

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZURICH AMERICAN INSURANCE  
COMPANY,  
  
Plaintiff,  
  
v.  
  
KWAN WO IRONWORKS INC.,  
  
Defendant.

Case No. [21-cv-06661-MMC](#)

**ORDER DENYING DEFENDANT'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Before the Court is defendant Kwan Wo Ironworks, Inc.'s ("Kwan Wo") Motion, filed February 16, 2022, for Judgment on the Pleadings. Plaintiff Zurich American Insurance Company ("Zurich") has filed opposition, to which Kwan Wo has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

**BACKGROUND<sup>2</sup>**

Between April 2013 and April 2015, Zurich provided insurance to Kwan Wo under a commercial package insurance policy, a general liability insurance policy, and two workers' compensation insurance policies. (See FAC ¶¶ 8-10.) Under the terms thereof, "the initial premium charged for each policy [was] an estimate, subject to an audit" to be conducted "after the conclusion of the applicable policy period"; if the audit showed that "the actual exposure exceed[ed] the estimated exposure used to calculate the initial

<sup>1</sup> By order filed March 21, 2022, the Court took the matter under submission.

<sup>2</sup> The following facts are taken from the allegations in the operative complaint, the First Amended Complaint ("FAC").

1 premium, then an additional premium [was] owed to [Zurich].” (See FAC ¶¶ 12-13.)<sup>3</sup>

2 On April 28, 2015, April 29, 2015, and May 11, 2015, Zurich performed audits  
3 pursuant to the above-referenced terms and determined that Kwan Wo owed additional  
4 premiums for each of the policies. (See FAC ¶¶ 14-17.) On August 10, 2016, and October  
5 5, 2016, respectively, Kwan Wo made partial payments toward those premiums. (See  
6 FAC ¶¶ 18-19.) On September 30, 2020, Zurich “issued to [Kwan Wo] a Statement of  
7 Account and demand for payment” of the outstanding amount owed (see FAC ¶ 20), and,  
8 on August 10, 2021, “having received no payment in response to the September 30,  
9 2020 demand, and having recalculated the amount due, [Zurich] issued . . . a [second]  
10 Statement of Account and demand for payment” (see FAC ¶ 21). Zurich alleges that, to  
11 date, Kwan Wo has not paid the full additional premium owed. (See FAC ¶ 23.)

12 On August 27, 2021, Zurich filed an initial complaint and, subsequently that same  
13 date, filed an amended complaint, in each instance asserting, based on the above  
14 allegations, a single cause of action against Kwan Wo for “Breach of Contract.”

### 15 LEGAL STANDARD

16 A Rule 12(c) motion for judgment on the pleadings may be brought at any time  
17 after the pleadings are closed, but within such time so as not to delay trial. See Fed. R.  
18 Civ. P. 12(c). The standard applied to decide a Rule 12(c) motion is the same as the  
19 standard used in a Rule 12(b) motion to dismiss for failure to state a claim. See Cafasso  
20 v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). “[J]udgment on  
21 the pleadings is appropriate when, even if all allegations in the complaint are true, the  
22 moving party is entitled to judgment as a matter of law.” Westlands Water Dist. v.  
23 Firebaugh Canal, 10 F.3d 667, 670 (9th Cir. 1993). The court may not, however, “go[]  
24 beyond the pleadings to resolve an issue.” See Hal Roach Studios v. Richard Feiner &  
25 Co., 896 F.2d 1542, 1550 (9th Cir. 1990). “For purposes of [such] motion, the allegations

26  
27  
28 <sup>3</sup> Although both parties make reference to the policies, neither party provides a  
copy thereof or even purports to quote therefrom.

1 of the non-moving party must be accepted as true, while the allegations of the moving  
2 party which have been denied are assumed to be false.” Id. The court need not  
3 automatically accept as true unreasonable inferences, unwarranted deductions of fact, or  
4 conclusory legal allegations cast in the form of factual allegations. See W. Mining  
5 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

### 6 DISCUSSION

7 In the instant motion, Kwan Wo contends it is entitled to judgment on the pleadings  
8 on the ground that Zurich’s breach-of-contract cause of action is time-barred by the  
9 applicable statute of limitations.

10 A plaintiff “ordinarily need not plead on the subject of an anticipated affirmative  
11 defense.” See Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 902 (9th Cir. 2013)  
12 (internal quotation and citation omitted). Where “the running of the statute [of limitations]  
13 is apparent on the face of the complaint,” however, the complaint may properly be  
14 dismissed on a motion for judgment on the pleadings. See Bakalian v. Cent. Bank of  
15 Republic of Turkey, 932 F.3d 1229, 1233 (9th Cir. 2019).

16 Here, as an initial matter, the parties disagree as to whether Zurich’s claim is  
17 governed by California or Illinois law. Kwan Wo contends the insurance policies at issue  
18 are subject to California’s four-year statute of limitations, see Cal. Code Civ. P. § 337,  
19 whereas Zurich contends Illinois’s ten-year statute of limitations applies, see Ill. Comp.  
20 Stat. 5/13-206.

21 Even assuming, arguendo, California’s four-year statute of limitations applies, the  
22 Court finds, as set forth below, the running of the statute of limitations is not apparent on  
23 the face of the FAC.

24 “It is a fundamental principle in determining when the statute of limitations  
25 commences to run, that it runs from the time a cause of action accrues.” Barlow v. City  
26 Council of Inglewood, 32 Cal. 2d 688, 694 (1948) (internal quotation and citation omitted).  
27 “A cause of action for breach of contract [generally] accrues at the time of the breach,”  
28 see Cochran v. Cochran, 56 Cal. App. 4th 1115, 1120 (1997), or “when the plaintiff

1 discovers, or could have discovered through reasonable diligence, the injury and its  
2 cause,” see Angeles Chem. Co. v. Spencer & Jones, 44 Cal. App. 4th 112, 119 (1996).  
3 Where a contract is executory, however, the statute of limitations “generally does not  
4 begin to run until the time for full performance has arrived.” State Comp. Ins. Fund v.  
5 WallDesign, Inc., 199 Cal. App. 4th 1525, 1529-30 (2011). An executory contract is one  
6 in which “some act remains to be done, while an executed contract” is one in which  
7 “everything is completed at the time of the agreement without any outstanding promise  
8 calling for fulfillment by the further act of either party.” See City of Gault v. Cohen, 12  
9 Cal. App. 5th 367, 381-82 (2017) (internal quotation and citation omitted); see also Cal.  
10 Civ. Code § 1661 (providing “[a]n executed contract is one, the object of which is fully  
11 performed,” and “[a]ll others are executory”).

12 The Court agrees with Zurich that the above-referenced insurance policies were  
13 executory contracts, for the reason that they “require[d] post-policy audits to true-up the  
14 estimated exposures with the actual exposures to determine the final premium” (see Opp.  
15 at 8:5-6), and, consequently, “could not be fully performed by either party until after their  
16 expiration,” see WallDesign, 199 Cal. App. 4th at 1529-30.<sup>4</sup> Although Kwan Wo contends  
17 “the Ninth Circuit has previously ruled that Zurich’s retrospective premium insurance  
18 policies are not ‘executory’” (see Reply at 4:6-13), the case on which Kwan Wo relies is  
19 distinguishable, see In re Int’l Fibercom, Inc., 503 F.3d 933, 942 (9th Cir. 2007) (finding  
20 Zurich’s insurance policies not executory under § 365 of Bankruptcy Code; noting  
21 contract is “executory” for purposes of § 365 “only if one party’s failure to perform its  
22 obligation would excuse the other party’s performance”); see also In re Norquist, 43 B.R.  
23 224, 225 (E.D. Wash. 1984) (noting “consensus of opinion” that common law definition of  
24

---

25 <sup>4</sup> Zurich contends the policies are executory for the additional reason that the  
26 parties “still have rights and obligations” thereunder, specifically, because “[t]he statute of  
27 limitations for Kwan Wo’s construction work for latent defects . . . is ten years,” and  
28 because “Zurich is still handling workers compensation claims under the workers[']  
compensation policies.” (See Opp. at 8:6-14.) Such additional facts are not, however,  
alleged in the FAC, and, consequently, are not further addressed herein.

1 “executory” is “too broad [for] . . . bankruptcy setting”).

2 Kwan Wo, citing WallDesign, next argues that, even if the policies are deemed  
3 executory, the statute of limitations necessarily began to run “when Zurich presented the  
4 final bill to Kwan Wo.” (See Reply at 5:1-2.) In WallDesign, the insured company, by  
5 missing a monthly premium payment, had already breached the insurance contract prior  
6 to the end of the policy period, and the issue presented was whether the statute of  
7 limitations on the insurance company’s claim to recover the final post-audit premium  
8 began running at the time of that earlier breach, or whether the insurance company “had  
9 the right to wait until the time for final performance under the policies” had arrived, which  
10 the insurance company had argued was the date the final bill was sent. See 199 Cal.  
11 App. 4th at 1527, 1529-30.

12 Here, by contrast, there is no allegation as to the time for final performance under  
13 the policies, nor is there any allegation that Zurich sent a bill or otherwise demanded  
14 payment from Kwan Wo prior to September 30, 2020, and although Kwan Wo contends a  
15 bill must have been sent prior to August 16, 2016, the date on which it made the first of  
16 two payments (see Reply at 5:3-4), the Court is not prepared to make that finding based  
17 on the allegations in the FAC.<sup>5</sup>

18 Accordingly, even assuming California’s four-year statute of limitations applies, it is  
19 not apparent, from the face of the FAC, that Zurich’s breach-of-contract cause of action is  
20 untimely.<sup>6</sup>

21 //  
22 //  
23 //  
24 //

25 \_\_\_\_\_  
26 <sup>5</sup> For example, Kwan Wo, prior to receiving a bill, could have learned the results of  
the audit and, for various reasons, decided to make a payment in a lesser amount.

27 <sup>6</sup> In light of this finding, the Court does not address herein the issue of whether the  
28 insurance policies are governed by California or Illinois law.


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

For the reasons stated above, Kwan Wo's motion for judgment on the pleadings is hereby DENIED.

**IT IS SO ORDERED.**

Dated: March 22, 2022

  
MAXINE M. CHESNEY  
United States District Judge