

Tentative Rulings for May 17, 2016
Departments 402, 403, 501, 502, 503

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).)

16CECG00094 *Weldrick v. City of Fresno et al.* (Dept. 501)

16CECG00180 *Alvaro Rivera-Diaz v. Alejandro Rivera-Diaz* (Dept. 503)

14CECG01906 *Haley v. Brumbaugh* (Dept. 402 for oral argument)

15CECG00974 *Barboza v. Stengel* (Dept. 501)

13CECG03811 *LeDuc v. General Motors Corp.* (Dept. 501)

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

14CECG02057 *Arnoldo Lua v. H/S Development Company, LLC* is continued to Wednesday, June 1, 2016, at 3:30 p.m. in Dept. 502.

16CECG00394 *Weidenbach v. Scott et al.* is continued to Tuesday, May 24, 2016, at 3:30 p.m. in Dept. 501.

(Tentative Rulings begin at the next page)

(24)

Tentative Ruling

Re: ***Arteaga v. Fresno Community Regional Medical Center***
Court Case No. 13CECG03906

Hearing Date: **May 17, 2016 (Dept. 402)**

Motion: Demurrer and Motion to Strike of Defendants Pervaiz Chaudhry, M.D., Valley Cardiac Surgery Medical Group and Chaudhry Medical, Inc. to the Fourth Amended Complaint

Tentative Ruling:

To sustain the general demurrer to the Second cause of action of the Fourth Amended Complaint as to the moving defendants, without leave to amend. To overrule the demurrers for misjoinder and uncertainty. To grant the motion to strike (also without leave to amend), except for one request only, namely the language at ¶140, p. 11:27-12:1: that language will not be stricken, as it also applies to the Hospital defendants.

Moving defendants are granted 10 days' leave to file their answer to the Fourth Amended Complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Meet and Confer

Meet and confer efforts were insufficient, on both sides. Defense counsel does not appear to properly understand the necessity for *in person or telephonic contact over the issues* that is required by Code of Civil Procedure section 430.41. The only person-to-person contact she had was on March 14, 2016, which appeared to consist only of obtaining plaintiffs' counsel's agreement to provide a *written meet and confer response*, and a continuance to await that letter. When she received no letter response, she filed this motion. There is no indication that the parties had a meeting wherein they discussed the issues, including the legal support for and against each side's position, as required by subdivision (a)(1) of section 430.41. Her letter contact and subsequent follow-up to demand opposing counsel's countering letter response does not comply with the statute. While letter correspondence suffices for meet and confer over discovery matters, it does not under section 430.41 (even though letter exchanges during this process can clearly be helpful in advance of the meeting).

Even so, it appears that further meet and confer will not resolve the issues; therefore, the court will rule on these motions. However, counsel are warned that in the future the court expects better compliance with this statute *from both sides*, and failure to do so will result in the demurrer being ordered off calendar to allow further *in person or telephonic* meet and confer efforts.

Demurrer and Motion to Strike:

Defendants' Requests for Judicial Notice are granted except as to Exhibits B and E of the Declaration of Barry N. Endick, as these copies are not the filed-stamped versions of those documents. However, the court takes judicial notice of those documents in the court's own file.

The various depositions and documents plaintiffs present in evidence are not subject to judicial notice and thus cannot be considered on these pleading motions, and must be disregarded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318—on demurrer and motion to strike, the court considers only matters appearing on the face of complaint or matters outside pleading that are judicially noticeable. *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—no other extrinsic evidence considered.)

The Second cause of action clearly has no charging allegations against the Chaudhry defendants. Plaintiffs allege Dr. Chaudhry's bad acts as a physician and surgeon (including allegations of alcohol use/abuse), but they allege *the Hospital* was on notice of this, *the Hospital* knew this was a routine practice, *the Hospital* had a duty to ensure competency of its staff, *the Hospital* breached this duty by failing to screen the competency of Dr. Chaudhry, and as a result *the Hospital* harmed plaintiffs and is liable for his conduct. So, while Dr. Chaudhry's negligence is mentioned in this cause of action, no charging allegations are aimed at him or the other Chaudhry defendants. Thus, it states no cause of action against moving defendants and is subject to general demurrer. (Code Civ. Proc. § 430.10, subd. (e).)

This court did not previously approve plaintiffs stating the Second cause of action against the Chaudhry defendants. This cause of action has never included charging allegations against these defendants. With plaintiffs' Motion to Amend the only proposed change to this cause of action was the addition of Paragraph 40, which contained the punitive damage allegations. The best that can be said is that the court failed to notice that plaintiffs erroneously named the Chaudhry defendants in that Paragraph and should not have granted leave to amend as to that portion of the Paragraph, since there were no other allegations against them in that cause of action.

It was also clear from the court's ruling on the Hospital and Chaudhry defendants' motions to strike against the Third Amended Complaint that the court viewed the corporate negligence cause of action to be stated only against the Hospital defendants: it observed that the alcohol use/abuse allegations against Dr. Chaudhry had "bearing on a hospital's decision to grant privileges and employment," which was why these allegations were not stricken (and again, no attention was drawn to Paragraph 40 on that motion). If, *arguendo*, plaintiffs intended the Second cause of action to be stated against the Chaudhry defendants from the beginning, this was not clear until they filed their Fourth Amended Complaint and added them to the caption and prayer for that cause of action. Defendants' demurrer and motion to strike are not untimely or precluded.

This cause of action is also subject to general demurrer because *Elam* claims are properly brought against hospitals, and moving defendants are not in that category. This does not make the claim subject to special demurrer for misjoinder, as argued by defendants, as this type of demurrer is not brought to state that a certain type of cause of action cannot state facts sufficient against moving defendant (which argues the point of a *general* demurrer), but rather is proper where the defendant is *improperly joined to the action*, as provided for in Code of Civil Procedure section 378 (i.e., the claim does not arise out of the same transaction or have questions of fact and law in common). (See *Anaya v. Superior Court* (1984) 160 Cal.App.3d 228, 231.) Thus, the court sustains the demurrer based on subdivision (e), and not subdivision (d) of Code of Civil Procedure section 430.10. Nor is the cause of action uncertain; the only argument defendants made for this was that it was uncertain because it was subject to demurrer based on subdivision (d) and (e); that is not the ground for a demurrer for uncertainty.

It may be strictly true that the *Elam* opinion “did not preclude the possibility that a physician or medical group could be liable” under an *Elam* theory, as plaintiffs argue. But the more accurate observation is that the *Elam* court did not discuss or deal with this at all; there was simply no consideration of it. The court merely considered a *hospital's* duty of care. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 345. See also *Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 960, *fn* 9—“*Elam* explained that [t]he term ‘corporate negligence’ has been commonly used to describe hospital liability predicated not upon vicarious liability ..., but upon its violation of a duty—as a corporation—owed directly to the patient which resulted in injury.”) Plaintiff cited no authority for extending this theory of liability to non-hospital defendants such as moving defendants.

The court has found one unpublished federal District Court opinion which appears to suggest there is no such authority. In *Meier v. U.S.* (N.D. Cal., Dec. 22, 2006, No. C 05-04404 WHA) 2006 WL 3798160 (*aff'd*, (9th Cir. 2009) 310 Fed.Appx. 976) the plaintiff sued the U.S. Government for injuries sustained at a Veteran's Hospital and included an *Elam* claim, and the court was determining whether governmental immunity applied. In regard to that, the critical issue was whether that theory of liability could be applied to *individual persons* (i.e., to implicate waiver of immunity pursuant to 28 U.S.C. 1346, subd. (b)(1)). The court found that an *Elam* claim was for *corporate* negligence against a *hospital*, and that “[plaintiff] has not cited – **nor can the Court find** – any California decision extending a hospital's corporate liability to individual persons.” (*Id.* *4, *emphasis added.*) This appears to suggest that the boundaries of an *Elam* claim have not been extended beyond encompassing liability for hospitals.

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

Tentative Ruling

Issued By: JYH **on** 5/16/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(27)

Tentative Ruling

Re: **James v. Wells Fargo Bank, N.A., et al.**
Superior Court Case No. 15CECG01024

Hearing Date: **May 17, 2016 (Dept. 403)**

Motions: Defendant Wells Fargo's demurrer to the Third Amended Complaint; Defendant Wells Fargo's motion to strike portions of the Third Amended Complaint

Tentative Ruling:

To sustain the demurrer without leave to amend. (CCP §§ 430.10(e); 430.41(e)(1). Defendant Wells Fargo shall submit to this court, within 7 days of service of the minute order, an ex parte request dismissing the action as to the demurring defendant.

To grant the motion to strike with the exception of the B&P Code § 17200 (ninth) cause of action.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 19, 2016 AT 3:00 P.M.

Explanation

Demurrer

Where the complaint fails to plead ultimate facts, the complaint is subject to a demurrer. (Code of Civil Procedure § 430.10(e); *Berger v. California Ins. Guar. Ass'n* (2005) 128 Cal.App.4th 989, 1006.) Essentially, "[a] complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 CA3d 1371, 1390.) Essentially, "'conclusory allegations will not withstand demurrer.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 quoting *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)

1. Causes of Action for: Breach of Contract/Breach of Implied Covenant/Anticipatory Breach

A threshold element to establishing a breach of contract cause of action is the existence of a contract. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Also, simply alleging the defendant "breached" the contract is conclusory and thus insufficient. (*Bentley v. Mountain* (1942) 51 Cal.App.2d 95, 98.) There must be factual allegations describing the conduct giving rise to the alleged breach. (*Ibid.*)

Additionally, a complaint asserting a cause of action for breach of contract must allege whether, “the contract is written, is oral, or is implied by conduct.” (CCP § 430.10(g); see *Maxwell v. Dolezai* (2014) 231 Cal.App.4th 93, 99 [specific allegations the contract was written, and setting forth the date of formation, was sufficient to withstand a demurrer under CCP § 430.10(g).]) A complaint alleging a breach of a written contract, “may plead the legal effect of the contract rather than its precise language.” (*Construction Protective Services, Inc., v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199.) Alternatively, the plaintiff may attach and incorporate the written contract to the complaint. (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1091.)

Here, the Third Amended Complaint (“TAC”) alleges the TPP agreement is evidenced by “written correspondence”, “telephone conversation” and “impliedly acquiesced”. (see TAC, ¶¶ 29, 30, 53, 67.) However, the TAC neither attaches the alleged written contract nor sets forth its terms. (*Davies, supra*, 168 Cal.App.4th at 1091; *Construction Protective Services, supra*, 29 Cal.4th at 199.) Also, to the extent the TAC alleges the contract was “impliedly acquiesced” there are no facts alleging the mutual assent necessary to support an implied contract. (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134.)

Consequently, the TAC does not sufficiently state a cause of action for breach of contract. Moreover, as they are premised on the alleged breach, which is insufficiently pled, the causes of action for breach of the implied covenant and anticipatory breach are also insufficient. The demurrer is sustained.

2. Cause of Action for Promissory Estoppel

The elements of a promissory estoppel claim are: “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” (*Laks v. Coast Fed. Sav. & Loan Ass’n* (1976) 30 Cal.App.3d 885, 890.) Allegations of a conditional promise is insufficient to establish a “clear and unambiguous” promise. (*Id.* at 891.)

Here, the TAC does not attach (to the extent they were written) the alleged promises of Wells Fargo. Neither does it clearly set forth the terms of those promises (to the extent they were made orally) nor does it allege the promise was unconditional. Consequently, the complaint does not set forth a “clear and unambiguous” promise. The demurrer is sustained.

3. Causes of Action under the Homeowner Bill of Rights

Civil Code § 2923.55

The servicer must contact the borrower to, “assess the borrower's financial situation and explore options for the borrower to avoid foreclosure” before recording of Notice of Default. (Civil Code § 2923.55(b)(2).) The servicer must also send to the

borrower a statement of the different types of documents the borrower may request. (Civil Code §2923.55(b)(1)(B).)

Here, the TAC alleges the plaintiff was not contacted in violation of Civil Code § 2923.55. (TAC, ¶ 85.) However, the TAC alleges the plaintiff discussed his financial situation with the defendant during both the 2011 and 2015 loan modification attempts. (TAC, ¶¶ 18, 26, 27.) The allegations that the plaintiff discussed his financial situation with the defendant demonstrates compliance, rather than a violation, of Civil Code § 2923.55. Moreover, Civil Code § 2923.55 does not require a loan modification. Additionally, there is no allegation plaintiff did not receive the statement of the types of documents he could request. (Civil Code § 2923.55(b)(1)B.) Accordingly, the causes of action under Civil Code § 2923.55 are insufficiently pled.

Civil Code § 2923.6

Once a borrower submits a completed mortgage modification application, the foreclosure process is suspended while review of the application is pending. (Civil Code § 2923.6(c) [no dual tracking].) In this case, the plaintiff does not allege he completed a loan modification application after the effective date of Civil Code § 2923.6. Accordingly, like the previous complaints, the prerequisite for Civil Code § 2923.6 (i.e. the submission of a completed application) is unalleged.

Civil Code § 2923.7

A borrower requesting a foreclosure prevention alternative must be provided with a "single point of contact" by the servicer. (Civil Code § 2923.7(a).) Here, the plaintiff alleges he was not provided with the "name or information of their case manager . . ." (TAC, ¶ 82.) However, Civil Code § 2923.7 does not require a name or case manager. Rather, "single point of contact" means an individual or team of personnel . . ." (Civil Code § 2923.7(e).) Moreover, the plaintiff herein claims he discussed his financial situation with the defendant thus raising the inference a single point of contact had been established. (TAC, ¶¶ 18, 26, 327.)

Civil Code § 2923.12

Injunctive relief to enjoin material violations of the HOBR may be issued. (Civil Code § 2923.12(a).) Here, however, the plaintiff has insufficiently pled a material violation of those provisions. Accordingly, the request for injunctive relief is denied.

4. Business & Professions Code § 17200

As plaintiff's other causes of action are insufficient, there is no predicate for the Business & Professions Code § 17200 claim. (*Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 357.)

Motion to Strike

Res Judicata Effect of Demurrer Sustained without Leave to Amend

(28)

Tentative Ruling

Re: ***Allison, et al. v. Union Bank, et al.***

Case No. 16CECG00691

Hearing Date: May 17, 2016 (Dept. 403)

Motion: By Plaintiffs James Austin Allison, Jr. and Rose Allison for a preliminary injunction against defendants Union Bank and Clear Recon Corp. to prevent them from foreclosing upon or otherwise transferring the real property at issue in this dispute.

Tentative Ruling:

To grant the motion for a preliminary injunction.

Defendants Union Bank and Clear Recon Corp. shall be ordered to take no action to foreclose upon or otherwise transfer the real property at issue in this dispute pending trial of the action.

If oral argument is requested, Defendants must be prepared to address the undertaking requirement. If oral argument is not requested, or Defendants do not otherwise address the undertaking requirement, then the Court will consider the requirement waived.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 19, 2016 AT 3:00 P.M.

Explanation:

Plaintiffs have filed a complaint for Damages, Injunctive Relief and Quiet Title related to a property located in Coalinga, California. Plaintiffs allege that they have acquired title to a property by adverse possession.

On March 7, 2016, Plaintiffs moved ex parte for a Temporary Restraining Order and to set an OSC re: preliminary injunction to prevent the sale of the property at issue in this dispute by foreclosure action on the part of Defendants.

This Court granted the TRO and initially set a hearing on the matter for March 22, 2016. This hearing was continued by several stipulations to May 17, 2016.

To date there have been no opposition filed or any other documents filed related to this hearing.

Cal.Civ. Proc. Sec. 526 states:

- (a) An injunction may be granted in the following cases:
- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
 - (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.
 - (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual.
 - (4) When pecuniary compensation would not afford adequate relief.
 - (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

In deciding whether to issue a preliminary injunction, a court must weigh two interrelated factors: "(1) the likelihood that the moving party will ultimately prevail on the merits, and (2) the relative harm to the parties from issuance or nonissuance of the injunction." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1462 (quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) Injunctive relief may be granted based on a verified complaint (such as here) showing sufficient grounds for relief. (Code of Civ.Proc. §527, subdvs. (a) & (h).)

Probability of Success on the Merits

Here, Plaintiffs claim that the evidence in the verified complaint shows that they have acquired adverse possession no later than 2004.

The required elements for relief in an action to quiet title based on adverse possession, are that (1) possession has been by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) such possession was hostile to the owner's title; (3) the claimant claims the property as his or her own, under either color of title or claim of right; (4) possession has been continuous and uninterrupted for at least five years; and (5) the claimant has paid all of the taxes levied and assessed against the property during that period. (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421.)

The verified complaint does appear to meet all of these elements: (1) Plaintiffs allege that they had actual possession so as to constitute reasonable notice to any of the original owners' possible heirs (Verified Complaint ("Veri. Cmplt.") at ¶¶4-6); (2) such possession was hostile to any putative heirs (Veri. Cmplt. ¶¶4-6); (3) the Plaintiffs claimed

it was theirs (Veri.Cmplt. ¶6); (4) possession has been continuous since 1999 (Veri.Cmplt. ¶¶4, 6); and, (5) the Plaintiffs assert that they paid all the taxes on the property (Veri.Cmplt. ¶6.).

Thus, Plaintiffs have produced evidence that they have fulfilled the elements for a quiet title action by adverse possession and have shown a likelihood of success on the merits.

Balance of Hardships.

Real property is usually deemed "unique," so that injury or loss cannot be compensated in damages. (*Aspen Grove Condominium Ass'n v. CNL Income Northstar LLC* (2014) 231 Cal.App.4th 53, 62-4.) Here, if the injunction does not issue, and defendants sell the property at a foreclosure sale, then Plaintiffs are unlikely to be able to reclaim the property and so are likely to suffer irreparable injury. (*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-71 (relief unlikely unless threat of harm is irreparable.)

Defendants have not submitted opposition papers, so it is unknown what harm could occur to them by granting this injunction.

Under these circumstances, Plaintiffs have produced evidence to show that the balance of hardships favors granting the preliminary injunction.

Undertaking

The parties have not addressed the undertaking requirement. If a preliminary injunction is granted, the court must require an undertaking. (Civ.Proc. §529.) However, the bond requirement may be waived if the enjoined party does not address the requirement. (*Smith v. Adventist Health System/West* (2010) 183 Cal.App.4th 729, 740.)

Therefore, the Court will not require an undertaking unless Defendants request oral argument and addresses the issue. Otherwise, the Court will deem the requirement waived.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (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: KCK **on** 05/16/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **DiSalvo Law Office v. Lucia Ochoa**
Superior Court Case No. 14 CECG 02391

Hearing Date: May 17, 2016 (**Dept. 403**)

Motion: Special Motion to Strike by Defendant

Tentative Ruling:

To grant the Plaintiff's request for judicial notice pursuant to Evidence Code § 452(d)(1). To overrule the Defendant's objections to the Plaintiff's evidence.

To grant the motion pursuant to CCP § 425.16 and strike the complaint without leave to amend. A separate motion for fees must be served and filed within the time limits for filing a notice of appeal. [CRC 3.1702(b); *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 545.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 19, 2016 AT 3:00 P.M.

Explanation:

Anti-SLAPP Motion in General

The Legislature has authorized a special motion to strike that may be filed against "SLAPP" suits (Strategic Lawsuits Against Public Participation). The anti-SLAPP motion is a procedural remedy, designed to quickly identify and dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [CCP § 425.16(a)]; see also *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056—a "quick and inexpensive method for unmasking and dismissing such suits" (internal quotes omitted)]

Courts use a two-step process for determining whether an action or a claim is a "SLAPP" suit subject to a special motion to strike. Plaintiff's claim must (1) arise out of defendant's protected speech or petitioning; and (2) lack even minimal merit. [*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733]

Defendant's Burden

The only thing that defendant needs to show to invoke the protection of the anti-SLAPP statute is that plaintiff's lawsuit "arises from" defendant's exercise of free speech or petition rights as defined in CCP § 425.16(e). [*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.] If plaintiff contends the suit is subject to one of the

CCP § 425.17 exemptions, plaintiff has the burden of proof on this issue. [*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 26, 109 CR3d 329, 340] Defendant need only make a prima facie showing that plaintiff's complaint "arises from" defendant's constitutionally-protected free speech or petition activity. The burden shifts to plaintiff to establish as a matter of law that no such protection exists. [See *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458-459]

In determining whether defendant has sustained its initial burden, the court considers the pleadings, declarations and matters that may be judicially noticed. [*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329, 339 (disapproved on other grounds in *Simpson Strong-Tie Co., Inc. v. Gore*, supra, 49 Cal.4th at 25, fn. 3)] But defendant's supporting evidence must be filed with its moving papers. Evidence presented for the first time in reply papers may be *disregarded*. [*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1536—trial court did not abuse discretion in excluding declarations containing new evidence filed with defendant's reply papers]

Although the statute refers to "lawsuits brought primarily to chill exercise" of rights of free speech and petition, defendant *need not show* that the lawsuit was brought with the subjective intent to "chill" these rights. [*Equilon Enterprises, LLC v. Consumer Cause, Inc.*, supra, 29 Cal.4th at 58] Nor need defendant demonstrate that plaintiff's complaint actually had a "chilling" effect on his or her First Amendment rights. [*Equilon Enterprises, LLC v. Consumer Cause, Inc.*, supra, 29 Cal.4th at 59; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88]

Plaintiff's Burden

Once defendant makes such a prima facie showing under the first prong, the burden shifts to plaintiff to establish a "probability" that plaintiff will prevail on whatever claims are asserted against defendant. [See CCP § 425.16(b)] "(P)laintiff must demonstrate that *the complaint is both legally sufficient* and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." [*Premier Med. Mgmt. Systems, Inc. v. California Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476 (emphasis in original; internal quotes omitted)—whether complaint could be amended to state valid claim is **immaterial**; see also *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821—complaint must adequately plead cause of action] The burden is on plaintiff to produce evidence that would be admissible at trial—i.e., to proffer a prima facie showing of facts supporting a judgment in plaintiff's favor. [*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.

To establish a "probability" of prevailing on the merits, plaintiff must demonstrate that the complaint is both:

- legally sufficient; and
- supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by plaintiff is credited. [*Navellier v.*

Sletten (2002) 29 Cal.4th 82, 89, 93; *Soukup v. Law Offices of Herbert Hafif*, supra, 39 Cal.4th at 291]

The “probability of prevailing” is tested by the same standard governing a motion for summary judgment, nonsuit or directed verdict. I.e., in opposing an anti-SLAPP motion, it is plaintiff’s burden to make a prima facie showing of facts that would support a judgment in plaintiff’s favor. [*Taus v. Loftus* (2007) 40 Cal.4th 683, 714—a “summary-judgment-like procedure”; *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 963; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 469] The court does not weigh credibility or comparative strength of the evidence. The court considers defendant’s evidence only to determine if it defeats plaintiff’s showing as a matter of law. [*Soukup v. Law Offices of Herbert Hafif*, supra, 39 Cal.4th at 291; *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 522; *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700—“We do not weigh credibility, nor do we evaluate the weight of the evidence ... (W)e accept as true all evidence favorable to the plaintiff”]

Plaintiff must demonstrate that the claim is legally sufficient. [*Navellier v. Sletten*, supra, 29 Cal.4th at 93; *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989—plaintiff need show only a “minimum level of legal sufficiency” (internal quotes omitted)] Plaintiff must present sufficient evidence to satisfy the standard of proof required under applicable substantive law. Where “clear and convincing” evidence is required (rather than a mere preponderance), plaintiff’s proof must meet this higher standard. [See *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84] In that case, plaintiff, a public figure, sued for defamation based on allegedly false charges published on defendant’s internet web site. Defendant’s anti-SLAPP motion was granted because plaintiff failed to present “clear and convincing” evidence that D acted with “actual malice” (i.e., hatred, ill will or reckless disregard for truth) as required in public figure defamation actions. [*Christian Research Institute v. Alnor*, supra, 148 Cal.App.4th at 84-85]

Competent Evidence

In order to demonstrate a probability of prevailing on the merits, plaintiff must also adduce competent, admissible evidence sufficient to overcome any privilege or defense to the claim asserted by defendant. [*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323—Civil Code § 47(b) litigation privilege presents substantive defense plaintiff must overcome to demonstrate probability of prevailing; *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 447—no probability of prevailing where undisputed facts showed plaintiff’s claims were barred by statute of limitations; *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 78—physician challenging peer review action who failed to exhaust “administrative and judicial remedies” could not establish probability of prevailing.

As with summary judgment motions, a court ruling on an anti-SLAPP motion must consider both the “supporting and opposing affidavits” (CCP § 425.16(b)(2)). Thus, gaps in plaintiff’s showing of a “probability of success on the merits” may be filled by defendant’s evidence. [*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289] Plaintiff

must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. [*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108] Plaintiff's evidentiary burden is similar but not identical to the burden in opposing a summary judgment motion.

Affidavits

Affidavits or declarations not based on personal knowledge, or that contain hearsay or impermissible opinions, or that are argumentative, speculative or conclusory, are **insufficient** to show a "probability" that plaintiff will prevail. [*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 714] Affidavits or declarations "on information and belief" are hearsay and hence insufficient to show a "probability" that plaintiff will prevail. [*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497] Evidence excludible only because it lacks a proper foundation *may* be used if there is a *high probability* plaintiff could establish a proper foundation at trial. [*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1148--plaintiff could use videotape, lacking authentication, to overcome anti-SLAPP motion because of "high probability" tape would be authenticated at trial]

Motion at Bench

Ochoa has met her Burden

As stated supra, the moving defendant need only make a prima facie showing that plaintiff's complaint "arises from" defendant's constitutionally-protected free speech or petition activity. [*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.] In the case at bench, Ochoa indicates that DiSalvo alleges at ¶ 28 of his verified complaint that she filed her DLSE claim "without probable cause" and that she "wrongfully trespassed" and stole his "personal property" for the purpose of "gaining an unfair advantage" in the administrative proceeding. This is sufficient to show that the action at bench "arose from" Ochoa's constitutionally-protected petition activity. The Defendant has met her burden pursuant to CCP § 425.16(e).

DiSalvo has not met his Burden

First, it should be noted that the law cited in the Plaintiff's Memorandum of Points and Authorities is incorrect. It appears that counsel has focused solely on the chilling of freedom of speech element of CCP § 425.16(a) and ignored the right to petition element. The Memorandum discusses whether the matter involved a "public issue", whether Ochoa was a "public figure," whether her conduct affected "large numbers of people" and whether her actions were of "widespread public interest." See pages 7-10. In short, it is not helpful.

Second, an examination of the Complaint indicates that no research was conducted to determine the applicable causes of action based upon the operative facts. To reiterate, the Plaintiff must show that his claims are legally sufficient. [*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 93] The second cause of action alleges "claim and

delivery." It also known as a writ of possession. But, it is a provisional remedy not a cause of action. See CCP § 512.010 et seq.

The third cause of action alleges "invasion of privacy." It appears that the Plaintiff is attempting to allege "intrusion into private affairs." The elements are set forth in CACI No. 1800:

[Name of plaintiff] claims that [name of defendant] violated [his/her] right to privacy. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] had a reasonable expectation of privacy in [specify place or other circumstance];
2. That [name of defendant] intentionally intruded in [specify place or other circumstance];
3. That [name of defendant]'s intrusion would be highly offensive to a reasonable person;
4. That [name of plaintiff] was harmed; and
5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

In deciding whether [name of plaintiff] had a reasonable expectation of privacy in [specify place or other circumstance], you should consider, among other factors, the following:

- (a) The identity of [name of defendant];
- (b) The extent to which other persons had access to [specify place or other circumstance] and could see or hear [name of plaintiff]; and
- (c) The means by which the intrusion occurred.

In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:

- (a) The extent of the intrusion;
- (b) [Name of defendant]'s motives and goals; and
- (c) The setting in which the intrusion occurred.

The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230.) "Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.'" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272 at 295.)

Here, the Declaration of DiSalvo states that Ochoa was his office manager/legal assistant. See Declaration of DiSalvo at ¶¶ 5, 11, 13, and 17. He states she misappropriated documents from his office. These documents consisted of "calendars,

fee agreements, confidential communication between the law office and clients, ledgers and print outs of payout logs, computer backups containing my entire law office hard drive and other documentation that evidenced the true payments made to Lucia." These items were allegedly found missing from his file cabinets. *Id.* At ¶ 28.

Yet, he also states at ¶ 51 that Ochoa was not allowed to take documents home but was instructed to lock up the cabinet at the end of the work day. Accordingly, he implies that she already had access to these documents in her capacity as an employee. As a result, she did not "intrude on his privacy." See *Hernandez*, *supra*. The cause of action for intrusion into private affairs is not equivalent to conversion. Compare CACI No. 1800 with CACI No. 2100. Therefore, this cause of action is legally insufficient. As for the fourth cause of action for "breach of right of privacy by intrusion," it is duplicative of the third cause of action and meritless as well.

The fifth cause of action is entitled "conspiracy." "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, *the conspiracy itself is not actionable without a wrong.*" (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454.) "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, internal citations omitted.) As a result, the fifth cause of action is legally insufficient.

Finally, the sixth cause of action alleges intentional infliction of emotional distress. As a matter of law, the defendant's conduct must be of an "outrageous" nature; i.e., conduct a reasonable person would regard as intolerable in a civilized community. See CACI No. 1602 and *State Rubbish Collectors Ass'n v. Siliznoff* (1952) 38 Cal.2d 330, 337-339, *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; and *Christensen v. Super.Ct. (Pasadena Crematorium)* (1991) 54 Cal.3d 868, 903. Thus, the conduct must amount to more than indignities, annoyances, hurt feelings, or bad manners. See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1610 and *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108-1109.

Here, DiSalvo offers his Declaration regarding the history of friendship with Ochoa and the betrayal he felt regarding her alleged conduct. See Declaration at ¶¶ 40-48. But, her conduct does not amount to "outrageousness" as a matter of law. See *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128. Therefore, the sixth cause of action is legally insufficient.

First Cause of Action--Conversion

The first cause of action alleges conversion. The elements are located at CACI No. 2100:

[Name of plaintiff] claims that [name of defendant] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [owned/possessed/had a right to possess] [a/an] [insert item of personal property];
2. That [name of defendant] intentionally and substantially interfered with [name of plaintiff]'s property by [insert one or more of the following:]

[taking possession of the [insert item of personal property];] [or]
[preventing [name of plaintiff] from having access to the [insert item of personal property];] [or]

[destroying the [insert item of personal property];] [or]

[refusing to return the [insert item of personal property] after [name of plaintiff] demanded its return.]

3. That [name of plaintiff] did not consent;

4. That [name of plaintiff] was harmed; and

5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

“[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. **Because the act must be knowingly done, ‘neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.’** It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion.” [Taylor v. Forte Hotels International (1991) 235 Cal.App.3d 1119, 1124, internal citations omitted.]

“In order to establish a conversion, the plaintiff ‘must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.’ Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort.” [Collin v. American Empire Insurance Co. (1994) 21 Cal.App.4th 787, 812, internal citations omitted.]

An action for conversion properly lies only where there is some substantial interference with possession or the right to possession, and the plaintiff in a conversion suit recovers the full value of the property, in effect forcing the defendant to buy it. Where the act does not amount to a *dispossession*, but consists of use of or damage to the property, the normal action will be for *trespass*, in which the plaintiff recovers only the actual damages suffered by impairment of the property or loss of its use. [Zaslow v. Kroenert (1946) 29 Cal.2d 541, 551, 176 P.2d 1]

Here, the Plaintiff attaches a copy of the transcript of the hearing before the DLSE on June 13, 2014 as Exhibit B to the Memorandum of Points and Authorities. The Defendant's objection on grounds of lack of authentication will be overruled. Evidence excludible only because it lacks a proper foundation may be used if there is a *high*

Tentative Rulings for Department 501

(20)

Tentative Ruling

Re: **Trujillo v. Iyer**, Superior Court Case No. 15CECG03363

Hearing Date: **May 17, 2016 (Dept. 501)**

Motion: Motion for Pre-Trial Discovery of Defendant's Financial Condition

Tentative Ruling:

To grant. (Code Civ. Proc. § 3295(c).)

Explanation:

No pretrial discovery by the plaintiff shall be permitted with respect to [defendant's financial condition] unless the court enters an order permitting such discovery pursuant to this subdivision. ... Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. ...

(Civ. Code § 3295(c).)

“[A] ‘substantial probability’ of prevailing on a claim for punitive damages means that it is ‘very likely’ that the plaintiff will prevail on such a claim or there is a ‘strong likelihood’ that the plaintiff will prevail on such a claim.” (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 283, quoting *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 120.)

In light of the repeated DUI arrests in a short period of time, and the fact that defendant consumed a dozen vodka drinks before driving sufficient to result in a BAC of 0.41% and causing the accident at issue, coupled with the common knowledge that driving while intoxicated greatly enhances the risk of auto accidents, the court finds that plaintiff has established a substantial probability of establishing that defendant acted in “conscious disregard” (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 33) of the safety of others. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899.) The discovery will therefore be permitted.

(24)

Tentative Ruling

Re: **Drake v. Rojas**
Court Case No. 16CECG00803

Hearing Date: May 17, 2016 (**Dept. 501**)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested minor is excused from appearing.

Explanation:

There are two issues here. First, the Petitioner is the minor's guardian and she is acting *in pro per*. A guardian who is not also a licensed attorney cannot act in court *in pro per* in matters outside probate proceedings, as this would constitute the unauthorized practice of law, in violation of Business and Professions Code section 6125. (*City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 779-780—applying rule as to conservator and executor. *Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1519; *Hansen v. Hansen* (2003) 114 Cal.App.4th 618, 619.) She was aided in preparing the Petition form by counsel for the insureds, but this does not ensure the minor's interests were adequately protected since that attorney would not have been representing the minor's interests.

Second, the Petition does not indicate how the parties who split the \$15,000 from the remaining \$30,000 insurance policy limit agreed to do so. Petitioner indicates that it is to be split between the minor's mother's heirs, namely the minor herein and Alexandra Gaudy, who is a "relative" of the deceased. She does not explain how they came to that decision.

In a wrongful death action (as this would have been had an action been filed), each wrongful death claimant is entitled to damages for all detriment personally suffered or likely to be suffered because of the decedent's death. (*Corder v. Corder* (2007) 41 Cal.4th 644, 663.) However, this does not mean that all claimants are entitled to share equally in the award. Each is entitled only to the amount that compensates for the loss he or she proved, and the court must apportion the award accordingly. (Code Civ. Proc. § 377.61; *Id.* at pp. 652-655.) While a claimant can waive the right to judicial apportionment (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 536), the court will not presume a waiver of the minor child's right to apportionment as between him and an unspecified "relative" of the decedent. Petitioner is required to explain how the decision to split the remaining amount was made, and show that this is in the best interest of the minor.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative

Tentative Rulings for Department 502

(20)

Tentative Ruling

Re: **Sagaser v. Arabian Villa, L.P. et al.**, Superior Court Case No. 16CECG00577

Hearing Date: **May 17, 2016 (Dept. 502)**

Motion: Demurrer to Complaint and Motion to Strike

Tentative Ruling:

To take the demurrer off calendar due to failure to comply with Code of Civil Procedure section 430.41. The parties are ordered to meet and confer pursuant to the statute and, if necessary, to calendar a new hearing date for a demurrer.

To deny the motion to strike. (Code Civ. Proc. §§ 435, 436.)

Explanation:

Defendants move to strike various unspecified allegations of the complaint.

A notice of motion must state the nature of the order sought and the grounds for the order. (Code Civ. Proc. § 1010; Cal. Rules of Court, Rule 3.1110.) Additionally, a notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. (Cal. Rules of Court, Rule 3.1322.)

Item number 3 of the motion to strike is the only part of the motion that complies with these requirements. Numbers 1, 2, 4 and 5 are vague enough that the court cannot ascertain what language, exactly, is to be stricken pursuant to the motion. Defendants' use of the language "any claims," "any reference," or "any request" is too vague and requires interpretation by the court and plaintiff in responding to the motion. For this reason the motion is denied as to numbers 1, 2, 4 and 5 of the motion to strike.

Number three seeks to strike paragraph 43 in its entirety, pursuant to which defendants seek emotional distress damages in connection with the cause of action for breach of implied covenant of quiet enjoyment.

Defendants move to strike paragraph 43 contending that a breach of a covenant is an action based in contract, and damages for mental suffering and emotional distress are generally not compensable in contract actions, citing *Sawyer v. Bank of America* (1978) 83 Cal.App.3d 135, 139. In *Sawyer*, the court held that compensation for insomnia and emotional distress are not to be awarded on a cause

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Tentative Ruling

Re: ***City of Clovis v. Shell Oil Co et al.***
Court Case No. 15 CECG03767

Hearing Date: May 17, 2016 (Dept. 502)

Motion: Occidental Chemical Corporation's Motion for Leave to File Motion for Summary Adjudication

Tentative Ruling:

To deny.

Explanation:

A trial court clearly has jurisdiction to determine its own jurisdiction. (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 740; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 267.) Accordingly, this Court may hear this motion.

As a transferee court of a coordinated proceeding, this court has limited jurisdiction. California Rule of Court, rule 3.543 provides, in subpart (a), that “[t]he coordination trial judge may order any coordinated action or severable claim in that action transferred from the court in which it is pending to another court for a specified purpose or for all purposes. ...” “On receipt of a transfer order, the court to which the action is transferred may exercise jurisdiction over the action in accordance with the orders and directions of the coordination trial judge, and no other court may exercise jurisdiction over that action except as provided in this rule.” (Cal. Rule of Court, rule 3.543(e).) Here, the both the Order Granting In Part and Denying In Part Plaintiff City of Clovis Motion to Remand to Los Angeles Superior Court to Transfer to Fresno Superior Court, and Ordering Transfer to Fresno Superior Court for Purposes of Trial and Post-Trial Related Motions, specifically states: that the transfer is “for the purpose of trial and consideration of post-trial related motions *only*.” (Emphasis added.) (Boone Decl., Ex. 1.)

Accordingly, this court has jurisdiction to hear Occidental's proposed Motion for Summary Adjudication only if it may properly be labelled a “trial” or is a “post-trial related motion[.]” First, a summary adjudication motion is not a post-trial related motion because it must be heard 30 days before trial. (Code Civ. Proc. § 473c., subd. (a)(3).) Second, a motion for summary adjudication is not a “trial.” A “trial” occurs when all of the issues tendered by the pleadings are heard before a trier of fact resulting in a decision upon which is entered one final judgment.” (*In re Marriage of Dunmore* (1996) 45 Cal.App.4th 1372, 1377.) It is clear that a motion for summary adjudication is not a trial because the action is not finally determined by the motion. (See *Lemaire, Faunce & Katznelson v. Cox* (1985) 171 Cal. App. 3d 297, 301; *King v. State of California* (1970) 11 Cal. App. 3d 307, [trial is the “determination of an issue of law or fact which brings the action to the stage where final disposition can be made.”].) Finally, Code of Civil

Tentative Rulings for Department 503

Tentative Ruling

(27)

Re: **Kaye v. Ryan, Christie, Quinn, Provost & Horn, et al.**
Court Case No. 14CECG00190

Hearing Date: **May 17, 2016 (Dept. 503)**

Motion: Defendants' demurrer to the Third Amended Complaint;
Defendant's motion to strike portions of the Third Amended
Complaint.

Tentative Ruling:

To Overrule the demurrer. The defendants shall file their answer to the Third Amended Complaint within 10 days of service of the order by the clerk.

To Grant the motion to strike as to the punitive damages allegations.

Explanation:

Demurrer

Generally, "[i]n determining the merits of a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) Additionally, "the complaint must be construed liberally by drawing reasonable inferences from the facts pleaded." (*Ibid.*) Essentially, the complaint is given, "a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Primary Rights Theory

Under the primary rights theory followed in California, "the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) Thus, "[e]ven where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (*Ibid.*; see also *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860 [although there were two acts of malpractice, the acts implicated, "only one primary right - the right to be free of negligence by its attorney . . ."].)

Nevertheless, the same set of facts can implicate different primary rights which the give rise to multiple causes of action. (*Rothschild v. Tyco Internat. (US), Inc.* (2000)

83 Cal.App.4th 488, 500 [the injuries were “wholly separate and distinct.”]; see also *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557-558 [plaintiff’s personal physical and emotional injuries affected a different primary right than the market based injuries asserted by the public entities, even though premised on the same underlying facts].)

Here, unlike the multiple allegations of fraud in *Bay Cities, supra*, 5 Cal.4th 854 and *Stoner v. Williams* (1996) 46 Cal.App.4th 986, the individual plaintiffs base their injuries apart from those suffered by the corporation as they seek, “lost monies they would have otherwise received as salary or other employment benefits”. (TAC, ¶ 41.) Accordingly, like the different primary rights addressed in *Rothschild* and *Bullock*, the individual plaintiffs’ alleged lost salaries and other employment benefits are distinct from the injuries sustained by the corporation although both primary rights are premised on the same allegations of negligence and fraud. Consequently, the different injuries give rise to different primary rights. The demurrer to the second, fourth, sixth, seventh, ninth and eleventh causes of action is overruled.

Intentional Infliction of Emotional Distress

A prima facie case showing of intentional infliction of emotional distress requires: “(1) outrageous conduct by the defendant; (2) the defendant’s intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff’s suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394.) Additionally, the nature of the parties’ relationship can elevate conduct to the requisite level of outrageousness. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, fn. 2; accord *Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 283.)

Here, the intentional infliction of emotional distress cause of action was set forth in the then proposed pleading attached to the motion to amend heard on April 12, 2016. The court granted the motion as to the proposed pleading – which included the intentional infliction of emotional distress cause of action. Accordingly, here, the TAC alleges the defendants’ conduct arose within a position of trust as the individual plaintiffs’ financial advisor and accountant. (TAC, ¶ 136.) Essentially, the complaint alleges the defendants abused their position of trust “in derogation of the rights, interests and concerns” of the individual plaintiffs. (TAC, 136-137.) The demurrer is overruled.

Motion to Strike

A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (CCP § 436(a); *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-67.) Punitive damages are allowable only if proved by clear and convincing evidence the defendant is guilty of oppression, fraud or malice. (Civil Code § 3294(a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 922.) Specific pleading is required for punitive damages. (*Smith v. Superior Court* (1992) 10

(23)

Tentative Ruling

Re: ***John Talesfore v. Clovis Auto Cars***
Superior Court No. 16CECG00480

Hearing Date: Tuesday, May 17, 2016 (**Dept. 503**)

Motion: Petitioners John Talesfore's and Wendy Talesfore's Petition to Compel Arbitration or, in the alternative, for Appointment of Arbitrator

Tentative Ruling:

To take off calendar the hearing on Petitioners John Talesfore's and Wendy Talesfore's petition to compel arbitration or, in the alternative, for appointment of arbitrator. (Code Civ. Proc., §§ 1005, subd. (b) & 1290.2.)

Explanation:

On February 16, 2016, Petitioners John and Wendy Talesfore ("Petitioners") filed a petition to compel arbitration or, in the alternative, for appointment of arbitrator. On March 2, 2016, Petitioners filed a notice of hearing on their petition to compel arbitration or appointment of arbitrator. The March 2, 2016 notice of hearing stated that the petition would be based on the instant notice of hearing and the petition to compel arbitration or for appointment of arbitrator filed with the Court on February 16, 2016 and stated that the hearing on the petition would be conducted on April 7, 2016.

On April 7, 2016, the Court denied without prejudice Petitioners' petition to compel arbitration or, in the alternative, for appointment of arbitrator because Petitioners failed to establish that the notice of hearing and petition had been properly served on Respondent Clovis Auto Cars dba Clovis Volkswagen ("Respondent").

According to the Court's case management system, on May 8, 2016, one of Petitioners' attorneys called the civil law and motion clerk and calendared a hearing on a petition to compel arbitration for May 17, 2016.

However, while Respondent has filed opposition papers, and Petitioners have filed reply papers, that refer to the May 17, 2016 hearing date, Petitioners failed to file either a new petition and a notice of hearing indicating that the hearing on the new petition would be conducted on May 17, 2016 or a notice of hearing stating that the petition would be based on the such notice and the petition filed with the Court on February 16, 2016 and that the hearing would be conducted on May 17, 2016 at least 16 court days before the May 17, 2016 hearing as required by Code of Civil Procedure sections 1005, subdivision (b), and 1290.2. Additionally, since no new notice of hearing was filed with the Court, Petitioners have not paid the required \$60.00 motion hearing fee. (Gov. Code, § 70617, subd. (a).)

