# Knock out Invalid Affirmative Defenses by Demurrer to Answer

by Bernard S. Kamine
(a version of this article appeared in the Los Angeles Daily Journal)

What kind of nut demurs to an answer? Well, sometimes it is not so nutty. Just like a complaint, affirmative defenses in an answer frame the case. No evidence is relevant that fails to prove or disprove allegations in the pleadings. If an affirmative defense is not legally competent, then no evidence pertaining to that defense is relevant. No such evidence should be offered or admitted at trial.

However, resolving admissibility during a trial is fraught with danger that irrelevant evidence will come in first and prejudice the trier of fact. Even before trial, legally incompetent affirmative defenses open up the defendant's discovery for enormous, irrelevant fishing expeditions, ostensibly to uncover facts that hopefully will prove the defenses. On the plaintiff's side, those defenses require at least minimal discovery to ascertain whether they have any substance. Often, this discovery leads to expensive discovery disputes and pointless consumption of court time.

California superior courts are taking note and sustaining demurrers to particular affirmative defenses in appropriate situations. For example, consider a case where the complaint only alleges a cause of action for breach of contract, but the answer comes back with numerous tort defenses. The contract, itself — not any tort law — governed the relationship of the parties and the issues in the lawsuit. *Foley v. Interactive Data Corporation,* 47 Cal. 3d 654, 683 (1988). Whether any acts or omissions of either party could be "negligent" as defined by tort law is irrelevant in a contract dispute. The only issue is whether each party performed what it was


KAMINE LAW PC
REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.
Phone: 213/972-0119. Fax: 213/972-0005. Website: www.KAMINECONSTRUCTIONLAW.com

required to perform under the contract. The measure of contract performance is not a reasonable person standard of care, but what the language of the contract spells out as being required. The contract can call for performance that is greater — or lesser — than the reasonable person standard of care might require in a tort context. As Justice Mosk's concurring opinion in *Kransco v. International Insurance Company* 23 Cal. 4th 390, 413 (2000), explains: "Actions in contract do not allow an affirmative defense of comparative fault. Fault, comparative or otherwise, generally does not matter under the law of contracts. What matters, rather, is performance."

Moreover, although the reasons or motive for a party's conduct can be relevant in a tort case, they have no place in a breach of contract action. As *Applied Equipment Corporation v. Litton Saudi Arabia Limited*, 7 Cal.4th 503, 516 (1994), explains: "the law generally does not distinguish between good and bad motives for breaching a contract . . . motives . . . are immaterial and cannot be inquired into . . . A party may breach a contract . . . because of personal, racial or ethnic animus, or for other nefarious or unethical reasons . . . a breach may be the product of naive or innocent misunderstanding or misperception . . . In any case, motivation is irrelevant."

Therefore, none of the following derivatives of contributory/comparative negligence is a defense to breach of contract: assumption of the risk, intervening and superseding cause, due care, fault of others, comparative negligence, no causation and no duty. Demurrers to them have been sustained without leave to amend.


KAMINE LAW PC
REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.
Phone: 213/972-0119. Fax: 213/972-0005. Website: www.KAMINECONSTRUCTIONLAW.com

Consider a case where the answer pleads affirmative defenses as merely terse legal conclusions. Typically, the defendant will argue that no more is needed, because any additional details could and should be acquired through discovery. The plaintiff-appropriate reply should be: requiring real facts to be alleged is the first, basic test of whether an affirmative defense has sufficient validity to justify the effort and expense of discovery proceedings. Typical of such defenses, against which demurrers should be sustained, probably with leave to amend, are: failure to mitigate damages, unjust enrichment, the parole evidence rule, failure to perform contractual obligations, the good faith of defendant's actions, speculative damages, a setoff or recoupment for plaintiff's breaches of the contract, impossibility of defendant's performance of the contract, uncertainty of the essential terms and conditions of the contract, and that no damages were caused by any act or omission of defendant.

Finally, consider the currently-in-vogue, nonsense affirmative defense purporting to reserve the right to raise additional affirmative defenses in the future. That verbiage is not "[a] statement of new matter constituting a defense" (CCP Section 431.30(b)(2)). Besides, CCP Section 473 requires a motion for leave to amend the answer to add affirmative defenses; no reservation of the right to amend in the answer can circumvent that requirement.

When faced with these kinds of affirmative defenses, plaintiff's counsel must move fast. A demurrer to an answer must be filed within 10 days after service of the answer (CCP Section 430.40(b)). It is often productive to send a cover letter with service of the demurrer, explaining this timing issue, and offering to take the demurrer off calendar if defense


KAMINE LAW PC
REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.
Phone: 213/972-0119. Fax: 213/972-0005. Website: www.KAMINECONSTRUCTIONLAW.com

counsel will stipulate to dropping the offending affirmative defenses. Lot's of times, such a stipulation is actually obtained.


KAMINE LAW PC
REPRESENTING CONTRACTORS, SUPPLIERS, SURETIES AND OWNERS SINCE 1976.
Phone: 213/972-0119. Fax: 213/972-0005. Website: www.KAMINECONSTRUCTIONLAW.com