor of the
22 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
23 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
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27 ² The Motion to Dismiss the TPC is made on behalf of all
28 named Third Party Defendants except Lance Lenz, who, the movants
claim, has not been served with the TPC.

1 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions
2 that are mere "legal conclusions," however, are not entitled to
3 the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937,
4 1950 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544,
5 555 (2007). To survive a motion to dismiss, a plaintiff needs
6 to plead "enough facts to state a claim to relief that is
7 plausible on its face." Twombly, 550 U.S. at 570. Dismissal
8 is appropriate where the plaintiff fails to state a claim
9 supportable by a cognizable legal theory. Balistreri v.
10 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

12 Upon granting a motion to dismiss for failure to state a
13 claim, the court has discretion to allow leave to amend the
14 complaint pursuant to Federal Rule of Civil Procedure 15(a).
15 "Absent prejudice, or a strong showing of any [other relevant]
16 factor[], there exists a presumption under Rule 15(a) in favor
17 of granting leave to amend." Eminence Capital, L.L.C. v.
18 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal
19 with prejudice and without leave to amend is not appropriate
20 unless it is clear . . . that the complaint could not be saved
21 by amendment." Id.

22 B. Third Party Complaint

23 Bruner's TPC seeks to hold each of the officers and
24 directors of the Association, along with its project manager,
25 its maintenance manager and a member of its Remodel Committee,
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1 liable for each and all of the allegedly wrongful acts asserted
2 in the Counterclaim against the Association. The first sixteen
3 claims listed in the TPC are the same claims alleged against the
4 Association in the Counterclaim. See Doc. # 5. As such, the
5 first sixteen claims in the Third Party Complaint are identical
6 to the claims contained in the Counterclaim except for the
7 parties against whom they are directed. As explained in this
8 Court's Order dated June 18, 2010 (Doc. # 27) dismissing the
9 Counterclaim, Bruner fails to plead enough facts to state any
10 claim to relief that is plausible on its face. Bruner's TPC not
11 only contains the same defects as his Counterclaim, but it also
12 fails to tie any individual Third Party Defendant to any
13 allegation. Thus, for the same reasons set forth in this
14 Court's Order dated June 18, 2010 (Doc. # 27), the Third Party
15 Defendants' motion to dismiss the first sixteen claims is
16 GRANTED with leave to amend.

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20 Bruner's seventeenth claim against the Third Party
21 Defendants is for indemnity in the event that the Association
22 recovers against Bruner in the underlying suit. In general,
23 indemnity refers to "the obligation resting on one party to make
24 good a loss or damage another party has incurred." Prince v.
25 Pacific Gas & Electric Co., 45 Cal. 4th 1151, 1157 (2009)
26 (citations omitted). To establish indemnity, a plaintiff must
27 show (1) fault by the indemnitor and (2) resulting damages to
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1 the indemnitee for which the indemnitor is contractually or
2 equitably responsible. Great Western Drywall, Inc. v. Interstate
3 Fire & Cas., 161 Cal. App. 4th 1033, 1041 (2008) (citations
4 omitted). Here, Bruner has failed to allege any facts to support
5 how the Third Party Defendants are contractually or equitably
6 responsible if the Association recovers against him. As such, he
7 has not asserted any facts to support a claim for indemnity.
8 Accordingly, Bruner's seventeenth claim for indemnity is
9 dismissed with leave to amend.
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11 Bruner's eighteenth claim alleges that if the Association
12 recovers against Bruner, then Bruner is entitled to
13 contribution against the Third Party Defendants. A right to
14 contribution exists "when two or more parties are jointly
15 liable on an obligation and one of them makes payment of more
16 than his share [so that] the one paying possesses a new
17 obligation against the other for their proportion of what he
18 has paid." Borba Farms v. Acheson, 197 Cal. App. 3d 597, 602
19 (1988) (citations omitted). Here, Bruner has failed to allege
20 how the Third Party Defendants are jointly liable for Bruner's
21 failure to pay common area assessments. As such, Bruner has
22 failed to allege any facts that he is entitled to contribution
23 from the Third Party Defendants. Accordingly, Bruner's
24 eighteenth claim for contribution is dismissed with leave to
25 amend.
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1 Finally, this Court is compelled to dismiss Bruner's TPC
2 in its entirety for two additional reasons. First, Bruner does
3 not even attempt to answer the Third Party Defendants' argument
4 that there is no basis for making them personally liable for any
5 breach of contract. Thus, even if Bruner's breach of contract
6 allegations were plausible against the Association, he has not
7 set forth any facts or theory on which the Third Party
8 Defendants could be personally liable under a contract theory.
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10 Second, Bruner does not answer the Third Party Defendants'
11 argument that individual directors of a defendant entity do not
12 have personal liability to a plaintiff unless it is shown, as to
13 each and all of them, that they committed some intentional tort
14 against plaintiff. See Reynolds v. Bement, 36 Cal. 4th 1075
15 (Cal. 2005).

17 Bruner appears to attempt to establish personal liability
18 against the Third Party Defendants by referencing in his
19 Opposition Brief (Doc. # 18) the California Supreme Court
20 decision Lamden v. La Jolla Shores Clubdominium Homeowners
21 Assn., 21 Cal. 4th 249 (Cal. 1999). Bruner argues that the
22 relationship between homeowner associations and individual
23 owners is analogous to that between a shareholder and
24 corporation and thus, the Court should treat this case as such.
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26 See Pl's Opp., Doc. # 18, at 5-6. Bruner has clearly misread and
27 misinterpreted this case. Lamden does not remotely establish
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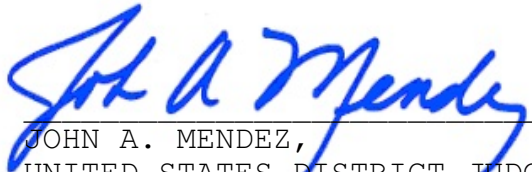
1 how individual directors of a homeowners association, much less
2 a project manager, maintenance manager and Remodel Committee
3 member, can be held personally liable to an individual
4 homeowner. Instead, the Lamden Court held that "[w]here a duly
5 constituted community association board, upon reasonable
6 investigation, in good faith and with regard for the best
7 interests of the community association and its members,
8 exercises discretion within the scope of its authority under
9 relevant statutes, covenants and restrictions to select among
10 means for discharging an obligation to maintain and repair a
11 development's common areas, courts should defer to the board's
12 authority and presumed expertise." Lamden, 21 Cal. 4th at 253.
13 Specifically, the Lamden Court created "a rule of judicial
14 deference to community association board decisionmaking that
15 applies, regardless of an association's corporate status, when
16 owners in common interest developments seek to litigate ordinary
17 maintenance decisions entrusted to the discretion of their
18 associations' boards of directors." Id. As such, the Lamden
19 holding appears to favor the Association, not Bruner.
20 Regardless, contrary to Bruner's argument, the Lamden case in
21 no way addresses the Third Party Defendants' argument that they
22 cannot be held personally liable to Bruner unless it is shown
23 that they committed some intentional tort against him.
24 Moreover, Bruner's TPC does not allege any basis for finding the
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1 Third Party Defendants personally liable to Bruner under a
2 contract or tort theory. Accordingly, Bruner's TPC must be
3 dismissed in its entirety.

4 III. ORDER

5 For the reasons set forth above, the Third Party
6 Defendants' Motion to Dismiss is GRANTED with leave to amend.
7 Plaintiff has twenty (20) days from the date of this Order to
8 file an amended third party complaint consistent with this
9 Order.
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13 DATED: July 1, 2010

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE