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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KMP PLUMBING,
12 Third Party Plaintiff,
13 v.
14 PLATT/WHITELOW
15 ARCHITECTS, INC. and DECK
16 ENGINEERING CONSULTANTS,
17 INC.,
18 Third Party Defendants.

Case No.: 14cv2756 BTM (MDD)

**ORDER GRANTING
DEFENDANTS' MOTIONS TO
DISMISS**

19 Third Party Plaintiff KMP Plumbing ("KMP") filed a Third Party Complaint on
20 October 22, 2015, against Third Party Defendants Platt/Whitelaw Architects, Inc.
21 ("Platt"), and Deck Engineering Consultants, Inc. ("DEC"). (ECF No. 50.) Platt
22 and DEC each moved separately to dismiss. (ECF Nos. 53, 54.) For the reasons
23 discussed below, Defendants' motions are **GRANTED**.

24
25 **I. BACKGROUND**

26 The issues in this case arise out of damage to a property in San Diego
27 allegedly caused by a hot water heater. (Compl. ¶ 11, ECF No. 1.) The original
28 complaint was brought by Hartford Casualty Insurance Company against A.O.

1 Smith Corporation. (Compl. p. 1.) Following initial discovery, the Court granted
2 the parties' joint motion for leave to file a Third Party Complaint for indemnity and
3 contribution against KMP. (ECF Nos. 25, 28.) KMP in turn requested, and was
4 granted, leave to file a Third Party Complaint against Platt and DEC. (ECF Nos.
5 45, 49.) Defendants filed separate motions to dismiss. (ECF Nos. 53, 54.)
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7 **II. DISCUSSION**

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
9 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or
10 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police
11 Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss,
12 the allegations of material fact in plaintiff's complaint are taken as true and
13 construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc.
14 v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

15 Although detailed factual allegations are not required, factual allegations
16 "must be enough to raise a right to relief above the speculative level." Bell
17 Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove
18 the 'grounds' of his 'entitle[ment] to relief' requires more than labels and
19 conclusions, and a formulaic recitation of the elements of a cause of action will
20 not do." Id. "[W]here the well-pleaded facts do not permit the court to infer more
21 than the mere possibility of misconduct, the complaint has alleged—but it has not
22 show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, 565 U.S. 662, 679
23 (2009) (internal quotation marks omitted). Only a complaint that states a
24 plausible claim for relief will survive a motion to dismiss. Id.

25 While Defendants filed separate motions to dismiss, the motions each
26 make the same arguments: that California law requires KMP to file a certificate of
27 merit, and that KMP failed to plead facts sufficient to state a claim. Each
28 argument is discussed in turn.

1 **A. Certificate of Merit**

2 California Civil Procedure Code § 411.35 requires that a plaintiff's counsel
3 alleging negligence on the part of an architect, engineer, or surveyor include a
4 certificate of merit attesting that the attorney has consulted with and received an
5 opinion of at least one professional, and subsequently determined from the
6 opinion that the case is meritorious. See Cal. Civ. Proc. Code § 411.35(b)(1).
7 Because KMP did not include a certificate of merit with the TPC, Defendants
8 argue that such a deficiency requires dismissal.¹ KMP argues that the
9 requirement is procedural and therefore not applicable in cases filed in federal
10 court pursuant to diversity jurisdiction.

11 Defendants cite two cases from the Northern District of California for the
12 proposition that the certificate requirement is procedural and therefore, under the
13 Erie doctrine, does not apply to diversity cases. See Apex Directional Drilling,
14 LLC v. SHN Consulting Eng'rs & Geologists, Inc., 119 F. Supp. 3d 1117 (N.D.
15 Cal. 2015); Rafael Town Ctr. Investors v. Weitz Co., No. C 06-6633 SI, 2007 WL
16 1577886 (N.D. Cal. May 31, 2007). The Court finds these decisions persuasive.

17 Accordingly, for the reasons outlined by Judge Seeborg in Apex Drilling,
18 119 F. Supp. 3d at 1129-30, the merit certificate requirement is a rule of
19 procedure that does not apply in this diversity case.

20 **B. Factual Allegations**

21 KMP's Third Party Complaint ("TPC") contains an "Introductory Allegations"
22 section that merely recites the procedural history of this case. (See TPC, ECF
23 No. 50, ¶¶ 1-9.) In this section, KMP states that, "Hartford's purported damages
24 were not caused by KMP's conduct but, instead, were caused, in whole or in
25 part, by Platt and DEC's conduct and actions." (TPC ¶ 9.) In KMP's first cause of
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27 ¹ KMP subsequently filed a merit certificate with its opposition to Defendants' motions. Platt noted in its reply that
28 the issue was moot, but DEC maintained that the merit certificate posed a substantive requirement necessary to
state a claim.

1 action for implied indemnity, KMP again states that, “the damages, if any, . . .
2 were directly and proximately caused, in whole or in part, by Platt and DEC.”
3 (TPC ¶ 11.) The remainder of the TPC reads the same. (See, e.g., TPC ¶¶ 13,
4 17.)

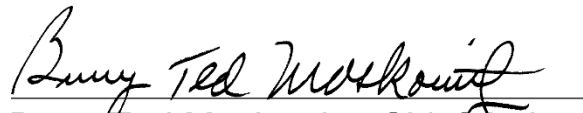
5 KMP has failed to allege facts sufficient to “raise a right to relief above the
6 speculative level.” Twombly, 550 U.S. at 555. KMP has only stated through
7 conclusory allegations that Platt and DEC’s actions are responsible for Hartford’s
8 purported damages. Importantly, the TPC never states how Platt and DEC
9 contributed to Hartford’s damages. Therefore, dismissal is proper.²

10 11 **III. CONCLUSION**

12 For the reasons discussed above, Defendants’ motions to dismiss (ECF
13 Nos. 53, 54) are **GRANTED**. The Court grants KMP leave to amend. KMP shall
14 file a First Amended Third Party Complaint within fifteen (15) days of the filing of
15 this Order.

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17 **IT IS SO ORDERED.**

18 Dated: August 2, 2016

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20 Barry Ted Moskowitz, Chief Judge
21 United States District Court
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28 ² Although the TPC states insufficient facts, KMP’s opposition to Defendants’ motions contains facts adequate to
remedy the TPC’s insufficiencies.