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ADELPHIA COMMUNICATIONS CORPORATION etc., Cross-Complainant and Appellant, v. PAULEY CONSTRUCTION, INC., Cross-Defendant and Appellant; ARROWOOD INDEMNITY COMPANY et al., Interveners and Appellants.

A131078

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION FOUR**

2012 Cal. App. Unpub. LEXIS 8621

November 28, 2012, Opinion Filed

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PRIOR HISTORY: [*1]

San Francisco City & County Super. Ct. No. CGC-03419761.

JUDGES: RUVOLO, P. J.; REARDON, J., RIVERA, J. concurred.

OPINION BY: RUVOLO, P. J.

OPINION

I.

INTRODUCTION

On appeal from a judgment following a bench trial, appellant Adelphia Communications Corporation, also

known as Century Mendocino Cable TV doing business as Adelphia Cable Communications (Adelphia) challenges the trial court's conclusion that respondent Pauley Construction, Inc. (Pauley Construction) was not required to indemnify Adelphia pursuant to an indemnification clause found in a construction contract entered into between the parties. Adelphia, through its insurers,¹ had sought contractual indemnity from Pauley Construction for all the costs and expenses associated with the defense and settlement of an underlying personal injury action, which arose when an employee working for a subcontractor of Pauley Construction was severely injured on the job. The trial court found Adelphia was not entitled to enforce the indemnity agreement because shortly after the employee's accident, Adelphia had filed for bankruptcy. The trial court concluded that Adelphia's bankruptcy filing constituted a material breach of the parties' contract, thereby relieving Pauley [*2] Construction from further performance, including any duty to defend or indemnify Adelphia.

1 Adelphia appears in this action through its insurers, interveners Arrowood Indemnity Company and Liberty Mutual Insurance Company (referred to collectively as Adelphia).

Adelphia appeals, claiming that the "trial court's finding that Adelphia's filing of a bankruptcy petition

alone constituted a material breach excusing Pauley's performance under the indemnity agreement was error in contradiction to both federal bankruptcy law and fundamental contract law." We agree, and find the trial court's ruling was erroneous. Pauley Construction has filed a cross-appeal, arguing that *even if* this court determines the trial court erred in concluding that the bankruptcy filing constituted a material breach of the parties' contract, Pauley Construction is still entitled to judgment as a matter of law. We dismiss Pauley Construction's purported cross-appeal as unnecessary. Nevertheless, we find that disputed issues of material fact preclude a ruling in Pauley Construction's favor as a matter of law. Consequently, we reverse and remand for further proceedings.

II.

FACTS AND PROCEDURAL HISTORY

On July 7, 2000, Century [*3] Mendocino Cable TV, doing business as Adelphia, hired Pauley Construction to string fiber optic cable on already existing power poles in Mendocino County (Mendocino County project). The parties entered into a "Fixed Price Construction Contract," which contained an express indemnity provision. The provision stated that Pauley Construction was to "indemnify, defend, and hold Adelphia harmless from any and all liability, claims, damages, causes of action, expenses, fines, judgments, sums of money awarded by arbitration or otherwise and any demands whatsoever arising out of or resulting from the acts, omissions or wrongdoing on the part of any employee, officer, agent servant or representative of [Pauley Construction] or any subcontractor engaged by [Pauley Construction]." ²

2 "A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. [Citation.]" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 969.)

The contract provided that payments were to be due to Pauley Construction in accordance [*4] with a payment schedule by weekly invoice. The payment schedule stated that "[p]ayment [by Adelphia] will be made approximately sixty (60) days after approval of the

invoice[.]" Although Adelphia initially made payments to Pauley Construction, as it was required to do under the contract, the payments became further and further behind, until Adelphia stopped making payments altogether. During the period of November 15, 2001, through June 25, 2002, Adelphia failed to make any progress payments to Pauley Construction. Nevertheless, Pauley Construction continued performing under the contract.

On May 1, 2002, during the period that Adelphia was in arrears on its payments to Pauley Construction, Sifa Tuiaki, a cable lineman, was injured while performing his work. At the time he was injured, Tuiaki was an employee of S.G. Barber Construction, Inc., a subcontractor of Pauley Construction. Tuiaki suffered extreme injuries after coming into contact with a 72,000-volt aerial power line. He lost both of his arms and was burned over a good portion of his body, and was rendered a paraplegic.

On June 25, 2002, shortly after Tuiaki's accident, Adelphia filed voluntary petitions for relief under Chapter [*5] 11 of the federal Bankruptcy Code (11 U.S.C. §§ 1101-1174) in the United States Bankruptcy Court for the Southern District of New York. Around the time Adelphia filed for bankruptcy, Pauley Construction ceased all work on the Mendocino County project.

On October 2, 2002, Pauley Construction submitted a claim with the bankruptcy court. The claim included work performed on the Mendocino County project, as well as several other projects Pauley Construction was performing for Adelphia in California and other states. The total amount of Pauley Construction's claims against Adelphia was \$7,848,040.43. One year later, on September 30, 2003, Pauley Construction submitted an amended claim which separated the various claims that Pauley Construction had against various Adelphia entities, including Century Mendocino Cable TV, the Adelphia entity for the Mendocino County project. Pauley Construction's claim with respect to the Mendocino County project was for \$4,251,595.08, which represented the delinquent progress payments still owed to Pauley Construction by Adelphia from November 15, 2001, to June 25, 2002. Adelphia has never disputed that this money was due and owing.

In April 2003, Tuiaki and [*6] his wife filed a lawsuit in San Francisco Superior Court naming Adelphia and Pauley Construction, among others, as defendants. On December 24, 2003, they filed a \$20 million proof of

claim against Adelphia in bankruptcy court based on the injuries suffered by Tuiaki, and a \$5 million proof of claim based on Mrs. Tuiaki's loss of consortium. On January 9, 2004, the court dismissed Tuiaki's complaint as to Adelphia, without prejudice, in light of the pending bankruptcy.

On December 18, 2003, acting under extreme financial pressure, Pauley Construction sold its claim against Adelphia to a third-party debt buyer, CanPartners Investments IV, LLC (CanPartners), for 76.1 cents on the dollar. Although the claims that Pauley Construction had submitted at the bankruptcy proceeding totaled \$7,848,040.43, CanPartners purchased claims worth \$7,810,099.71.

On June 15, 2004, the bankruptcy court issued an order pursuant to stipulation which lifted the bankruptcy stay to allow the Tuiakis to pursue their lawsuit against Adelphia to the extent of Adelphia's insurance coverage. 3 On November 2, 2005, Adelphia filed its cross-complaint against Pauley Construction in the Tuiaki lawsuit. Among other allegations, [*7] Adelphia claimed it had tendered its defense and indemnification in the Tuiaki lawsuit to Pauley Construction pursuant to the indemnification clause in the parties' contract but that Pauley Construction had improperly rejected the tender.

3 The court ordered that, "The automatic stay arising pursuant to *Section 362 of the Bankruptcy Code* shall be modified for the sole purpose of permitting the Claimants to assert the Claims regarding the Accident; *provided, however*, that any recovery by the Claimants pursuant to an action, including costs and recovery of punitive damages, if any, shall be limited to the proceeds available under the Insurance Policies or any other insurance policies covering the Debtors with respect to the Claims (collectively, 'All Insurance Policies')."

On April 7, 2006, Latigo Master Fund, Ltd. purchased Pauley Construction's claim from CanPartners. On February 13, 2007, pursuant to the terms of Adelphia's reorganization plan, Pauley Construction's claim against Adelphia for work performed was satisfied in full, with interest, by payment to Pauley Construction's assignee, Latigo Master Fund, Ltd.

The Tuiaki lawsuit was ultimately settled and all the defendants, including [*8] Adelphia and Pauley

Construction, were dismissed. Adelphia's insurers paid \$5 million to resolve the Tuiakis' claims against Adelphia.

Given Adelphia's bankruptcy and the suspension of its corporate status in California, two of Adelphia's insurers, Arrowood Indemnity Company and Liberty Mutual Insurance Company, were granted leave to intervene on behalf of Adelphia on February 26, 2009. Since that time, this action and appeal have been prosecuted by Adelphia's insurers on behalf of Adelphia to recover the \$5 million paid by the insurers in the Tuiaki settlement, and \$248,139.33 in defense costs in the underlying Tuiaki litigation.

On February 8, 2010, a court trial commenced on Adelphia's cross-complaint against Pauley Construction based solely on the cause of action for breach of contract. Adelphia alleged that Pauley Construction breached the contract by failing to defend and indemnify it with regards to the Tuiaki personal injury litigation. Pauley Construction argued that Adelphia could not demand performance since Adelphia had materially breached the contract by failing to make \$4,251,595.08 in progress payments before ultimately filing for bankruptcy.

After hearing all evidence [*9] on the issue, the trial court issued its statement of decision. The trial court found in favor of Pauley Construction based on its belief that "Adelphia's filing of a bankruptcy petition was a material breach of contract which excused Pauley's performance under the indemnity clause of the contract, and that Pauley's receipt of payment for its claim against Adelphi [*sic*] in bankruptcy court did not revive Pauley's duty to indemnify Adelphia."

Judgment was rendered in favor of Pauley Construction, and notice of entry of judgment was filed on November 19, 2010. On January 14, 2011, Adelphia appealed from the judgment. On January 25, 2011, Pauley Construction filed notice of a cross-appeal.

III.

DISCUSSION

Adelphia's Appeal

A. Was Filing for Bankruptcy a Material Breach of the Parties' Contract?

Adelphia articulates the decisive issue as follows: "[W]hether the filing of a bankruptcy petition, as a matter

of law, constitutes a material breach of contract excusing the performance of Pauley's duty to indemnify." This is a question of law, which we review de novo. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 ["When the decisive facts are undisputed, we are confronted with a question of [*10] law and are not bound by the findings of the trial court' ".])

Significantly, Pauley Construction makes no effort on appeal to defend the trial court's conclusion that Adelphia's filing for bankruptcy constituted a material breach of contract allowing Pauley Construction to unilaterally repudiate its contractual obligations, including its indemnity obligation. Presumably, this is because the trial court's reasoning runs counter to numerous authoritative sources that have spoken on the issue.

Williston on Contracts states: "Under the Bankruptcy Code, merely filing a petition in bankruptcy (or having an involuntary petition filed against a party by its creditors) is not of itself an anticipatory repudiation of an executory contract" (23 Williston on Contracts (4th ed. 2002) § 63:50, p. 647, fn. omitted.) Williston explains: "The prospective inability to perform the contract which arises upon insolvency is not considered sufficient to excuse the other party from his or her obligations under the contract altogether, since it is possible that the insolvent or the representative of the insolvent's creditors may find it advantageous to perform the contract. Under the Bankruptcy Code, [*11] the solvent party to an executory contract is bound to honor the contract until such time as the trustee decides whether to assume or reject it, unless the contract lapses by its own terms as a result of a default *other than the filing of a bankruptcy petition*." (15 Williston on Contracts (4th ed. 2000) § 43:29, pp. 55-57, fns. omitted & italics added.)

The court in *Central States, SE & SW Pen. v. Basic Am. Ind.* (7th Cir. 2001) 252 F.3d 911, held "[f]iling for bankruptcy . . . is not anticipatory repudiation per se. For the trustee or debtor in possession can affirm the contract even if it contains a clause (a so-called 'ipso facto' clause) that makes filing for bankruptcy a ground for termination. [Citations.]" (*Id.* at p. 916.) The court explained the basic rationale for this rule: "Merely filing for the protection of the bankruptcy court is not a repudiation of obligations or a cessation of operations. More broadly, insolvency, with or without a declaration of bankruptcy, does not equal dissolution. An insolvent firm is not necessarily out of

business, and the parties with which it has contracts cannot automatically assume that the firm will default, [citations], although insolvency [*12] can of course be a very ominous signal, entitling a creditor to demand security. [Citations.]" (*Id.* at p. 917.)

While California case law on the subject is sparse, California presumably adheres to the view that a party to an agreement who has reason to fear that its counterpart may fail to perform because of insolvency may demand assurances that performance will be forthcoming and may, without breaching, suspend its own performance until those assurances are received. As Witkin explains, "Where the obligor's insolvency gives the obligee reasonable grounds to believe that the obligor will commit a breach . . . , the obligee may suspend any performance for which he has not already received the agreed exchange until he receives assurance in the form of performance itself, an offer of performance, or adequate security." [Citations.]" (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 865, pp. 953-954.) This is essentially the view of the *Restatement Second of Contracts*, section 252.⁴

4 *Restatement Second of Contracts*, section 252(1) (insolvency justifies suspension of performance pending adequate assurances of due performance); 252(2) (defines "insolvent" to mean (1) nonpayment [*13] of debts in the ordinary course of business, (2) inability to pay debts as they become due, or (3) "insolvent within the meaning of the federal bankruptcy law").

Obviously, the trial court's conclusion that Pauley Construction was discharged from its duties under the parties' contract, including its indemnity obligation, by virtue of Adelphia's filing for bankruptcy is wholly inconsistent with the foregoing authorities. Countenance of the trial court's holding would generally interfere with the bankruptcy court's power to "collect all obligations and money due the institution" (12 U.S.C. § 1821(d)(2)(B)(ii)), and its ability to "promote the restructuring of troubled businesses," which is "the primary goal of Chapter 11." (*In re SM 104 Ltd. (Bkrpty.S.D.Fla. 1993)* 160 B.R. 202, 245.) Furthermore, to the extent the trial court believed Adelphia's filing for bankruptcy, standing alone, established its inability to perform in the future, that notion is refuted by the facts in the case. It is undisputed that the amount owed Pauley Construction was eventually paid, in full with interest, to

Pauley Construction's assignee as part of Adelphia's plan of reorganization in bankruptcy. This result [*14] is clearly inconsistent with relieving Pauley Construction of its contractual obligations. Therefore, Adelphia did not breach the parties' contract by filing its petition for bankruptcy, and its claim for indemnity cannot be denied on these grounds alone. The trial court erred as a matter of law when it held otherwise.

Alternatively, Pauley Construction claims that the court's ruling was "in direct response" to Adelphia's counsel's admission that filing a bankruptcy petition constitutes a breach of contract and that Adelphia should be bound by that admission. In making this argument, Pauley Construction principally relies on a statement made by Adelphia in its closing brief below, in which it stated: "Pauley relies on the general proposition that a bankruptcy filing constitutes a breach of contract as of the date of the petition. The filing of the petition does excuse the bankrupt from responsibility to further perform its contracts (unless assumed) and in that sense does constitute a breach. But by no means does that end the inquiry."

When viewing counsel's statement in its full context with the rest of the argument, we find it to be entirely consistent with Adelphia's repeatedly expressed [*15] view that filing for bankruptcy was not a material breach excusing performance; but at most, was an anticipatory breach that would allow Pauley Construction to suspend its performance pending assurance that Adelphia would continue to perform its contractual obligations.

In any event, Pauley Construction cites no authority that would permit this court to bind Adelphia to its counsel's conception of the legal theories which counsel thinks are applicable to the case. In order to be considered a binding judicial admission "the declaration or utterance must be one of *fact* and not a conclusion of law, opinion, legal contention, or argument." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 709, original italics.) Counsel's statement was obviously a legal argument and does not constitute a binding judicial admission.

B. Alternative Theories by Which the Trial Court's Finding of Breach Can Be Sustained

As previously noted, Pauley Construction does not dispute the proposition that the trial court erred in concluding that Adelphia's action in filing for bankruptcy

constituted a material breach of the parties' contract. However, Pauley Construction seeks [*16] to expand the issues on appeal by claiming that implicit in the trial court's decision was a finding, albeit an unspoken one, that Adelphia breached the parties' contract when Adelphia failed to make progress payments for the work that Pauley Construction was performing for a seven-month period from November 15, 2001, through June 25, 2002. As argued by Pauley Construction on appeal, "[w]hile it is true that the trial court did not expressly declare in its Statement of Decision that 'there was an actual failure to perform by Adelphia,' the trial court certainly implied it." Therefore, Pauley Construction claims that *even if* this court finds the trial court erred as a matter of law in concluding Adelphia's bankruptcy filing constituted a material breach, this unspoken corollary of the trial court's findings provides this court with another theory by which we can affirm the trial court's decision that Pauley Construction was justified in refusing to indemnify Adelphia.

We turn to the actual wording used by the trial court in its statement of decision: "Pauley contends that Adelphia breached its contract with Pauley and thereby forfeited its right to Pauley's performance of the indemnity [*17] provision of the contract. Pauley cites two such breaches. (1) Adelphia fell behind in its progress payments to Pauley. (2) Adelphia filed a bankruptcy petition. Adelphia argues that as of May 1, 2002 [the date Tuiaki was injured] it had a right to withhold its payments to Pauley, in anticipation of a need for Pauley to perform under the indemnity provision of the contract. However, as for breach by bankruptcy, Adelphia acknowledges, 'The filing of the petition . . . does constitute a breach.' (Adelphia's closing [trial court] brief, filed April 19, 2010, page 17, lines 22-24.) Indeed, what could be more indicative of an intent to put an end, at least temporarily, to one's duty to pay money under a contract than seeking judicial approval for such non-performance? Adelphia speculates at length as to how things might have turned out if there had been no bankruptcy filing and asserts that 'if anything Pauley benefited from Adelphia's bankruptcy filing.' (*Id.*, page 18, line 25.) The court concludes that Adelphia's filing of a bankruptcy petition was a material breach of contract which excused Pauley's performance under the indemnity clause of the contract, and that Pauley's receipt of [*18] payment for its claim against Adelphi [*sic*] in bankruptcy court did not revive Pauley's duty to indemnify Adelphia."

After reviewing this decision, we believe the trial court's path to its conclusion is abundantly clear. The court set out alternative theories of breach of contract put forward by Pauley Construction: (1) Adelphia fell behind in its progress payments; and (2) Adelphia filed a bankruptcy petition. The theories outlined by the court were sufficiently distinct and separate to infer that a separate decision would be rendered on each. However, the court carefully avoided the issue of whether a breach of contract occurred when Adelphia fell behind on its payments to Pauley Construction. Contrary to Pauley Construction's assertion, the trial court's finding of breach was premised *solely* on Adelphia's filing for bankruptcy. This is apparent from the language used on the critical element of breach: "The court concludes that Adelphia's filing of a bankruptcy petition was a material breach of contract which excused Pauley's performance under the indemnity clause of the contract, and that Pauley's receipt of payment for its claim against Adelphi [*sic*] in bankruptcy court did not [*19] revive Pauley's duty to indemnify Adelphia." Nowhere mentioned in the court's holding is Adelphia's failure to perform its payment obligations. Therefore, we reject Pauley Construction's attempt to read the trial court's statement of decision more expansively than can be supported by the record; and we reject its argument that a ruling on the legal consequences of Adelphia's missed payments was necessarily interwoven into the trial court's decision.

We also reject Pauley Construction's claim that we can simply imply the omitted findings. The court in *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42 (*Fladeboe*), explained the implied finding doctrine as it pertains to a statement of decision rendered after a bench trial: "If the party challenging the statement of decision fails to bring omissions or ambiguities in it to the trial court's attention, then, under *Code of Civil Procedure* section 634, the appellate court will infer the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues. [Citations.]" (*Id.* at pp. 59-60.)

However, in this case, after [*20] the trial court issued its tentative decision, Adelphia brought the omission of any findings on "principal controverted issues" to the trial court's attention. One of the omitted issues brought to the court's attention was whether at the time of the bankruptcy filing, Pauley Construction's obligation to indemnify Adelphia had already been

forfeited because Adelphia had fallen behind in making its progress payments. Specifically Adelphia asked the court to address "whether or not Adelphia breached its contract with Pauley [Construction] such that Adelphia forfeited its right to Pauley's performance of the indemnity provision of the contract." In arguing that Pauley Construction could not legitimately claim that its obligation to indemnify Adelphia was excused by Adelphia's failure to pay all the money due it, Adelphia pointed out that Pauley Construction "did not demand payment, did not serve a stop work order, and in fact continued to work until the time it received notice of the bankruptcy filing." The trial court issued a final statement of decision that was virtually identical to its tentative statement of decision, without making any additional findings on any of these issues.

Because [*21] Adelphia brought these omissions and ambiguities in the statement of decision to the trial court's attention, the normal prism of reviewing the record is reversed: "[I]f omissions or ambiguities in the statement of decision's factual findings are timely brought to the trial court's attention, 'it shall *not* be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or that issue.' " (*Fladeboe, supra*, 150 Cal.App.4th at p. 59, quoting *Code Civ. Proc.*, § 634, italics added). Therefore, this court cannot presume the trial court found that Adelphia breached the parties' contract when it failed to make progress payments to Pauley Construction.

Confining our consideration to the reasoning articulated in the trial court's decision, we conclude that the trial court erred as a matter of law in holding that Adelphia's filing for bankruptcy constituted a material breach of contract permitting Pauley Construction to refuse to perform its contractual obligations. Reversal of the judgment is therefore required, unless the judgment may be affirmed on alternative grounds, as urged in Pauley Construction's cross-appeal.

Pauley Construction's Cross-Appeal

A. [*22] *Is the Cross-Appeal Properly Before Us?*

Pauley Construction has filed what it characterizes as a "protective" cross-appeal, arguing that even if the judgment could not be sustained on the basis upon which the trial court ruled, the judgment can nevertheless be affirmed on alternative grounds. Specifically, Pauley Construction claims the trial court erred, as a matter of

law, in rejecting two other theories advanced by Pauley Construction that would have resulted in a judgment in its favor: (1) Adelphia failed to identify its claim for indemnity against Pauley Construction in the bankruptcy proceeding. Therefore, it is judicially estopped from asserting its cause of action for breach of contract against Pauley Construction; and (2) The evidence was undisputed that Adelphia breached its contract with Pauley Construction when it failed to honor its contractual obligations to make progress payments. Therefore, Pauley Construction was excused from any indemnity obligation it might have owed to Adelphia as a matter of law.

As a threshold matter, Adelphia questions whether this cross-appeal is properly before us because Pauley Construction prevailed below and therefore is not aggrieved by the [*23] judgment. (*Code Civ. Proc.*, § 902 [only aggrieved parties may appeal].) In response, Pauley Construction argues that this cross-appeal is necessary to assert alternative grounds in support of the judgment should this court reject the basis on which the trial court ruled in its favor.

However, a cross-appeal is not necessary in order to assert on appeal that there exist alternative grounds for affirmance, or to establish lack of prejudice from any other alleged error. (See *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7; *Central Manufacturing District, Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 857; *Code Civ. Proc.*, § 906 ["The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any [decision which necessarily affects the judgment or order appealed from or which substantially affects the rights of a party] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which [*24] the appeal is taken"].)

Therefore, to the extent that Pauley Construction is seeking to advance alternative grounds in support of the judgment, it is entitled to do so without taking a separate cross-appeal. Consequently, we dismiss the cross-appeal as improvidently taken. We nevertheless address the issues raised therein because Pauley Construction makes these identical arguments, albeit in a less-developed

fashion, in its appellate brief.

B. Adelphia's Failure to Disclose the Indemnity Claim Against Pauley Construction in the Bankruptcy Proceeding

Pauley Construction contends that "[b]ecause Adelphia failed to identify the Pauley contract in its bankruptcy proceeding . . . Adelphia should be judicially estopped from bringing an action under the contract."

"In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. [Citations.]" (*Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 783 (*Hamilton*).) In *Hamilton*, the Ninth Circuit affirmed the district court's determination that the plaintiff's claim against his insurance company [*25] was barred by judicial estoppel because the plaintiff had failed to list the claim as an asset in his bankruptcy schedule. (*Id.* at p. 785.) The court noted that this failure "deceived the bankruptcy court and Hamilton's creditors," and therefore, the court "must invoke judicial estoppel to protect the integrity of the bankruptcy process." (*Ibid.*) The duty to disclose prevents the plaintiff from proceeding on a cause of action which is the property of the bankruptcy estate. (*Id.* at p. 784.)

Pauley Construction claims that Adelphia has asserted inconsistent positions by failing to include its indemnity claim against Pauley Construction in its bankruptcy filings, and in subsequently suing on that claim outside of the bankruptcy proceeding. Consequently, Pauley Construction argues "Adelphia should be judicially estopped to insist upon performance of the Pauley contract."

The pertinent facts are as follows: The bankruptcy court lifted the automatic stay and allowed the Tuiaki lawsuit to proceed based on a stipulation that any recovery would be limited to Adelphia's available insurance. Thus, Adelphia itself was relieved of all obligations with respect to Tuiaki's claim against it and any [*26] recovery would not affect the bankruptcy estate because it would be paid by Adelphia's insurers, not Adelphia itself. With those obligations now solely the insurers', the insurers became equitably subrogated to Adelphia's right of contractual indemnity against Pauley Construction. (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633-634.) For these reasons, the

indemnity proceeding had no affect upon the bankruptcy estate because the indemnity obligation, and the concomitant right to enforce the indemnity obligation, had been shifted to the insurance carriers.

This was precisely the conclusion reached by the federal court after Adelphia removed its indemnity claim to federal court. In eventually ordering remand on July 2, 2007, the United States District Court found, among other things that "this proceeding, Adelphia's cross-claim for indemnity against Pauley Construction, is not a core proceeding under the Bankruptcy Code, but is merely related to Adelphia's bankruptcy case. . . . Contrary to Adelphia's contention, the outcome of this indemnity action is a separate matter from Adelphia's payment to Pauley in the bankruptcy case." ⁵

5 The full text of the court's order [*27] was that, "As the Court noted at the hearing, this proceeding, Adelphia's cross-claim for indemnity against Pauley Construction, is not a core proceeding under the Bankruptcy Code, but is merely related to Adelphia's bankruptcy case. Thus, this Court has non-exclusive jurisdiction over it. 28 U.S.C. § 1334(b). Contrary to Adelphia's contention, the outcome of this indemnity action is a separate matter from Adelphia's payment to Pauley in the bankruptcy case. The state court is well suited to hear Adelphia's indemnity cross-claim, as it involves state law issues of negligence and contract law. Furthermore, Adelphia could have originally brought this claim in federal court but chose to sue Pauley in state court. Finally, under either 28 U.S.C. § 1446(b) or *Federal Rule of Bankruptcy Procedure* 9027(a)(3), Adelphia's notice of removal was untimely."

Following remand, the bases for Pauley Construction's claim of judicial estoppel were again fully examined by the trial court in conjunction with Pauley Construction's motion for judgment on the pleadings. In light of the undisputed facts in the present case, the court ruled, "based on the inability of this action to alter the bankruptcy estate, [*28] the court concludes that the matter is unrelated [to Adelphia's bankruptcy case] and that it was not necessary for Adelphia to disclose it in its bankruptcy filing."

Thus, as to the state court's ruling, we find no abuse of discretion. (*Blix Street Records, Inc. v. Cassidy* (2010)

191 Cal.App.4th 39, 46-47.) It is undisputed that the bankruptcy court was aware of the Tuiaki lawsuit, and that the court permitted the litigation to proceed separate and apart from the bankruptcy proceeding because any recovery would be paid by Adelphia's insurers, not Adelphia itself. Like Tuiaki's underlying claim, Adelphia's indemnity claim against Pauley Construction would not affect the bankruptcy estate because any recovery would be by Adelphia's insurers, not Adelphia itself.

Furthermore, Pauley Construction has submitted no evidence or argument that Adelphia was acting in bad faith or in an attempt to deceive its creditors when it failed to list its indemnity claim in its bankruptcy schedules. Numerous courts have refused to judicially estop a plaintiff from pursuing claims that were not mentioned in a bankruptcy proceeding when there is no showing of bad faith. (See *Annot., Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding* (2001) 85 A.L.R 5th 353, 424-431, [*29] § 12(j) [listing cases].)

Indeed, Adelphia lacked a motive to improperly conceal this claim, because, as the trial court pointed out, "it does not appear that this matter can affect the bankruptcy estate for better or worse: the insurers will be made whole for their payment or they will not." In other words, there is no showing Adelphia was playing "fast and loose" with the courts and its action poses no threat to the underlying rationale for judicial estoppel--preventing a debtor from obtaining relief from the bankruptcy court by representing that no claims exist and later asserting those claims for the debtor's own benefit in other proceedings. (See *Hamilton, supra*, 270 F.3d at p. 785; *In re Coastal Plains* (5th Cir. 1999) 179 F.3d 197, 208.) Therefore, Pauley Construction has failed to demonstrate any abuse of discretion in the trial court's decision finding that Adelphia was not judicially estopped from pursuing its indemnity claim in this proceeding.

C. Is Pauley Construction Entitled to Judgment as a Matter of Law?

Regardless of whether the trial court made any express or implied findings, Pauley Construction requests that this court affirm the judgment in its favor because under the [*30] law and undisputed facts, there can be only one conclusion--that "Adelphia's failure to make

over \$4 million in progress payments from November 2001 through May 2002 constituted a material breach, thereby entitling Pauley to rescission, and excusing it from further performance on the contract, including any alleged indemnity obligations." Pauley Construction emphasizes that the evidence at trial was undisputed that Adelphia was seven months behind in progress payments at the time it filed its bankruptcy petition. Those delinquent payments totaled \$4,251,595.08. It claims the "record further demonstrates that Adelphia's failure to make those payments almost put Pauley into bankruptcy itself" and forced it to assign its claim against Adelphia to a third party at "a substantial discount."

Adelphia counters that the evidence instead demonstrates that *it*, and not Pauley Construction, is entitled to judgment as a matter of law. Adelphia points to evidence demonstrating that Pauley Construction did not consider the lack of payments to be a material breach of the parties' contract or one excusing its performance. Not only did Pauley Construction never object to the missed payments, but it continued [*31] to perform according to the terms of the contract, at least until May 2002, when Tuiaki was injured. Consequently, Adelphia claims Pauley Construction cannot rely on Adelphia's supposed breach to excuse its own nonperformance because Pauley Construction did not manifest an intent to rescind or to treat its remaining indemnity duties as discharged before Tuiaki's accident. In any event, Adelphia argues that *even if* a breach occurred, Pauley Construction waived any breach when its assignee was paid in full for all the work Pauley Construction had performed. In short, Adelphia argues that when the proper analysis is applied to the undisputed facts, there can be only one conclusion--Adelphia did not breach the contract and Pauley Construction's duty to indemnify was not excused.⁶

⁶ Adelphia raises an additional argument, that the parties' contract is an "aleatory" contract. Unlike most bilateral contracts, the promise of each party to an aleatory contract is not given in exchange for the prospect of performance of the other party's promise, and actual or prospective nonperformance by one party to the contract does not discharge the other. (See *Rest.2d Contracts*, § 379.) Consequently, if [*32] this is an aleatory contract, Adelphia's alleged nonperformance of its contractual obligation to pay Pauley Construction would not discharge Pauley Construction from its

aleatory promise to indemnify Adelphia. However, Adelphia admits that this argument is made for the first time on appeal. As such, the argument is waived. (See *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.)

We briefly summarize some of the legal principles implicated by the parties' conflicting view of the facts. When a party has failed to make progress payments within the time required by the contract, the court must determine whether such failure constitutes a material breach of the parties' contract; and "[t]hat is a question of fact to be determined by the trial court. [Citations.]" (*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 297-298.) Whether a breach is material or whether a breach by one party will justify nonperformance by the other party is typically a factual inquiry not resolvable as a matter of law. (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 599 ["The circumstances of each case determine whether the injured [*33] party may treat a breach of contract as total"].)

At most, a material breach of the parties' contract gives the non-breaching party a *right* to rescission. Alternatively, a party "may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform" (*Rehart v. Klossner* (1941) 48 Cal.App.2d 46, 50.) A party seeking rescission must notify the other party of the rescission "promptly upon discovering the facts which entitle him to rescind." (*Civ. Code*, § 1691; *Estrada v. Alvarez* (1952) 38 Cal.2d 386, 391 ["Because of their inexcusable failure to give prompt notice of rescission plaintiffs lost their right to rescind. The right to rescind is lost by delay because diligence is 'a condition of the right to rescind' "].) Questions regarding whether a party waived the right to rescind and whether he or she did so promptly are generally factual, and therefore properly decided by a the trier of fact. (*Mayer v. Northwood Textile Mills* (1951) 105 Cal.App.2d 406, 409; *Esau v. Briggs* (1948) 89 Cal.App.2d 427, 438.)

It is also well-established in California law that a party to a contract may waive his or her right to rescind that contract by acceptance of [*34] its benefits. (See 1 Witkin, Summary of Cal. Law, Contracts (10th ed. 2005) Contracts, § 939, p. 1033 ["The injured party may lose his or her right to rescind . . . by conduct (such as

retention of benefits) indicating an election to affirm the contract"]; see, e.g., *Wells Properties v. Popkin* (1992) 9 Cal.App.4th 1053, 1057-1058.) The waiver of a breach "need not be an express statement; it may result where the injured party . . . continues to perform, with knowledge of the other's breach, and where he or she accepts further performance from the guilty party after the breach. [Citations.]" (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 857, p. 944.) " 'Waiver of a right to rescind will be presumed against a party who, having full knowledge of the circumstances which would warrant him in rescinding, nevertheless accepts and retains benefits accruing to him under the contract.' [Citation.]" (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 897.) Whether a party has waived a breach by performance "depends upon the factual showing, and there is no proof as a matter of law of any express or implied waiver" (*California Milling Corp. v. White* (1964) 229 Cal.App.2d 469, 479; [*35] *Cole v. Calaway* (1956) 140 Cal.App.2d 340, 348.)

In light of the foregoing controlling legal principles, it is clear there exists an array of genuine and material disputed factual issues that prevent us from granting judgment to either Adelphia or Pauley Construction as a matter of law. Therefore, we must remand for further proceedings. While the trial court in the statement of decision did not address these issues, there *may* already

exist an adequate evidentiary record to permit the trial court to resolve any factually disputed issue based on the evidence previously before it in the bench trial. (See, e.g., *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 751; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 895.) However, the trial court may also conclude that the parties should be allowed to present "such additional evidence [on remand] as it may deem necessary or advisable" in reaching a decision in this matter. (*England v. Christensen* (1966) 243 Cal.App.2d 413, 435.) These determinations are to be made by the trial court in the first instance.

IV.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with [*36] this opinion. Pauley Construction's cross-appeal is dismissed. Adelphia shall recover its costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.