

Tentative Rulings for June 17, 2010
Departments 97A, 97B, 97C & 97D

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

05CECG01585 *Janet Orlando v. Alarm One* (Dept. 97A) is continued to Thursday, June 24, 2010 at 3:30 p.m. in Dept. 97A

09CECG04755 *Dixon v. Stark* is continued to Thursday, June 24, 2010 at 3:30 p.m. in Dept. 97A

08CECG02435 *Stark v. Dixon* is continued to Thursday, June 24, 2010 at 3:30 p.m. in Dept. 97A.

07CECG02834 *Rios v. Ortiz* is continued to Thursday, June 24, 2010, at 3:30 p.m. in Dept. 97D

09CECG04020 *Her et al. v. Club One Casino, Inc.* is continued to Tuesday, June 29, 2010 at 3:30 p.m. in Dept. 97C

(Tentative Rulings begin at the next page)

Tentative Ruling

(17)

Re: ***Gunnell v. Shared Imaging et al.***
Superior Court Case No. 08 CECG 02000

Hearing Date: June 17, 2010 (**Dept. 97D**)

Motion: Motion for Cost of Proof Sanctions [C.C.P. § 2033.420]
Motion to Tax Costs

Tentative Ruling:

To deny the Motion for Cost of Proof Sanctions. To grant the Motion to Tax Costs in the amount of \$89.75.

Explanation:

Motion for Cost of Proof Sanctions:

Code of Civil Procedure section 2033.420 provides, in relevant part:

If a party fails to admit ... the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves ... the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(Code Civ. Proc. § 2033.420, subd. (a).)

The court shall make such an order unless it finds one of the following:

- 1) An objection to the request was sustained or a response to it was waived under Section 2033.290;
- 2) The admission sought was of no substantial importance;
- 3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter;
- 4) There was other good reason for the failure to admit.

(Code Civ. Proc. § 2033.420, subd. (b).)

Whether a party is entitled to costs of proof under section 2033.420, and, if so, the amount to be awarded is within the trial court's discretion. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508.) In determining whether a party reasonably denied the truth of a requested admission, "there are a variety of factors which a court should consider." (*Brooks v. American Broadcasting Co.*, *supra*, 179 Cal.App.3d at p. 509.) These include whether a responding party later learned facts that would have called for an admission and advised the requesting party that the denial was in error or should be modified, and "whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." (*Id.* at pp. 510-511.) "[I]t is [not] enough for the party making the denial to 'hotly contest' the issue. [Instead], there must be some reasonable basis for contesting the issue in question before sanctions can be avoided." (*Id.* at p. 511.) In assessing the reasonableness of a party's refusal to admit, the court must consider the responding party's knowledge at the time of the request. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637-638.)

Plaintiff contends that the runaround that he received in discovery makes it clear that opposing counsel never spoke with the actual employee who set up the stairs, because that employee was never located. It should have been apparent that the locking mechanism was never set causing the stairs to collapse, causing, in turn, plaintiff's injuries. Thus, there was no factual basis to deny liability.

However, plaintiff admits that defendant stipulated to liability on the first day of trial. (Notice of Motion and Motion, pg. 1-2.) Plaintiff seeks the costs of discovery, and miscellaneous time spent reviewing photographs, "addressing concerns about the Nebraska inspection" and reviewing deposition transcripts. (See Renberg Decl. ¶ 6.) However, only those expenses incurred in actually proving the matter are recoverable pursuant to section 2033.420. (§ 2033.420, subd. (a); see also *Wagy v. Brown* (1994) 24 Cal.App.4th 1.)

In *Wagy*, the plaintiff sued defendants for injuries arising from an automobile accident. (*Wagy*, *supra*, 24 Cal.App.4th at p. 4.) In response to a request for admission, defendants denied having been negligent. (*Ibid.*) The matter was ordered to judicial arbitration. (*Ibid.*) Prior to arbitration of the matter, the defendants admitted their negligence, obviating the need for proof of that matter. (*Ibid.*) The trial court granted the plaintiff's motion for cost of proof attorney fees. (*Ibid.*) The *Wagy* court reversed, reasoning: "'Proof' is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." [Citation.] Given this definition, preparation for trial or arbitration is not the equivalent of proving the truth of a matter so as to authorize an award of attorney fees under [former] section 2033, subdivision (o). Expenses are recoverable only where the party requesting the admission 'proves . . . the truth of that matter,' not where that party merely prepares to do so. Plaintiff is not entitled to attorney fees under the statute and the trial court erred

in awarding them." (*Id.* at p. 6, italics added; accord *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 737 [trial court's awarding all of a party's litigation costs from the date of service of party's requests for admissions "was far more than reasonable compensation under the circumstances"]; see also *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865-866 ["Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved."].)

Plaintiff argues that a stipulation is evidence and therefore proof and he must be entitled to the cost of obtaining that stipulation. (CACI Nos. 106, 5002.) This does not follow. *Wagy* is directly on point. "[P]reparation for trial" – which discovery certainly is, is not recoverable where the opposing party admits negligence.

Plaintiff also argues that failing to award fees violates the public policy behind section 2033.420 because a party may always deny requested admissions, then stipulate at the time of trial. This is not a violation of the public policy behind 2033.420. "The primary purpose of requests for admissions is to expedite trial. Although their use may ultimately decrease trial preparation time, that clearly is not their focus." (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 737.)

Defendant asks for sanctions for having to oppose this motion. There is no statutory basis for sanctions.

The motion for cost of proof sanctions is denied.

Motion to Tax Costs:

A. *Motion to Tax—Generally*

A motion to tax costs shall be served and filed within 15 days after service of the cost memorandum. (Cal. Rule of Court Rule 3.1700, subd. (b).) Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5, subd. (c)(4).) All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).)

On motion to tax costs, the initial burden depends on the nature of the costs that are being challenged. "If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are

properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs.” (*Ladas v. Calif. State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)

[T]he mere filing of a motion to tax costs may be a “proper objection” to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. However, if the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant, and the burden of showing that an item is not properly chargeable is upon the objecting party.

(*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.)

“The court’s first determination, therefore, is whether the statute expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to show them to be unnecessary or unreasonable.” (*Id.*). In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.)

B. Deposition Costs

The costs of taking, videotaping, transcribing and traveling to a deposition are specifically recoverable under Code of Civil Procedure section 1033.5, subdivision (a)(3). Defendant alleges that the Memorandum of Costs and Worksheet do not clearly break down what expenses are for “travel, lodging, meals, transcribing etc.” This is because neither the law nor the form requires them to do so. Defendant knows what the transcripts cost. It can calculate what the remainder of the cost is and make an educated guess as to the other categories. Moreover, in reply plaintiff has provided a detailed breakdown of each expense and all appear in order. (Renberg Decl. Exhibit B.) Mileage costs are given at the rate approved by the IRS. Some depositions out of town have a lodging component, which is not per se unreasonable, and which defendant has not objected to – only that they cannot calculate what said lodging cost was.

Defendant also objects to the \$562.80 for “document subpoenas.” As plaintiff explains these records only depositions were of records custodians. Plaintiff was within his rights to have live depositions of these witnesses and simply attached the records at greater expense. Defendant also claims that plaintiff could have obtained copies of his medical records by asking for them. However plaintiff was entitled to obtain copies of his records from the custodian of records under oath. The costs are allowed.

C. *Copies of Exhibits*

Allowable costs include "[m]odels and blowups of exhibits and photocopies of exhibits ... if they were reasonably helpful to aid the trier of fact." (See Code Civ. Proc. § 1033.5, subd. (a)(12).) Defendant claims that "the lions share of the exhibits identified by the Defendant were never even seen by the jury let alone used to aid them." Again, where the costs are proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant, and the burden of showing that an item is not properly chargeable is upon the objecting party. (*Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 131.) The fact that defendant's exhibits may not have been introduced in evidence is not proof that the modest \$158.01 was not spent on exhibits used to aid the trier of fact. Defendant has not introduced evidence that no exhibits of plaintiff's were introduced to the jury.

D. *Costs Associated with Oshkosh Specialty Vehicles*

Defendant asserts that the motion fee for the motion to amend to add Oshkosh as a defendant and the service of process fee for Oshkosh are not properly costs assessed against it. All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation. (Code Civ. Proc. § 1033.5, subds. (c)(1), (2).) It was not necessary to the case against defendant to prosecute the case against Oshkosh, particularly as Oshkosh was dismissed at trial. The court taxes the sum of \$89.75 as costs.

E. *Mediator's Fees*

Defendant asserts that the mediation fees should not be awarded. The court allows the fees pursuant to *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202 and the court's Standing Order No. 07-0628 which requires the parties to engage in some form of ADR.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-15-10.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Green v. Saint Agnes Medical Center, et al***
Superior Court Case No. 09CECG02063

Hearing Date: June 17, 2010 (**Dept. 97D**)

Motion: By Saint Agnes to compel responses to form and special interrogatories, request for production of documents and request for statement of damages, and for monetary sanctions

Tentative Ruling:

To grant motion and to award monetary sanctions of \$390.

Explanation:

The moving papers are sufficient to establish Saint Agnes' entitlement to the requested orders, and plaintiff has filed no opposition attempting to justify his failure to have responded to either the discovery or the March 31, 2010 letter.

The court will therefore order plaintiff to provide complete response to the form and special interrogatories, request for production of documents, and request for statement of damages, within 10 days of service of this order.

It will also order plaintiff to pay monetary sanctions of \$390 within 30 days of service of this order.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-15-10.
(Judge's initials) (Date)

(19)

Tentative Ruling

Haen et al. v. Logos Group, Et al.

09CECG02700

Hearing Date: June 17, 2010 **(97B)**

Motion: by one or more defendants for responses to discovery.

Tentative Ruling:

To deny.

Explanation:

The declaration accompanying the motion provides several exhibits, but omits tabs, as required by California Rules of Court, Rule California Rules of Court, Rule 3.1110(f). There is no declaration setting forth specific facts establishing good cause for the documents sought, and several appear to be irrelevant to a wrongful death action as opposed to an action by the deceased's estate. *Boeken v. Philip Morris USA, Inc.* (May 12, 2010) 48 Cal. 4th 788 discusses the difference between the two. The absence of such a declaration would require the Court to speculate as to good cause, which it declines to do. Such a declaration was required by Code of Civil Procedure section 2031.310(b)(1).

California Rules of Court, Rule 3.1110(a) states: "A notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order."

"As a general rule, the trial court may consider only the grounds stated in the notice of motion. (*Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1545; *Silva v. Holland* (1888) 74 Cal. 530, 531.) An omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought. (*Carrasco v. Craft* (1985) 164 Cal. App. 3d 796, 807-808; 388 *Geary St. v. Superior Court* (1990) 219 Cal. App. 3d 1186, 1200.) The purpose of these requirements is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.' (*Hernandez v. National Dairy Products* (1954) 126 Cal. App. 2d 490, 493.)"

Luri v. Greenwald (2003) 107 Cal. App. 4th 1119, 1125.

The notice of motion here fails to state what discovery responses are sought or who the responses are sought from. It does state that both defendants seek the same order. But an April 4, 2010 meet and confer letter attached to the Church Declaration states that the sole responses demanded are those "with regard to defendant Triple E Produce."

Tentative Ruling

(24)

Re: ***Julie Ochoa, et al. v. California Fireworks, et al.***
Court Case No. 07CECG02675

Hearing Date: **June 17, 2010 (Dept. 97A)**

Motion: Defendant Charles LeRoy Dotson's Motion for Order Imposing Terminating Sanctions or in the Alternative Issue and/or Evidence Sanctions Against Plaintiffs Julie Ochoa and Richard Seracho and Imposing Monetary Sanctions against Plaintiffs for Failure to Obey a Court Order Compelling a Response to Discovery

Tentative Ruling:

To deny.

Explanation:

Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. Sanctions should not constitute a "windfall" to the requesting party; i.e. the choice of sanctions should not give that party more than would have been obtained had the discovery been answered. [*Caryl Richards, Inc. v. Sup.Ct.* (1961) 188 Cal.App.2d 300, 303—striking a party's pleadings because of evasive answers to an interrogatory is excessive; an order establishing the facts in question against the party would accomplish the purposes of discovery] "The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]" [*Caryl Richards, Inc. v. Superior Court*, supra at 304]

The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. [*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581] Terminating sanctions in the first instance may be an appropriate sanction, if the abuse of the discovery process is particularly egregious. [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496—forgery and spoliation of evidence] However, in most instances such a drastic consequence is not warranted to promote the purposes of discovery.

(23)

Tentative Ruling

Re: ***Vanessa Black v. State of California and County of Fresno***
Superior Court No. 09 CECG 04650

Hearing Date: June 17, 2009 (**Dept. 97A**)

Motion: Petitioner Vanessa Black's Petition for Relief from Claim Requirement Pursuant to Government Code § 946.6.

Tentative Ruling:

To DENY Petitioner Vanessa Black's Petition for Relief from Claim Requirement pursuant to Government Code § 946.6.

Explanation:

After Petitioner Vanessa Black failed to file a timely government claim and the Clerk of the Board of Supervisors for the County of Fresno and the California Victim Compensation and Government Claims Board denied Petitioner's application to present a late claim, Petitioner has filed a petition with this Court for an order relieving the Petitioner of the requirements of Government Code § 945.4. Government Code § 946.6(a) provides that "[i]f an application for leave to present a [late] claim is denied or deemed to be denied ..., a petition may be made to the court for an order relieving the petitioner from Section 945.4." In order to get relief from the claim requirement, a person seeking relief under Government Code § 946.6 must show *both* (1) that the application to the board to file a late claim was made within a reasonable time not to exceed one year after the accrual of the cause of action, *and* (2) that the failure to file a timely claim was due to one of the reasons set forth in the statute, e.g., mistake, inadvertence, surprise or excusable neglect. (*Tammen v. County of San Diego* (1967) 66 Cal. 2d 468, 474; *El Dorado Irrig. Dist. v. Superior Court* (1979) 98 Cal. App. 3d 57, 62.)

First, Petitioner Vanessa Black states, in her Petition, that her application to the County of Fresno and the California Victim Compensation and Government Claims Board was made within a reasonable time after the cause of action accrued. (Petition ¶ 8.) However, Respondents State of California, acting by and through the Department of Transportation, and County of Fresno contend that this Court is without jurisdiction to grant relief to Petitioner because Petitioner's late claim application to the public entities was filed on June 24, 2009, a year and a day after the accrual of her cause of action.

Government Code § 911.4(b) provides that the late claim application “shall be presented to the public entity ... within a reasonable time not to exceed one year after the accrual of the cause of action[.]” The Court finds that Petitioner’s cause of action for dangerous condition of public property accrued on June 24, 2008, the date of Petitioner’s car accident. Therefore, it appears that the last day that Petitioner could have timely filed a late claim was June 23, 2009. Since Petitioner did not sign and serve her late claim to both governmental entities until June 24, 2009, it appears that Petitioner’s late claim application was filed after the one-year time period lapsed.

However, Petitioner contends that in determining the length of the one-year period, the Court must not count all of the time that Petitioner was mentally incapacitated. Government Code § 911.4(c)(1) provides that “the time during which [the person who sustained the alleged injury or damage was] mentally incapacitated and does not have a guardian or conservator of his or her person shall not be counted” in “computing the one-year period” under Government Code § 911.4(b). Petitioner argues that she has presented evidence that she was mentally incapacitated during the one-year time period and that the period must be tolled for such a length of time that her late claim application was not late. After considering the declaration of Tod Black, Petitioner’s father, the Court finds that Petitioner was mentally incapacitated for the month or slightly longer that she was in a medically induced coma and did not have a guardian or conservator appointed for her. (Declaration of Tod Black ¶¶ 3 and 5.) The Court overrules the Respondents’ objections to Tod Black’s declaration as to his statements regarding Petitioner’s coma and her lack of guardian or conservator as a lay witness can discern if someone is in a coma and does not have a guardian or conservator. Consequently, after tolling the one-year late claim period for one month pursuant to Government Code § 911.4(c)(1), Petitioner had until July 23, 2009 to timely file a late claim application. As Petitioner signed and served her late claim application on June 24, 2009, the Court finds that Petitioner’s late claim application was timely filed within the one-year period required by Government Code § 911.4(b) and that this Court has jurisdiction over Petitioner’s petition for relief from government claim requirements.

Second, Petitioner Vanessa Black contends that her petition for relief from the claim requirements should be granted because she was mentally incapacitated during the claim filing period. In opposition, Respondents State of California, acting by and through the Department of Transportation, and County of Fresno contend that the Petitioner has failed to prove that she was incapacitated for the entire claims filing period and that Petitioner’s incapacity, if any, was not the cause of her failure to timely file a government claim.

Government Code § 946.6(c)(3) provides that the Court “shall relieve the petitioner” if the late claim was made within a reasonable time within the one-year period required by Government Code § 911.4(b) and

[t]he person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time.

Under Government Code § 911.2, as Petitioner's claim relating to a cause of action for injury to a person, Petitioner had six months after the accrual of her cause of action to present a government claim. Therefore, in order to establish her entitlement to relief pursuant to Government Code § 946.6(c)(3), Petitioner needs to establish that her late claim was made in a reasonable time within the requisite time period and that she failed to file a timely claim due to the fact that she was mentally incapacitated for the six months after her car accident and that mental incapacitation caused her to not file a timely claim.

Initially, the Court finds that the Petitioner has not established that she was mentally incapacitated for the entire six months after her car accident. The Court acknowledges that Petitioner has established that she was mentally incapacitated during the month or slightly longer that she was in a coma. However, Petitioner's submitted evidence is insufficient to establish that she was mentally incapacitated for longer than the time that she was in a coma. Petitioner has not submitted any of her medical records or the declaration of Petitioner's physician demonstrating that a doctor believed that Petitioner was mentally incapacitated during the claim period from a medical point of view. Rather, the only evidence that Petitioner initially submitted was the declaration of her father, Tod Black. In his declaration, Tod Black states that the Petitioner seemed to be in an out and that, it was his opinion and belief, that Petitioner was not able to deal with any financial, legal, or other complex matters during 2008. (Declaration of Tod Black ¶ 4.) However, the Respondents have submitted evidence that Petitioner signed an attorney retainer agreement, authorizations for release of medical records, and a release of claims following a settlement. (Declaration of Jeffrey Lovell, Exhibits 5, 6, and 7; Declaration of Leslie Dillahunty, Exhibits C, D, and E.) Taken altogether, the evidence shows that Petitioner was able to deal with legal matters during 2008 and the Court finds that the declaration of Tod Black does not establish that Petitioner was mentally incapacitated during the entire claim period.

Further, even if the Court found that Petitioner was mentally incapacitated during the entire claims period, the Court finds that Petitioner has not established that her mental incapacitation caused her to not file a timely claim. Rather, the evidence demonstrates that Petitioner signed an attorney retainer agreement, authorizations for release of medical records, and a release of claims following a settlement. (Declaration of Jeffrey Lovell, Exhibits 5, 6, and 7; Declaration of Leslie Dillahunty, Exhibits C, D, and E.) Consequently, it appears that Petitioner was able to attend to her legal affairs and could have submitted a timely claim. (*See Draper v. City of Los Angeles* (1990) 52 Cal. 3d 502, 509; *Tammen v.*

County of San Diego (1967) 66 Cal. 2d 468, 474-75.) Because the Petitioner has failed to demonstrate that she was mentally incapacitated for the entire claim period and failed to establish that her mental incapacitation caused her to not file a timely claim, the Court denies Petitioner's request for relief from the claim requirement pursuant to Government Code § 946.6(c)(3).

Third, Petitioner Vanessa Black contends that her petition for relief from the claim requirements should be granted because she has demonstrated that her failure to present a claim was caused by excusable neglect. In opposition, Respondents State of California, acting by and through the Department of Transportation, and County of Fresno contend that the Petitioner has failed to prove that her failure to file a claim was caused by her attorney's excusable neglect.

Government Code § 946.6(c)(1) provides that the Court "shall relieve the petitioner" if the late claim was made within a reasonable time within the one-year period required by Government Code § 911.4(b) and

[t]he failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4.

The Petitioner argues that the failure to present her claim was caused by excusable neglect. "[T]he showing required for relief under section 946.6 because of mistake, inadvertence, surprise or excusable neglect is the same as required under Code of Civil Procedure section 473 for relieving a party from a default judgment." (*Ebersol v. Cowan* (1983) 35 Cal. 3d 427, 435.) An attorney's neglect is imputed to his or her client and, therefore, the claimant cannot get relief unless the attorney's neglect was excusable. (See *Clark v. City of Compton* (1971) 22 Cal. App. 3d 522, 528.)

"The mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief." (*Department of Water & Power v. Superior Court* (2000) 82 Cal. App. 4th 1288, 1293.) "Excusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." (*Ebersol v. Cowan* (1983) 35 Cal. 3d 427, 435.) "There must be more than the mere failure to discover a fact; the party seeking relief must establish the failure to discover the fact in the exercise of reasonable diligence." (*Department of Water & Power v. Superior Court* (2000) 82 Cal. App. 4th 1288, 1293.)

In support of Petitioner's claim that her counsel's excusable neglect caused Petitioner's failure to file a claim, the Petitioner has submitted the

declaration of Jay S. McClaugherty, her counsel. In his declaration, McClaugherty states that, within two months of the accident, he traveled to the Fresno area to meet with Petitioner's father and to see the site of the accident. (Declaration of Jay S. McClaugherty ¶ 6.) McClaugherty states that he spent several hours at the site of the accident, considering how the accident occurred, and who was at fault. (Declaration of Jay S. McClaugherty ¶ 6.) Since McClaugherty did not see any fault on the part of any governmental entity, he went forward with the case against the driver of the vehicle that rear-ended the Petitioner. (Declaration of Jay S. McClaugherty ¶ 6.) It was not until March or April of 2009, when McClaugherty met with Petitioner and her boyfriend and Petitioner's boyfriend stated that there had been a large number of accidents at the site of the accident, that McClaugherty went back to the scene and noticed that there was no warning sign for a possible left turn from State Route 145 onto Date Avenue and no protected left turn lane, which McClaugherty believes were causes of the accident. (Declaration of Jay S. McClaugherty ¶¶ 7-8.)

After considering all of the evidence, the Court finds that the Petitioner has failed to establish that her failure to present a claim was due to Petitioner's counsel's excusable neglect. Specifically, the Court finds that Petitioner's counsel, Jay McClaugherty, was not diligent in investigating and pursuing the Petitioner's claim to identify possible defendants. Apparently, the only investigation that McClaugherty did during the claim period was to go out to the accident site once, look around for a couple of hours, fail to notice the lack of a protected left turn lane or a warning sign for possible left turns, and conclude that only the driver that rear-ended Petitioner was liable. However, the lack of a protected left turn lane and a warning sign should have been obvious from any investigation of the accident scene. McClaugherty has provided no reason why he did not notice these conditions until after he learned of previous accidents. Lack of a protected left turn lane and lack of a warning sign are not made more obvious or noticeable just because previous accidents occurred at the same location.

Further, it appears that McClaugherty did consider during the claim period that the accident was caused by a possible dangerous condition of public property – a failure to have a traffic signal at the intersection where the accident occurred, but McClaugherty only states that he rejected that idea. (Declaration of Jay S. McClaugherty ¶ 8.) McClaugherty does not state that he talked to any witnesses, or a traffic engineer who stated that a traffic signal was unnecessary, or even looked up to see if any other accidents had occurred at the same location before disregarding his initial idea of a claim for dangerous condition of public property. Given that “attorneys representing clients in personal injury matters routinely try to locate as many potential tortfeasors as possible to ensure his or her client receives adequate compensation[,]” the Court finds it rather incredible that Petitioner's counsel just disregarded the idea of a dangerous condition of public property without conducting any further investigation into the claim's feasibility. (*Greene v. State of California* (1990) 222 Cal. App. 3d 117,

122.) While the Court acknowledges that McClaugherty conducted some investigation into the circumstances of the accident, McClaugherty's investigation was not a reasonably diligent or prudent one and the Court finds that McClaugherty's neglect is inexcusable.

Further, even if the Court found that Petitioner had established that her counsel's neglect was excusable, the Petitioner has not established that her late claim was made "within a reasonable time not to exceed" the one-year period identified in Government Code § 911.4(b). While the Court has already determined that the Petitioner's claim was filed within the one-year period, the Court finds that the late claim was not made within a reasonable time. The Petitioner's late claim was filed about 11 months after Petitioner's cause of action accrued and either 2 or 3 months after Petitioner's counsel concluded that a dangerous condition of public property existed. (Declaration of Jay S. McClaugherty ¶¶ 7 and 9; Declaration of Jeffrey Lovell, Exhibit 2, p. 51, lines 10-21.) Specifically, the Court finds that the 2 or 3-month delay between when Petitioner's counsel determined that a dangerous condition of public property existed to when the application to file late claim was filed was an unreasonable amount of time.

Petitioner's counsel states that the delay between determination that there was a dangerous condition of public property and the filing of the late claim occurred because David Ryan, the attorney assigned the preparation of the late claim by Jay McClaugherty, had a number of files that had pressing deadlines and a new large case, that Ryan attended a large number of depositions and hearings, and that Ryan needed to research the law about claims procedures before he could prepare the late claim applications. Further, McClaugherty states that, due to the fact that the office was short-staffed, Ryan did not have an earlier opportunity to prepare the applications. However, "press of business" is not a valid excuse for attorney neglect of a case. (See *Martin v. Taylor* (1968) 267 Cal. App. 112, 117.) As the Petitioner's counsel has failed to provide a valid excuse for why it took 2 to 3 months to file a late claim after counsel determined that there was a dangerous condition of public property, the Court finds that the Petitioner has not established that her late claim was filed "within a reasonable time not to exceed" the one-year period identified in Government Code § 911.4(b). Consequently, due to the fact that the Petitioner has failed to establish that her failure to file a timely claim was caused by her counsel's excusable neglect and failed to establish that her late claim was filed within a reasonable time, the Court denies Petitioner's request for relief from the claim requirement pursuant to Government Code § 946.6(c)(1).

For all these reasons, the Court denies Petitioner Vanessa Black's Petition for Relief from Claim Requirement.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary.

Tentative Ruling

Re: ***Gwartz, et al. v. Weilert, et al.***
Case No. 09CECG01032

Hearing Date: June 17, 2010 (Dept. 97C)

Motion: For leave to file a fourth amended complaint

Tentative Ruling:

To grant subject to the condition of vacating the currently set trial date and resetting it pursuant to California Rules of Court (CRC) rules 3.1324(a) and (b), and California Code of Civil Procedure (CCP) sections 473(a)(1) and 576.

Explanation:

Plaintiffs have filed a copy of the proposed fourth amended complaint with their motion. Thus plaintiffs comply with California Rules of Court Rule (CRC) rule 3.1324(a). Through the declarations of counsel for plaintiffs, Mr. Norys, plaintiffs establish compliance with the requirements in CRC rule 3.1324(b).

The court acknowledges that discovery in this case has been contentious. It appears to the court that plaintiffs have been diligent in their discovery efforts. As such, the court does not find that plaintiffs have been dilatory in connection with the present motion. (*See Melican v. Regents of University of California* (2007) 151 Cal. App. 4th 168, 175.)

Based on all the papers filed in connection with this motion it appears to the court that the parties will not be ready to proceed to trial on the currently set trial date. The fact that the amendment involves a change in legal theory that would make admissible evidence damaging to the opposing party is not the kind of prejudice the court will consider. (*Hirsa v. Sup.Ct. (Vickers)* (1981) 118 Cal.App.3d 486.) Yet, prejudice exists where the amendment would require delaying trial, resulting in loss of critical evidence or added costs of preparation, increased burden of discovery, etc. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.) The court's discretion to impose conditions on leave to amend the complaint "extends only to those conditions which are just, *i.e.*, intended to compensate the defendants for any inconvenience belated amendment may cause." (*Armenta ex rel. City of Burbank v. Mueller Co.* (2006) 142 Cal.App.4th 636, 642.) Under CCP sections 473(a)(1) and 578 the court may impose conditions on such terms as may be proper even if some prejudice is shown. The judge may continue the trial date, limit discovery, or order the party seeking the amendment to pay the costs and fees incurred by the opposing party in preparing for trial. (*Fuller v. Vista Del Arroyo Hotel* (1941) 42 Cal.App.2d 400, 404.) The trial court has discretion to permit or deny the amendment of the

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Tentative Ruling

Re: ***Villegas v. Schwarzenegger et al.***
Superior Court Case No. 10 CECG 00065

Hearing Date: June 17, 2010 (**Dept. 97A**)

Motion: Demurrer to the Original Complaint

Tentative Ruling:

To strike the original Complaint sua sponte pursuant to CCP § 436 with leave to amend. The demurrer is rendered moot. An Amended Complaint in conformity with the tentative ruling is to be filed within 20 days of notice of the ruling. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Oral argument on the case will be continued to Tuesday, June 29, 2010 at 3:30 p.m. in Dept. 97A so that the tentative ruling can be mailed to the Plaintiff.

Explanation:

Tort Claims Requirement

In general, no suit for money or damages may be maintained against a governmental entity unless a formal claim has been presented to such entity, and has been rejected (or is deemed rejected by the passage of time). See Gov. Code §§ 945.4 and 912.4 and see *Munoz v. State of Calif.* (1995) 33 CA4th 1767, 1776. Failure to allege facts in the complaint demonstrating compliance with the prelitigation governmental claims presentation requirements subjects the complaint to a general demurrer. See *State of Calif. v. Sup.Ct. (Bodde)* (2004) 32 C4th 1234, 1239. Failure to comply with the claims statute bars the claim against the public entity. *Id.* at 1239, fn. 7—allowing action to proceed an error of law but *not* a jurisdictional defect. If action against the public entity is barred by failure to file a timely claim, suit against a public employee for causing injury in the scope of his or her employment is also barred. See Gov. Code § 950.2.

The statutory requirements for presentation of a claim apply to claims for “money or damages.” See Gov. Code § 905 and see *City of Los Angeles v. Sup.Ct. (Collins)* (2008) 168 CA4th 422, 430. The statutes do not apply to nonpecuniary actions, “such as those seeking injunctive, specific or declaratory relief.” See *Canova v. Trustees of Imperial Irrig. Dist. Employee Pension Plan* (2007) 150 CA4th 1487, 1493. There appears to be a split of authority on whether the statutory claim requirements apply where money damages are

“incidental” to a claim for equitable relief. See *Lozada v. City & County of San Francisco* (2006) 145 CA4th 1139, 1163–1164 (collecting cases) and see *Traffic-School-Online, Inc. v. Clarke* (2003) 112 CA4th 736, 742—claim presentation required where damages sought as incidental relief to mandate petition; but see also *Eureka Teacher’s Ass’n v. Board of Ed.* (1988) 202 CA3d 469, 476 (contra)—claim presentation not required where money damages incidental to injunctive or declaratory relief.

Finally, the Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2) protects federal rights from impairment by state rules of procedure. Thus, claims filing requirements of state law cannot defeat a claim arising under federal law. For example, claims against a public entity based on the Federal Civil Rights Act (42 USC § 1983) need *not* be presented to the public entity prior to suit in state (or federal) court. See *Felder v. Casey* (1988) 487 US 131, 134, 108 S.Ct. 2302, 2304–2305 and *Williams v. Horvath* (1976) 16 C3d 834, 842.

Demurrer

The Defendants failed to ask for judicial notice of the documents related to the presentation and rejection of the Plaintiff’s tort claim. Instead, they were simply attached to the Memorandum of Points and Authorities as an exhibit. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are *judicially noticeable*. See *Blank v. Kirwan* (1985) 39 C3d 311, 318 and *Donabedian v. Mercury Ins. Co.* (2004) 116 CA4th 968, 994. Therefore, these documents cannot be considered by the Court.

By the same token, there are several defects in the Complaint that appear on its face. Plaintiff alleges at ¶ 1 of the “Factual Allegations” that he has complied with the requirements of Gov. Code § 905 for all state law causes of action “as well as other requirements of the California Tort Claims Act for actions requesting injunctive and declaratory relief.” But, failure to allege **facts** in the complaint demonstrating compliance with the prelitigation governmental claims presentation requirements subjects the complaint to a general demurrer. See *State of Calif. v. Sup.Ct. (Bodde)* (2004) 32 C4th 1234, 1239. Accordingly, the Plaintiff has failed to allege when he filed his claim and when he received notice of rejection or attach the applicable claim and rejection as exhibits.

Second, as stated supra, it is unclear whether Plaintiff seeks primarily injunctive relief or monetary damages. Compare ¶ 1 of the “General Allegations” and the Prayer at ¶ 1 with ¶¶ 2-4 of the Prayer. Third, there are some other defects in the Complaint that the Defendants failed to address. To the extent that the Plaintiff is alleging violations of due process and/or a violation of the 8th Amendment, there is no claims’ filing requirement. See *Felder v. Casey*, supra. But, in the case at bar, Plaintiff’s allegations are “all over the map”. It is unclear whether he is alleging a violation of 42 USC § 1983 or whether he is alleging

Tentative Ruling

(17)

Re: ***Tucker v. Clovis Unified School District***
Superior Court Case No. 09 CECG 02994

Hearing Date: June 17, 2010 (**Dept. 97D**)

Motion: "Clarification" of Court's March 19, 2010 Ruling After Hearing

Tentative Ruling:

To grant in part. The court amends its March 19, 2010 Ruling After Hearing by adding the following text to section entitled "Ruling:" after the first sentence: "To sustain the demurrer to the second cause of action with leave to amend. An amended complaint shall be filed within 15 days of service of this order. All new allegations shall be in boldface type."

Explanation:

In *Le Francois v. Goel* (2005) 35 Cal.4th 1094, the California Supreme Court considered whether, notwithstanding the provisions of section 1008, a trial court may "reconsider interim orders it has already made in the absence of new facts or new law[.]" (*Id.* at p. 1101.) The court interpreted section 1008 "as imposing a limitation on the parties' ability to file repetitive motions, but not on the court's authority to reconsider its prior interim rulings on its own motion." (*Id.* at p. 1105.) The court further held that a trial court may reconsider an interim ruling on its motion regardless of whether the motion arises from prompting by a party or from the court's own "unprovoked flash of understanding." (*Id.* at p. 1108.)

The March 19, 2010 Ruling states that it overruled the demurrer to the second cause of action. However, it further stated: "Thus, to the extent that the fourth and fifth causes of action state claims of writs of prohibition and mandate, they survive. Defendant's quarrel is with one of the alternative remedies sought, not the cause of action. However, the second cause of action, while denominated a writ is solely directed at seeking damage. It is subject to demurrer."

The demurrer to the second cause of action is sustained because the second cause of action seeks only damages, not the traditional writ remedies of declaratory and injunctive relief, as well as disgorgement. Thus, it does not state a cause of action for writ relief as it is a writ cause of action in name only. Leave to amend is granted because the prayer can easily be amended to make it into a proper cause of action for writ relief.

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Tentative Ruling

Re: ***Heffley v. Wild Water Adventure Park***
Superior Court Case No. 09 CECG 02115

Hearing Date: June 17, 2010 (**Dept. 97A**)

Motions: (1) By Defendant to dismiss as a terminating sanctions for failure to comply with the Court's

(2) By Defendant seeking additional monetary sanctions

Tentative Ruling:

To grant the motion pursuant to CCP § 2023.030(d)(3) and to dismiss the Plaintiff's action. The prevailing Defendant is directed to submit to this court, within 7 days of service of notice of the ruling, a proposed judgment dismissing the action. No additional monetary sanctions will be imposed.

Explanation:

On June 16, 2007 the Plaintiff was a patron at the Defendant's Water Park. She alleges that one of Defendant's employees permitted a raft to go down on a waterfall ride before the raft that she was riding in had cleared the area and that raft, full of riders, hit her in the head. She sustained injuries. She filed a Complaint on June 16, 2009 alleging causes of action for negligence and premises liability. Defendant filed an Answer on November 3, 2009.

On November 19, 2009 Defendant propounded and served Form Interrogatories Set One, "Request for Production of Documents" Set One and Request for Admissions Set One upon the self-represented Plaintiff. No responses were served despite a follow-up letter sent by Defendant's counsel on December 30, 2009. See Declaration of Fugere. On January 15, 2010 Defendant filed and served a motion to compel initial responses to the outstanding discovery and seeking an order deeming the truth of matters specified in the RFAs as established. No opposition was filed.

However, the Plaintiff had filed a change of address form on September 17, 2009 with the court but did not serve the form on the Defendant. Defendant's counsel submitted a Declaration stating that Plaintiff telephoned her on Friday, February 26, 2010 and indicated that she had a new address and although mail was being forwarded, there was a delay of approximately 2 weeks. See Declaration of Fugere filed on March 2, 2010. Accordingly, the hearing was continued to allow the Plaintiff the opportunity to respond to discovery.

Tentative Ruling

Re: **Barton, et al. v. Bellasera Studio Day Spa, et al.**
Superior Court Case No: 07 CECG 03893 DRF

Hearing Date: June 17, 2010 (**Dept. 97D**)

Motion: Motion for Summary Judgment/Adjudication by Defendant
Regina Freitas dba Bellasera Studio Day Spa.

Tentative Ruling:

To DENY both the motion for summary judgment and the motion for summary adjudication. (CCP 437c.)

Explanation:

Hold Harmless Agreement

As to all three causes of action, Defendant argues that when Plaintiff Tiffany Barton signed her one-year sublease for a 12 x 12 space at the Day Spa, the sublease included an indemnity clause at page 6 of the lease, which required Plaintiff to hold Defendant harmless "from any and all loss, claims, damage and liability to or by any person or property occurring upon or about the premises from any cause whatsoever." (Freitas Decl. at Ex. A.)

"TENANT shall indemnify and hold LANDLORD harmless from and against any and all claims arising from TENANT'S use or occupancy of the Premises or from the conduct of its business or from any activity, work, or things which may be permitted or suffered by TENANT in or about the Premises including all damage, costs, attorney's fees, expenses and liabilities incurred in the defense of any claim or action or proceeding arising therefrom. Except for LANDLORD'S willful or grossly negligent conduct, TENANT hereby assumes all risk of damage to property or injury to person in or about the premises from any cause, and TENANT hereby waives all claims in respect thereof against LANDLORD."

But Defendant fails to present sufficient evidence to make a prima facie showing that the hold harmless agreement applied here and was binding. Defendant fails to mention the hold harmless agreement in her Separate Statement and fails to cite to a complete copy of the lease agreement. The excerpt set forth in Defendant's memorandum in support is insufficient to carry Defendant's initial burden. Defendant provides no legal argument analyzing the enforceability and legal import of the hold harmless agreement in its entirety.

In particular, the Defendant does not quote the entire language of the hold harmless clause. The clause expressly states that, "Except for LANDLORD's willful or grossly negligent conduct, TENANT hereby assumes all risk of damage to property or injury to person in or about Premises from any cause, and TENANT hereby waives all claims in respect thereof against LANDLORD." Defendant makes no showing that the alleged conduct did not rise to the level of willful or grossly negligent conduct. So there remains a triable issue of material fact as to whether the Landlord's conduct falls within that express exception to the hold harmless clause.

Furthermore it is unclear whether the hold harmless clause applies to the Landlord's conduct. The express language of the agreement states that the TENANT will hold the LANDLORD harmless against claims arising from the TENANT's use of the property. Here, the problem is the LANDLORD invited the fraudulent physician to the premises to promote LANDLORD's business.

Accordingly, the burden does not shift to Plaintiff to show that triable issues of material fact exist.

The court DENIES the motion for summary adjudication on this ground as to all three causes of action. And the motion for summary judgment is also DENIED.

Unforeseeable Criminal Acts of Third Party Dr. Mario

As to the first cause of action for negligence, Defendant argues that as a matter of law, the criminal acts by Dr. Mario were unforeseeable, under the totality of the circumstances, so that Defendant had no legal duty to protect Plaintiff against those acts. (**Ann M. v. Pacific Plaza Shopping Center** (1993) 6 Cal.4th 666, 677; **Isaacs v. Huntington Memorial Hospital** (1985) 38 Cal.3d 112, 127-129.)

First, Defendant argues that she never discussed Dr. Mario with Plaintiff. (Freitas Decl. at para. 11.)

However, this argument fails for several reasons. Defendant admits that her co-lessee Jennifer Hubbard did invite Dr. Mario to perform injections and did promote him. Defendant claims that their business was an unincorporated association, and not a partnership or corporation. Jennifer and Defendant leased space together, then subleased space to Plaintiff. Accordingly, Defendant does not eliminate the legal possibility that she may still be held vicariously liable for the conduct of Jennifer Hubbard. Furthermore, the lease agreement at Exhibit A shows that both Hubbard and Freitas were listed as Landlords, suggesting that they were business partners. Plaintiff states in her declaration that she had discussions with both women prior to leasing space from them and understood them to be business partners. (Barton Decl. at para. 4, 8-9.)

Even assuming Defendant makes a prima facie showing that she did not invite or promote Dr. Mario's services, Plaintiff in her Opposition makes a showing that both Freitas and Hubbard made it clear to her that they were both excited to have Dr. Mario at their spa as a great way to advertise their joint business to customers. Accordingly, even if Defendant makes a prima facie showing, and even if the burden shifts to Plaintiff, Plaintiff has carried her burden to show a triable issue of material fact as to whether Defendant did or did not invite Dr. Mario to perform procedures at Bellasera and whether she did or did not promote Dr. Mario's services.

Second, Defendant argues that Plaintiff already had a pre-existing relationship with Dr. Mario. Defendant maintains that, prior to receiving treatment from Dr. Mario at Bellasera, Plaintiff had received three injections from him at Better Health Chiropractic, run by Dr. Jennifer Henrique and unaffiliated with Defendant. (Def.'s Sep. Statement Fact 18 -- Exhibit 2, Barton Depo at 104, 285, 351.)

This argument also fails, because it goes to the question of proximate cause and duty. If Defendant or her partner held Dr. Mario out as a reputable practitioner at their salon, then they may owe a duty of care to Plaintiff and other customers. Furthermore, if their holding Dr. Mario out was a proximate cause of Plaintiff's injury, then they may share at least some liability for comparative negligence. Defendant denies that she promoted Dr. Mario. But she admits that her business associate promoted Dr. Mario, and she fails to make an adequate showing that she cannot be held vicariously liable for the conduct of her business associate.

In her Opposition, Plaintiff states in her declaration that the only reason she went to see Dr. Mario that night was because his services were being made available at Bellasera. She did not know how to contact him personally. Accordingly, even if Defendant makes a prima facie showing sufficient to shift the burden of production, Plaintiff makes a prima facie showing sufficient to create a triable issue of material fact as to whether Freitas's owed Barton a duty of care and whether Freitas's conduct was a proximate cause of Barton's injury.

Third, Defendant argues that she never suspected Dr. Mario was a fraud, had no reason to believe his certificates and degrees were false, and it never occurred to her to investigate his background or qualifications. Furthermore Plaintiff herself did not investigate his credentials or perform any background checks. (Facts 43-44.) But this latter argument goes to the issue of Plaintiff's comparative negligence for her own injuries. It does not establish as a matter of law that Freitas owed no duty of care to Plaintiff or that Freitas could not bear partial liability under a comparative negligence analysis.

Defendant merely asserts that it was NOT foreseeable that Dr. Mario was qualified. But on the contrary, it is reasonably foreseeable that a person may be unqualified to perform a Botox procedure and Defendant owed a duty of care to reasonably inquire into Dr. Mario's background and qualifications. Defendant fails to show that she conducted a reasonable inquiry. There is a triable issue of fact here as to whether Defendant and/or her business associate conducted a reasonable inquiry before promoting Dr. Mario.

The motion for summary adjudication of the First Cause of Action for NEGLIGENCE is DENIED on these grounds.

Vicarious Liability for Conduct of Business Associate

Defendant argues that her business agreement was an unincorporated association, that she and Jennifer Hubbard co-leased space from which they jointly operated a beauty salon, and that they split costs including rent but did not share profits or losses. Defendant fails to establish the legal significance or impact of the argument that her business was an unincorporated association, rather than a corporation or partnership.

In Opposition, Plaintiff presents evidence from the deposition testimony of Jennifer Hubbard that she and Freitas were co-owners or business partners. (Barrett Decl. at Ex. 2.)

The motion for summary adjudication of the First Cause of Action for NEGLIGENCE is DENIED on this ground.

Premises Liability: Plaintiff's Purpose for Presence on Land; Other Factors

Defendant Freitas argues that she cannot be found liable for negligence, as a landlord, under the theory of premises liability. She argues this is so because she did not make any explicit statements or representations to Tiffany Barton concerning Dr. Mario's qualifications to administer Botox treatments. Defendant Freitas argues that she received no money from Dr. Mario as a result of Plaintiff's treatment.

Defendant argues that the purpose of the Plaintiff's presence on the land is a factor in determining whether the landlord owe's the Plaintiff a duty of care. But Defendant fails to present a complete analysis of this line of reasoning.

Defendant argues that other factors establish that Defendant owed no legal duty of care to Plaintiff. But Defendant cites no controlling case law in support of this argument.

Defendant fails to make a prima facie showing sufficient to meet her initial burden of production on this point. Even assuming she did, Plaintiff's Opposition presents evidence sufficient to create triable issues of material fact as to whether Defendant Freitas, as a co-lessee of the property, did promote Dr. Mario's services, did make her salon available to him to meet patients, and did benefit from his services.

Did Defendant Exercise Reasonable Care in Vetting Dr. Mario?

Setting aside the question of whether Defendant Freitas owed Plaintiff a duty of care, Defendant argues that the negligence claim also fails because she did exercise reasonable care in verifying Dr. Mario's qualifications. But Defendant fails to cite evidence in her Separate Statement sufficient to make a prima facie showing on this issue. Accordingly, the burden does not shift to Plaintiff.

The motion for summary adjudication of the First Cause of Action for NEGLIGENCE is DENIED on this ground.

Did Freitas Breach Contract with Plaintiff?

Defendant Freitas argues that she never spoke with Plaintiff about Dr. Mario, so that no oral contract existed between them. (Sep. Statement, Fact 46.) The burden shifts to Plaintiff.

Plaintiff's Opposition presents evidence sufficient to create a triable issue of material fact as to whether Freitas and Hubbard promoted Dr. Mario and as to whether they entered into an oral contract with Plaintiff to provide his services to Plaintiff. (Plaintiff's Sep. Statement at Facts 4-5.)

Accordingly, the motion for summary judgment/adjudication as to the Second Cause of Action for BREACH OF CONTRACT must be DENIED on this ground.

Did Freitas's Conduct Constitute an Unfair Business Practice?

Defendant Freitas raises the argument that her allegedly negligent failure to vet Dr. Mario cannot constitute an unfair business practice.

First, Freitas argues that she was tricked by a charlatan so that her allegedly negligent failure to investigate Dr. Mario's qualifications. Second, Freitas argues that Plaintiff has no standing to sue because Plaintiff cannot show she relied on Freitas's representations, because Freitas made no such representations to Plaintiff.

However, it appears there is a triable issue of fact as to whether Defendant Freitas committed an unlawful act by making deceptive, untrue, or misleading representations to Plaintiff, concerning Dr. Mario and his qualifications, which by the exercise of reasonable care should have been known to be untrue or misleading. (Cal. Bus. & Prof. Code 17500.)

Pursuant to CRC 3.1312 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-15-10.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Baseline Financial Services, Inc. v. Joanne Allison (and related cross-action)***
Court Case No. 08CECG03859

Hearing Date: June 17, 2010 (**Dept. 97B**)

Motion: Cross-Defendant Bank of the West's Motion to Compel Further Responses to Special Interrogatories and Requests for Production

Tentative Ruling:

To grant the motion. Cross-defendant Bank of the West is ordered to respond to the discovery requested, supplying the details requested as to the Bank's customers: full name, last-known business and residence addresses and all last known business, residence and cellular telephone numbers. Bank of the West is further ordered to produce the actual Notice of Intent letters sent to said customers, and not just an exemplar of the form used. Prior to producing this information, Bank shall send the *Pioneer* opt-out letter supplied by cross-complainant to the prospective substitute class members prior to cross-defendant being required to respond to the discovery requested. The information produced pursuant to these discovery requests shall be used only for the purposes of the litigation, and specifically only for the purpose of locating a suitable class representative, and shall not be disclosed without the consent of the customer, the parties by stipulation, or the court.

To grant sanctions in the amount of \$4,425.00

Explanation:

Before the court ruled on cross-complainant's motion for reconsideration, the issue of permitting cross-complainant to conduct limited-purpose discovery in order to find a suitable substitute class representative was briefed and discussed at the hearing. The court has thus already considered the arguments cross-defendant makes in the instant motion, including consideration of the *Rodriguez* case. [*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal. App. 4th 1110] A timely motion to reconsider that ruling was not made.

Joanne Allison's individual claims, and all class claims pertaining to her, were stayed pending the arbitration. However, the class claims themselves were not stayed, and need not be stayed. Even pursuant to *Rodriguez*, California law *continues to apply* to those parties not bound by the arbitration agreement (i.e., here, the class claimants). [*Rodriguez v. American Technologies, Inc.*, 136 Cal.

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Tentative Ruling

Re: ***Inova Enterprises, LLC v. Singh***
Superior Court Case No.: 10CECG00821

Hearing Date: June 17, 2010 (**Dept. 97C**)

Motion: Demurrer to complaint by Defendant Amandeep Singh

Tentative Ruling:

To sustain, without leave to amend. The prevailing party is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant. The request for judicial notice is granted.

Explanation:

The first cause of action for breach of contract and the second cause of action for possession of collateral do not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The matters judicially noticeable show that the action is barred by principles of res judicata. When all the facts necessary to show that the action is barred by res judicata are within the complaint or subject to judicial notice, the complaint is subject to a general demurrer on the ground it fails to state facts sufficient to constitute a cause of action. (*Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 485.) It is settled that a final judgment on the merits between the same parties bars a later action upon the same cause of action. (*Id.* at p. 486.)

Here, the complaint alleges the making of an installment note the parties entered into on July 22, 2005. The installment note, in the principal sum of \$505,004.00, was secured by personal property located at 5687 East Kings Canyon Road in Fresno, California, 93727. (Complaint, ¶¶6-7, exhibit 1.) The installment note called for payments of \$3,897.70 monthly, beginning on December 29, 2005, and continuing until November 29, 2012, at which time the unpaid balance would be due and payable. The installment note also provided for late fees of 10 percent of any installment not received within 10 days of the due date. The installment note also provided for two principal reduction payments of \$25,000.00 due on May 29, 2006, and November 29, 2006. (Complaint, exhibit 1, page 1 of the installment note.)

The installment note also included an acceleration clause that stated: "Should default be made in payment of any installment when due, the whole sum

of principal and accrued interest shall become immediately due, without notice, at the option of the holder of this note.” (Complaint, exhibit 1, page 2 of the installment note.)

In 2007, Amandeep Singh (“Singh”) was the plaintiff along with Kulwinder Sandhu (“Sandhu”) in a prior action against Inova Enterprises, LLC (“Inova”), in which they sued Inova for fraud and breach of contract. Inova filed its own lawsuit against Sandhu and Singh in 2008 for breach of the installment note for the purchase of the store/service station. The two actions were consolidated under the lead case, Fresno County Superior Court Case No. 07CECG00560 (“prior lawsuit”). The consolidated cases went to trial in July of 2009, and a judgment was entered on August 24, 2009. The jury determined that neither party was entitled to any damages. (Request for judicial notice, exhibits A and B.) Judgment on the special verdicts was entered on August 24, 2009. (Request for judicial notice, exhibit C.)

Inova’s complaint in the prior lawsuit alleged that Singh and Sandhu had breached the terms of the installment note. Inova sought damages in the total amount of \$501,892.02. (Request for judicial notice, exhibit A, p. 3.)

The current complaint alleges the making of the same installment note. (Complaint, ¶¶6-7.) The current complaint alleges that on August 11, 2009, Inova’s counsel wrote to the attorneys for Singh and Sandhu demanding payment for sums due under the installment note. The letter included an attachment setting forth how the past due sums were calculated. The letter sought payment of \$71,886.99, which represented past due installment payments of \$3897.70 for the period of March 29, 2008 through July 29, 2009, plus \$389.77 in late payment fees for each payment. (Complaint, exhibit 2.)

An acceleration clause in a contract permits a creditor to sue at once for the entire amount of an obligation if a default is made in an installment of principal or interest. If the acceleration clause is made expressly optional, the law provides the statute of limitations on the entire obligation will not begin to run until the creditor elects to take advantage of the acceleration clause. And even where the clause is in terms absolute or automatic, it is generally held to be not self-operative, i.e., it is interpreted in accordance with its manifest purpose, as giving the creditor an election to declare the whole amount due or not. Although normally a cause of action for breach of contract accrues at the time of breach, acceleration clauses operate to accelerate the entire amount of the debt and for statute of limitations purposes, the statute of limitations does not begin to run on installments not yet due until the creditor, by some affirmative act, manifests his or her election to declare the entire sum due. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, §§520, 535, and cases cited therein.) In other words, once the acceleration clause is exercised by the holder of the note and the whole amount of the unpaid balance is declared due, the statute of limitations begins to run on the entire amount due.

Absent the exercise by the creditor of an acceleration clause to declare the entire amount of an obligation due at once, however, successive actions may be maintained on the same contract whenever, after a former action, a new cause of action arises from the obligation, such as when a note is payable in monthly installments, the plaintiff is not limited to a single action but may sue for successive monthly breaches in payment. In other words, a new cause of action will not be barred by res judicata. (Code Civ. Proc., §1047; cf. *Mycogen Corporation v. Monsanto Company* (2002) 28 Cal.4th 888, 896 [Two lawsuits were based on violation of the same primary right, Monsanto's breach of contract, where first lawsuit sought specific performance, second lawsuit was for damages; the second lawsuit was barred.])

It is well settled that it is not necessary that the holder of an instrument containing an acceleration clause give, before commencing his action, any notice to the defaulting maker of his election to declare the entire amount due. The commencement of the action itself is notice of the exercise of the option. (*Jump v. Barr* (1920) 46 Cal.App. 338, 343-344.)

Inova has cited *Zingheim v. Marshall* (1967) 249 Cal.App.2d 736, 744-745, for the proposition that pursuant to Code of Civil Procedure section 1047, it can sue for successive breaches of the contract for installments that have come due since the judgment in the prior action.

Zingheim involved two lawsuits consolidated for trial that resulted in judgments for plaintiff in each. The plaintiff in that case had purchased a radio station for \$40,000, payable in monthly installments of not less than \$300 a month, with a provision for a larger monthly installment payment when net billings from advertising sold in the previous month exceeded a certain amount. There was an acceleration clause in the contract. Before an actual delinquency occurred, the plaintiff filed an action for the entire balance, upon the theory that monthly payments of more than \$300 should have been made but were not. (*Zingheim v. Marshall, supra*, 249 Cal.App.2d 736, 742.)

The trial court found that there had not been a default before the action was commenced; because 12 payments had become due up to the date of the judgment, judgment was given for those amounts totaling \$3,600. Part of the judgment contained a conclusion that "no default can be declared for purposes of declaring the balance of the remaining payments due immediately where the default occurs during the process of litigation to determine whether such a default existed. The right of action must exist at the time that action is commenced." (*Zingheim v. Marshall, supra*, 249 Cal.App.2d 736, 742.)

The plaintiff then brought a third lawsuit to recover the unpaid balance of the purchase price and which resulted in a judgment. On appeal from that judgment, the defendants argued that the action was barred by res judicata

because of the previous lawsuits and the \$3,600 judgment in plaintiff's favor. (*Zingheim v. Marshall, supra*, 249 Cal.App.2d 736, 744.)

Citing Code of Civil Procedure section 1047, the court said that the later action was not barred because it was conclusively adjudicated in the prior action that there was no delinquency due under the contract at the time the action was commenced that permitted the plaintiff to declare the entire unpaid balance due; and that the plaintiff could recover only the accrued monthly payments. In the prior action, the plaintiff had no right to declare the entire unpaid balance due under the acceleration clause because of nonpayment during the pendency of the action of installments due in that period. [Emphasis added.] (*Zingheim v. Marshall, supra*, 249 Cal.App.2d 736, 744-745.) Since no cause of action for subsequently accruing payments arose prior to the \$3,600 judgment in the prior action, recovery of the installments occurring after the first action were not barred by the judgment in that action. (*Zingheim v. Marshall, supra*, 249 Cal.App.2d 736, 745.)

By contrast here, there was no finding by the jury in the prior action that Inova had no right to declare the entire unpaid balance due. (See judgment on special verdicts.) Although the jury found on Inova's complaint that there was a contract between the parties clear enough so that the parties could understand what each was required to do, that Singh and Sandhu had failed to do all, or substantially all, of the significant things that the contract required them to do, and they were not excused from doing those things, so that there was a breach, Inova was not awarded any damages on the contract. The jury also found that although Inova made false representations to Singh and Sandhu intending them to rely on those statements, the jury found that Singh and Sandhu did not reasonably rely on the representation, and Singh and Sandhu were not awarded any damages on their complaint, either. On the motion for attorneys fees heard on November 19, 2009, the court found that there was no prevailing party on the contract for purposes of an award of attorneys fees. (Request for judicial notice, exhibit B.) For whatever reason, as reflected in the judgment on special verdicts in the prior action, the jury left the parties in a standstill.

"Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom. It was conclusively adjudicated in the former action, No. 240878, that there was no delinquency under the contract at the time that action was commenced that permitted plaintiff to declare the entire unpaid balance due; and that plaintiff might recover only the accrued monthly payments; that he had no right to declare the entire unpaid balance due because of nonpayment during the pendency of the action of installments that became due in that period. No appeal was taken from that judgment. No cause of action for subsequently accruing payments arose prior to judgment in that action, No. 240878. Recovery of such installments cannot be barred by the judgment in that action." (*Zingheim v. Marshall, supra*, 249 Cal. App. 2d 736, 744-745.)

