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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RONALD CROWELL, Plaintiff and Appellant, v. DOWNEY REGIONAL MEDICAL CENTER HOSPITAL, INC., Defendant and Respondent.	B167785 (Los Angeles County Super. Ct. No. BC271263)

APPEAL from orders of the Superior Court of Los Angeles County. John P. Shook, Judge. Affirmed in part and reversed in part.

The Ford Law Firm, William H. Ford, III, and Claudia J. Serviss for Plaintiff and Appellant.

Dewey Ballantine, Jeffrey R. Witham, and Matthew M. Walsh for Defendant and Respondent.

Appellant Ronald Crowell, M.D., a professional corporation, appeals the trial court's order sustaining respondent Downey Regional Medical Center-Hospital, Inc.'s demurrer without leave to amend to appellant's second amended complaint (SAC). The trial court found that all of appellant's causes of action were barred by the statute of limitations and that appellant had not pled sufficient facts to avail itself of the doctrine of equitable tolling. Appellant also challenges the trial court's award of $138,868.75 in attorney fees to respondent.

We affirm in part and reverse in part. We conclude that the SAC adequately alleges facts supporting the application of the doctrine of equitable tolling as to the first, second, and fourth causes of action only. However, the first and second causes of action for breach of written contract and breach of oral or implied contract, respectively, are barred for other reasons. With respect to the fourth cause of action for interference, we conclude that the trial court erred in sustaining the demurrer.

Because we reverse in part the trial court's order sustaining the demurrer without leave to amend, we reverse the order awarding respondent attorney fees of $138,868.75.

FACTUAL AND PROCEDURAL BACKGROUND

"Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

The Parties and Their Agreement

Appellant is the professional medical corporation of Ronald Crowell, M.D., an emergency medicine specialist. Respondent is a nonprofit public benefit corporation operating a hospital in Downey, California. On January 1, 1996, appellant and respondent entered into an "Agreement to Provide Hospital Emergency Department Services" (the agreement), pursuant to which appellant provided emergency room physicians and services to respondent. The agreement provides that if respondent terminates the agreement prior to its natural expiration, respondent "agrees not to solicit

for employment or retention any [physician retained by appellant to provide emergency services for respondent] for one (1) year following the effective date of any such termination." The agreement also contains an arbitration clause with a 45-day notice provision and an attorney fee provision.

By its terms, the agreement expired on December 31, 1997. In the SAC, appellant alleges that on or about December 31, 1997, the parties orally agreed to renew the agreement on substantially the same terms (the renewed agreement). The SAC further alleges that on or about March 24, 1998, respondent demanded that appellant cease operations at the emergency department, thereby repudiating the renewed agreement.

The First Lawsuit to Compel Arbitration

On March 31, 1998, appellant filed suit against respondent, seeking interim and permanent injunctions forcing respondent: (1) to give appellant 90 days notice of termination, as required by the renewed agreement, and (2) to arbitrate the parties' dispute within 45 days, as called for in the renewed agreement.

On July 30, 1998, appellant again demanded arbitration of its contract claims. On August 6, 1998, respondent agreed to submit those claims to arbitration, subject to the terms of the parties' renewed agreement.

For unknown reasons, despite having received respondent's agreement to participate in arbitration, appellant did not initiate arbitration proceedings. Instead, on October 23, 1998, appellant dismissed its injunctive relief lawsuit without prejudice.

The Charitable Trust Action

In the meantime, appellant's principal, Dr. Crowell, was pursuing another action alleging that certain officers, directors, and affiliates of respondent had breached various fiduciary duties and had made a number of suspect business decisions (the Charitable Trust Action). As set forth in the SAC, appellant and respondent apparently agreed that it was in their best interests to suspend the arbitration of this dispute until the Charitable Trust Action was resolved. Accordingly, on or about March 31, 1999, the parties orally agreed to suspend temporarily the arbitration until the Charitable Trust Action concluded.

In May 2000, the trial court in the Charitable Trust Action granted the defendants' motions for summary judgment, thereby disposing of that action. At that time, appellant then allegedly renewed its request that respondent submit this dispute to arbitration. Respondent refused on the grounds that the arbitration clause was unenforceable.

The Second Lawsuit to Compel Arbitration

Six months later, in November 2000, appellant filed an action requesting a judicial declaration that respondent attend arbitration. In January 2001, the trial court found the arbitration clause unenforceable, and in January 2002, this Division affirmed. (*Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730.)

The Instant Litigation

On April 3, 2002, appellant initiated this lawsuit. Respondent demurred, and appellant voluntarily filed a first amended complaint. In response to the first amended complaint, respondent again demurred, arguing, inter alia, that the statute of limitations had expired and that appellant had failed to allege equitable tolling. On August 28, 2002, the trial court sustained the demurrer with leave to amend, finding: "The equitable tolling doctrine is insufficiently alleged as a matter of law because [appellant] has not alleged either lack of prejudice to [respondent] or that [appellant's] actions in delaying this lawsuit were reasonable and taken in good faith at all times after the 1998 incidents giv[ing] rise to this lawsuit." Appellant then filed the SAC.

The SAC and Successful Demurrer

The SAC alleges six causes of action: breach of written contract, breach of oral or implied contract, fraud, interference with contract, breach of the implied covenant of good faith and fair dealing, and violation of Business and Professions Code section 17200 et seq. With respect to equitable tolling, the SAC alleges that all applicable statutes of limitations have been tolled because the parties agreed to arbitrate their dispute, and subsequently agreed to suspend the arbitration while the Charitable Trust Action was pending. Moreover, respondent has not been prejudiced by any delay because (1) the parties agreed that suspending the arbitration was mutually advantageous; (2) each side

has identified in discovery responses all percipient witnesses and documents; (3) "Don Miller, who negotiated contracts on behalf of [respondent], and Allen Korneff, who signed the 'cease and desist' letter have remained at [respondent] from at least 1997 through the filing of the complaint in this action. Richard Guess, M.D., also identified as a witness to the solicitation of the [doctors under contract with appellant], has remained at [respondent] as an independent contractor"; and (4) Dr. Crowell was deposed in the Charitable Trust Action. Finally, the SAC outlines appellant's attempts to resume arbitration of its dispute with respondent, only to face respondent's successful challenge to the enforceability of the arbitration clause, leaving appellant with no choice but to file a civil action against respondent.

Respondent again demurred, and the trial court sustained the demurrer without leave to amend. "As with the earlier complaint, [appellant] has insufficiently alleged facts supporting the shield of the equitable tolling doctrine because it has not alleged either lack of prejudice to [respondent] or that [appellant's] actions in delaying this lawsuit were reasonable and taken in good faith at all times after the 1998 incidents giving rise to this lawsuit." The trial court even explained how appellant's attempt at curing the previously-identified defects was inadequate. "[Appellant] attempted to cure the defect by adding allegations of lack of prejudice to paragraph 34, but the additional allegations are insufficient. In light of [appellant's] crucial claim that the parties orally agreed to renewal of the services contract, [appellant] should have alleged oral testimony on this claim has somehow been preserved. Further, [appellant] has failed to allege facts indicating its delay in pursuing this lawsuit was reasonable and in good faith, at each step of the way between late 1998 and the date it filed the complaint. Having been given two opportunities to sufficiently allege its claims, the court now sustains without leave to amend."

Respondent's Motion for Attorney Fees

On December 9, 2002, respondent timely filed a motion for attorney fees. Over appellant's objection, the trial court granted that motion, awarding respondent $138,868.75 in attorney fees, as well as other costs.

This timely appeal followed.

DISCUSSION

I. *Demurrer*

A. Standard of Review

Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: "'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043-1044.)

B. Appellant Adequately Alleged Equitable Tolling with Respect to the Contract Causes of Action

It is evident that the applicable statutes of limitations have run on all of appellant's claims. The first cause of action (breach of written contract) is governed by the four-year statute of limitations (Code Civ. Proc., § 337); the second and fifth causes of action (breach of oral or implied contract and breach of the implied covenant of good faith and fair dealing, respectively) are governed by the two-year statute of limitations (Code Civ.

Proc., § 339); the third cause of action (fraud) is governed by the three-year statute of limitations (Code Civ. Proc., § 338, subd. (d)); the fourth cause of action (interference with contractual relations) is governed by a two-year statute of limitations (Code Civ. Proc., § 339, subd. (1)); and the sixth cause of action (Bus. & Prof. Code, § 17200) is governed by a four-year statute of limitations (Bus. & Prof. Code, § 17208). Because appellant alleges that all wrongful conduct occurred by no later than March 24, 1998, but it did not file the instant lawsuit until April 2, 2002, more than four years later, all claims are time-barred unless the doctrine of equitable tolling applies.

"Equitable tolling is a judge-made doctrine 'which operates independently of the literal wording of the Code of Civil Procedure' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) "[T]he effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Id*. at pp. 370-371.)

The doctrine "reliev[es] plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage." (*Addison v. State of California* (1978) 21 Cal.3d 313, 317.) "The underlying assumption of these cases [discussing the equitable tolling doctrine] is that when the plaintiff has several alternative remedies and makes a good faith, reasonable decision to pursue one remedy in order to eliminate the need to pursue the other, the doctrine of equitable tolling will suspend the running of the statute of limitations if it becomes necessary to pursue the alternative remedy. However, equitable tolling is not available to a plaintiff whose conduct evidences an intent to delay disposition of the case without good cause; and it is certainly not available to a plaintiff who engages in the procedural tactic of moving the case from one forum to another in the

hopes of obtaining more favorable rulings." (*Mitchell v. Frank R. Howard Memorial Hospital* (1992) 6 Cal.App.4th 1396, 1407-1408.)

"[T]he three elements necessary to establish the doctrine of equitable tolling are (1) timely notice to the defendant, (2) lack of prejudice to the defendant, and (3) reasonable and good faith conduct on the part of the plaintiff." (*Garabedian v. Skochko* (1991) 232 Cal.App.3d 836, 846.)

Applying these legal principles, we conclude that the trial court erred in finding that appellant failed to allege facts sufficient to give rise, at least at the pleading stage, to equitable tolling. First, it is undisputed that appellant gave respondent timely notice of its claims. Second, the SAC alleges adequate facts demonstrating a lack of prejudice to respondent. Not only does the pleading indicate that "each side has identified in response to discovery all percipient witnesses and documents relied upon," but it even identifies, by name, three critical witnesses who are still affiliated with respondent and reminds the parties that Dr. Crowell has already provided testimonial evidence at his deposition in the Charitable Trust Action.

Moreover, according to the SAC, respondent has been on notice of appellant's claims against it, and appellant's intent to pursue those claims, since March 31, 1998, when it filed its first lawsuit against appellant. Appellant continued its efforts by requesting the parties participate in arbitration and then by filing a second lawsuit to compel arbitration. Given the allegations of appellant's relentless pursuit of its claims against respondent, respondent should have taken measures to preserve evidence if it believed that doing so was necessary for its defense. (*Addison v. State of California*, *supra*, 21 Cal.3d at p. 318 [A defendant cannot claim substantial prejudice if it has "received timely notice of possible tort liability" and therefore has had "ample opportunity to gather defense evidence in the event a court action ultimately is filed."].)

Finally, the SAC alleges reasonable and good faith conduct on appellant's part. Specifically, appellant sets forth the history of its continuous efforts to arbitrate its dispute with respondent. While appellant may not have alleged the technical words that

it acted reasonably and in good faith, we may infer this fact from the detailed allegations in the SAC. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 [in reviewing a demurrer, we accept as true not only those facts pleaded, but facts which may be inferred from those expressly alleged].) To the extent the parties dispute whether these facts are sufficient to prove equitable estoppel, that factual issue may be resolved later in the proceedings, i.e., in connection with a motion for summary judgment or at trial.

Relying heavily upon *Curtis v. City of Sacramento* (1886) 70 Cal. 412 (*Curtis*), respondent argues that a statute of limitations cannot be tolled while arbitration proceedings are pending, thereby resolving this entire issue. *Curtis* stands for no such proposition. The issue in *Curtis* was whether a plaintiff sought relief pursuant to a written agreement or an oral promise. All *Curtis* held was that because the plaintiff did not bring his lawsuit on the oral promise, the statute of limitations against that promise could not have been suspended during the arbitration proceedings. (*Id*. at p. 417.) Such a holding makes sense. If the plaintiff did not bring his claim on an oral promise, then the statute of limitations could not have been tolled on that claim while the plaintiff was pursuing a different claim. (See, e.g., *Dowell v. County of Contra Costa* (1985) 173 Cal.App.3d 896, 903 [noting that the doctrine of equitable tolling applies when the second action is really a continuation of the first action, involving the same parties, the same facts, and the same cause of action].)

Pursuant to *Gordon v. Santa Cruz Portland Cement Co.* (1942) 130 P.2d 232, respondent urges us to reject appellant's implicit argument that an agreement to arbitrate implicitly tolls the limitations period. Respondent misunderstands the issue as we see it. It is not the existence of the parties' agreement to arbitrate which supports appellant's allegations of equitable tolling; rather, the allegations of appellant's continuous attempts to have his dispute arbitrated (albeit unsuccessful) support the application of the equitable doctrine.

Having concluded that the doctrine of equitable tolling has been adequately alleged, we next consider as to which causes of action it applies. As set forth in respondent's brief, and uncontested in appellant's reply brief and at oral argument, appellant only attempted to arbitrate its contractual claims against respondent; there is nothing in the SAC or the record to indicate that the arbitration had anything to do with appellant's tort and statutory unfair competition claims.[1] As such, we conclude that the doctrine of equitable tolling applies only to appellant's contract claims.

C. Equitable Estoppel Does Not Apply

On appeal, to the extent equitable tolling does not apply, appellant also argues that it sufficiently alleged equitable estoppel to save its claims from the statute of limitations. This argument has been waived on appeal. "It is a general rule of appellate review that arguments waived at the trial level will not be considered on appeal." (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 122.) "A party on appeal cannot successfully complain because the trial court failed to do something which it was not asked to do." (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603.) "[I]t would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896.)

As conceded at oral argument, appellant never raised the issue of equitable estoppel with the trial court. At most, the SAC alleges that the "applicable statutes of limitations have been tolled . . . and [respondent is] estopped to assert any statutes of limitations in defense of this action." The one word passing reference in the SAC is inadequate to preserve this argument for appeal.

Even if we were to consider the merits of appellant's theory, it fails as a matter of law. Embodied in Evidence Code section 623, the doctrine of equitable estoppel

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1 At oral argument, appellant's counsel stated that appellant has withdrawn the sixth cause of action (violation of Bus. & Prof. Code, § 17200).

provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

"This doctrine of equitable estoppel has four elements: (1) The party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 890.) If any of the elements is missing, equitable estoppel fails. (*Hair v. State of California* (1991) 2 Cal.App.4th 321, 328.) Specifically, California courts have not applied equitable estoppel where the party seeking to invoke it knows the true facts. (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 885 [where plaintiff and defendant claimed they were married in order to mislead federal government, appellate court refused to apply equitable estoppel because plaintiff knew she and defendant were not married].)

Fatally, no facts giving rise to equitable estoppel are alleged in the SAC. For example, appellant never alleges that it was ignorant of the true state of the facts. It never alleges that respondent agreed that the statutes of limitations would not run while the Charitable Trust Action was being litigated and arbitration was suspended, or that respondent somehow led appellant to believe that the statutes of limitations would be suspended. Under these circumstances, the doctrine of equitable estoppel simply does not apply. The trial court properly dismissed the third (fraud), fifth (breach of the implied covenant of good faith and fair dealing), and sixth (Bus. & Prof. Code, § 17200) causes of action on statute of limitations grounds.

D. Merits of Appellant's Contract Claims

Because we conclude that the doctrine of equitable tolling saves appellant's first, second, and fourth causes of action from dismissal on statute of limitations grounds at the

demurrer stage of the litigation, we next consider respondent's challenges to those causes of action on other grounds.

1. *Breach of Written Contract*

The trial court properly dismissed the first cause of action for breach of written contract. The SAC admits that the parties' agreement expired by its own terms on December 31, 1997. However, the SAC fails to allege that respondent breached the agreement at any time prior to that date. The only breaches alleged in the SAC occurred on March 24, 1998, more than three months after the agreement expired. As the agreement was not in effect when it was allegedly breached, appellant has not stated a claim for breach of contract. The first cause of action was properly dismissed.

2. *Breach of Oral or Implied Contract*

In the second cause of action, appellant alleges that respondent breached the parties' oral or implied renewed agreement by soliciting for employment or retention physicians previously under contract with appellant. Respondent contends that this claim is barred by the statute of frauds. We agree.

Civil Code section 1624, subdivision (a)(1), provides, in relevant part, that an oral or implied agreement "that by its terms is not to be performed within a year from the making thereof" is invalid under the statute of frauds.

It is clear from the allegations of the SAC that the alleged oral or implied contract cannot be performed within one year. The SAC alleges that the renewed agreement contains substantially the same terms as the parties' written agreement, including the provisions that (1) respondent may terminate the agreement without cause on 90 days notice; and (2) in the event of such a termination, respondent agrees not to solicit for employment any of the physicians under contract with appellant for one year. As a result, appellant purports to sue respondent under an oral agreement that, even if it were breached immediately, could not be fully performed for 15 months (90 days plus one year). Since this provision could not be fully performed within one year, it is unenforceable under the statute of frauds. (Civ. Code, § 1624, subd. (a)(1).)

Appellant's contrary arguments are not persuasive. First, appellant contends that it is alleging violation of both the oral agreement and the written agreement, thereby obliterating the application of the statute of frauds. We disagree. As set forth above, the written agreement expired by its own terms on December 31, 1997. Because the provision governing respondent's agreement not to solicit appellant's contract physicians only applies if respondent terminates the parties' agreement prior to its natural expiration, and that condition precedent did not occur, respondent could not have violated the nonsolicitation clause under the terms of the written agreement months after said agreement terminated.

Second, appellant argues that the parties' original agreement is a written memorialization of the terms of the renewed agreement, save two items not relevant to this dispute. As set forth in respondent's brief, appellant's argument is "fundamentally inconsistent"; how can an expired written agreement memorialize a subsequent oral agreement which incorporates most (but not all) of the terms of the written agreement?

Third, appellant contends that pursuant to Civil Code section 1623, the statute of frauds does not apply. Appellant misconstrues the statute and its application. Civil Code section 1623 provides: "Where a contract, which is required by law to be in writing, is prevented from being put in writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party."

Here, there is no evidence whatsoever that respondent prevented the renewed agreement from being put in writing or that respondent fraudulently led appellant to believe that the renewed agreement was put in writing. Rather, the SAC admits that at all times appellant knew that the written renewed agreement was "being[] prepared." Because appellant was not misled into believing that a written contract actually existed, Civil Code section 1623 does not apply. (*Owens v. Foundation for Ocean Research* (1980) 107 Cal.App.3d 179, 183 ["An oral agreement is enforceable, despite the statute of frauds, where one party to the agreement is prejudicially led to believe a writing exists

because of the misrepresentations of the other party [Citation]."], disapproved on another ground in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.)

3. *Interference with Contract*

In the fourth cause of action, appellant alleges that respondent intentionally interfered with its contracts with various emergency room physicians. Respondent challenges this cause of action solely pursuant to *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409 (*GAB*).

In *GAB*, the Court of Appeal considered, for the first time, whether an employer could bring a claim against its former officer and employee and his new employer for interfering with its relationship with its at will employees. (*GAB*, *supra*, 83 Cal.App.4th at p. 427.) The Court of Appeal declined to do so, reasoning that (1) "recognizing an employer's right to sue for intentional interference with its employment relationships would invite innumerable lawsuits," (2) California has a strong policy supporting the mobility of employees, and (3) "there seems to be something inherently suspect about a tort that, at bottom, concerns an employee's voluntary departure from employment." (*Id*. at pp. 427-428.)

GAB is readily distinguishable from the instant case. The SAC does not allege that the emergency room physicians were appellant's employees; rather, the SAC alleges that the physicians were under contract with appellant to perform professional services on appellant's behalf. Quite simply, the facts and policy considerations at issue in *GAB* are not present herein.[2]

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2 Needless to say, we only are considering the allegations of the SAC, not their substantive merit. If, later in the litigation, respondent is able to establish that the physicians were employees of appellant, then the holding in *GAB* may apply.

II. *Motion for Attorney Fees*

Because we are reversing the trial court's order sustaining the demurrer in part, we reverse the trial court's order on attorney fees. (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 241.) The issue of attorney fees should be resolved at the conclusion of the action.

In doing so, however, we reject appellant's claim pursuant to *Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424 (*Leamon*) that respondent is not entitled to attorney fees as a matter of law. As a preliminary matter, this argument is waived on appeal. Appellant did not develop this argument in opposition to respondent's motion for attorney fees; rather, it only mentioned *Leamon* in passing in the conclusion of its opposition to respondent's motion. Having failed to raise this argument fully with the trial court, it is waived on appeal. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.)

Regardless, *Leamon* is distinguishable. In *Leamon*, the contract under which attorney fees were available had an express provision requiring a party commencing suit to first participate in mediation in order to recover attorney fees in a subsequent civil action. (*Leamon*, *supra*, 107 Cal.App.4th at p. 432.) The plaintiff in *Leamon* commenced her lawsuit without first proceeding to mediation, and, even though she prevailed, she was denied attorney fees. (*Id*. at p. 427.) The Court of Appeal affirmed, noting that mediation was a condition precedent to the recovery of attorney fees. (*Id*. at p. 433.)

Here, the parties' agreement contains no such condition precedent. As such, *Leamon* does not apply.

Accordingly, we remand the issue of attorney fees to the trial court for consideration of the amount to which respondent is entitled in connection with the causes of action on which it prevailed.

DISPOSITION

The order sustaining the demurrer is affirmed in part and reversed as to the fourth cause of action only. The order awarding respondent attorney fees is reversed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
NOTT