

Tentative Rulings for May 19, 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).)

15CECG01234 *Toste et al. v. Gottfried et al.* (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.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(30)

Re: **Anjelica Ramirez v. Eric Benitez**
Superior Court Case No. 15CECG02562

Hearing Date: May 19, 2016 (Dept. 403)

Motion: Default Hearing

Tentative Ruling:

To deny.

Explanation:

Plaintiff requests judgment in the amount of \$ 24, 500 plus interest. However, this amount exceeds that properly noticed in the Complaint.

Notice

In all default judgments, the demand sets a ceiling on recovery. (*David S. Karton, a Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 150.) And the amount demanded in the complaint is determined both from the *prayer* and from the *damage allegations* of the complaint. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417-418.) Further, due process requires *formal notice* of the amount demanded and is not satisfied by "constructive notice" from other sources. (*Stein v. York* (2010) 181 Cal.App.4th 320, 326—where complaint did not specify amount of damages sought, defaulted defendant's participation in discovery and other pretrial procedures did not waive his right to object to amount of damages awarded.)

In her Complaint, Plaintiff asserts that Defendant made one \$1000 payment (Complaint, ¶ FR-2). This leaves a balance of \$24,000. However, Plaintiff seeks judgment in the amount of \$24,500. This is \$500 above that which was properly noticed. *In her declaration (filed 4/8/16), Plaintiff asserts damages in the amount of \$24,500, but declarations do not provide proper notice (National Diversified Services, supra.)* Upon resubmission, Plaintiff must either amend her request or her Complaint.

Interest

Under California Rules of Court 3.1800 Default judgments . . . [t]he following must be included in the documents filed with the clerk: (3) Interest computations as necessary . . ."

Here, if Plaintiff reduces her request to \$24,000, interest calculations must be adjusted accordingly.

Tentative Rulings for Department 501

(17)

Tentative Ruling

Re: **Crop Production Services, Inc. v. EarthRenew, Inc.**
Court Case No. 09 CECG 02733

Hearing Date: May 19, 2016 (Dept. 501)

Motion: CPS' Renewed Motion to Dismiss EarthRenew's Cross-Complaint for Failure to Bring to Trial Within Five Years [C.C.P. § 583.310]

Tentative Ruling:

To deny.

Explanation:

Code of Civil Procedure section 583.310, which governs the cross-complaint that EarthRenew, Inc. brought against Crop Production Services, Inc., requires an action "be brought to trial within five years after the action is commenced against the defendant." Otherwise, dismissal of the action is "mandatory and ... not subject to extension, excuse, or exception except as expressly provided by statute." (Code Civ. Proc., § 583.360, subd. (b).) In computing the time within which an action must be brought to trial, courts must exclude the time during which "[p]rosecution or trial of the action was stayed or enjoined." (Code Civ. Proc., § 583.340(b).)

CPS argues that the stay entered by this court on its docket on April 16, 2010, did not automatically encompass all causes of action, and was not therefore complete, and thus could not trigger automatic tolling under Code of Civil Procedure section 583.340, subdivision (b). CPS bases this argument on *Varian v. Delfino* (2005) 25 Cal.4th 180, which held that an appeal of an unsuccessful anti-SLAPP motion does not automatically stay "proceedings related to causes of action not affected by the motion." (*Id.* at p. 195, fn. 8.) Moreover, CPS argues that because its own Notice of Stay of Proceedings cites to *Varian v. Delfino*, no stay entered by the court could have been broader than that allowed by *Varian*. (Motion 11:1-5.) Therefore, the cross-complaint must be dismissed pursuant to Code of Civil Procedure section 583.310. These contentions fail.

The Court's docket entry of April 16, 2010, is of a dual nature. First, it records the April 16, 2010, filing of CPS' "Notice of Stay of Proceedings" on Judicial Council Form CM-180. This form indicated the case was stayed "with regard to all parties" due to the "[a]utomatic stay caused by filing of SLAPP appeal. See Attachments A and B." Attachment A cited Code of Civil Procedure section 916 for the general principal that taking an appeal stays the action in the trial court upon the order appealed from or upon matters embraced therein or affected thereby. Attachment A also cited *Varian v. Delfino, supra*, 25 Cal.4th 180 at page 194 for the principal that an appeal of the denial of an anti-SLAPP motion "stays all further proceedings on the merits during the

pendency of an appeal ..." "Accordingly, the filing of the Notice of Appeal ... caused an automatic stay of further trial court proceedings ..." Attachment B is the Notice of Appeal.

Second, the docket entry also records the trial court's order actually staying "the entire action." Clerks do not issue orders staying actions, judges do. We presume the official duty has been regularly performed (Evid. Code, § 664), and this presumption applies to the actions of both trial judges and court clerks. (*People v. Martinez* (2000) 22 Cal.4th 106, 125; *In re Lopez* (1970) 2 Cal.3d 141, 146 [presumption that preparing docket entry was regularly performed; docket entries must ordinarily be deemed to speak the truth].) The docket also reflects that on April 16, 2010, the Court immediately acted on the order staying "the entire action." The Mandatory Settlement Conference, Trial Readiness Conference and Trial date were all taken off calendar. Indeed, this court did nothing in this case except process the appeal and impose a stay in conjunction with the bankruptcy until the issuance of the remittitur.

CPS relies on the recent California Supreme Court case of *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081 (*Gaines*) in asking that this court disregard the facts that CPS asked for a stay of "all further proceedings," and that this court actually entered a stay of the "entire action," and conclude instead that such a stay was legally ineffective to support tolling. However, CPS's authority, *Gaines*, contains no discussion as to whether a stay must be legally appropriate. *Gaines* requires that a stay "be functionally in the nature of a stay." (*Id.* at p. 1092.) The stay must be "extrinsic to the litigation and beyond the plaintiff's control." (*Ibid.*) A stay of the prosecution of the action qualifies under Code of Civil Procedure section 583.340, subdivision (b), "only when the stay encompasses *all* proceedings in the action." (*Id.* at p. 1094 (italics in original).) It is clear that a stay of the entire action issued as far as this court was concerned. Trial dates were taken off calendar, no status conferences were set, and this court waited for the remittitur from the Court of Appeal. The stay was procured by CPS' appeal and filing of Notice of Stay, not by any act of EarthRenew. Even if the stay was wrongly issued, EarthRenew had no obligation to come to court to seek relief. (*Ocean Services, supra*, 15 Cal.App.4th at 1775.)

The result, under *Gains, supra*, 62 Cal.4th 1081 or *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, is the same: the "bright-line," non-discretionary rule excluding time from which a plaintiff must bring his or her case to trial applies to all the time after April 16, 2010, to the time the Remittitur issued, and this Court resumed jurisdiction. Accordingly, the case is not yet barred by the five year limitation set forth in Code of Civil Procedure section 583.310.

EarthRenew Could Not Consent to a Temporary Stay:

CPS argues that because this Court stay was legally erroneous, the parties agreed among themselves that there would be a 90-day complete stay, to be periodically revisited. However, this 90-day stay never referenced Code of Civil Procedure section 583.310, and was ineffective to toll the five year statute.

(20)

Tentative Ruling

Re: ***Reintjes et al. v. Lynoff et al.***, Superior Court Case No.
16CECG00338

Hearing Date: **May 19, 2016 (Dept. 502)**

Motion: Demurrer to Answer

Tentative Ruling:

To take the demurrer off calendar in light of the filing of an amended answer on May 6, 2016.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 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: DSB **on** 5/18/16 .
(Judge's initials) (Date)

Tentative Ruling

Re: ***Banda-Wash v. Wash***
Case No. 15 CE CG 00967

Hearing Date: May 19th, 2016 (Dept. 502)

Motion: John Wash's Demurrer to Answer to Second Amended
Cross-Complaint

Tentative Ruling:

To overrule the demurrer to the answer to the second amended cross-complaint as to the first, second, and ninth affirmative defenses. (Code Civ. Proc. § 430.20.) To sustain the demurrer as to the third through eighth and tenth through fourteenth affirmative defenses, for failure to state facts sufficient to constitute valid defenses. (*Ibid.*)

To grant leave to amend as to all defenses to which the demurrer has been sustained. (*Ibid.*) Cross-defendant shall file and serve her first amended answer within 10 days of the date of service of this order. All new allegations shall be in *boldface*.

Explanation:

First, Maria Banda-Wash has argued that John Wash failed to meet and confer in good faith before bringing the demurrer to the answer, thus violating the meet and confer requirement under Code of Civil Procedure section 430.41. However, John¹ claims that he attempted to call Maria's counsel to discuss the alleged defects in her answer on April 8th, 2016, and he left a voicemail detailing the defects, but he received no response from counsel. Maria's counsel claims that John did not call until April 11th, and he did not wait for a response before filing his demurrer on the same day. However, Maria's counsel does not state that he ever attempted to respond to John's message, or that he offered to stipulate to amend the answer after receiving the demurrer. Therefore, it appears that John adequately complied with the meet and confer requirement, and that it was Maria's counsel who failed to respond to John's attempt to meet and confer. In any event, failure to meet and confer is not a ground for overruling a demurrer (Code Civ. Proc. § 430.41, subd. (a)(4)), so the alleged failure to meet and confer does not affect the outcome of the demurrer.

Next, with regard to the merits of the demurrer, John has demurred to fourteen of the affirmative defenses in the answer on the ground that they fail to state facts sufficient to constitute a defense. (Code Civ. Proc. § 430.20, subd. (a).) "Generally speaking, the determination whether an answer states a defense is governed by the

¹ The court will refer to the parties by their first names for the sake of clarity. No disrespect is intended.

same principles which are applicable in determining if a complaint states a cause of action." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations omitted.) It is improper to allege affirmative defenses based on legal conclusions. Facts supporting affirmative defenses must be alleged with as much detail as the facts supporting a cause of action. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) However, "The rules of pleading require, with limited exceptions not applicable here, only general allegations of ultimate fact. The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. A pleading is adequate so long as it apprises the defendant of the factual basis for the plaintiff's claim." (*McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1469-1470, internal citations omitted.)

Here, the first and second affirmative defenses allege that the cross-complaint [*sic*, second amended cross-complaint] fails to state a cause of action and is uncertain. John argues that this defense is insufficiently alleged because there are no facts to support it. However, the defense of failure to state a claim or defense is not, properly speaking, an affirmative defense, but rather a traverse or denial. In other words, it does not rely on any new matter or facts extrinsic to the cross-complaint, but simply on the legal contention that the claims in the cross-complaint are insufficiently alleged. (*State Farm Mutual Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725.) Maria does not have to allege any further facts to support the defense, as it is purely legal in nature and simply relies on the alleged deficiencies in the allegations of the SACC. Therefore, the court intends to overrule the demurrer to the first and second affirmative defenses.

Likewise, the ninth affirmative defense does not need to be supported by any facts, because it relies on a purely legal contention, namely that the court lacks subject matter jurisdiction over the cross-claims. Therefore, the court intends to overrule the demurrer as to the ninth affirmative defense.

On the other hand, the third through eighth and tenth through fourteenth affirmative defenses rely on facts extrinsic to the cross-complaint to allege that the cross-complaint is barred. However, Maria alleges no facts to show that the cross-complaint is actually barred. Maria simply makes conclusory claims without any factual support for her defenses. Thus, the defenses are insufficiently alleged, and the court intends to sustain the demurrer to them.

Also, while the fifth affirmative defense alleges that the cross-complaint is barred by the statute of limitations, Maria does not allege which statutes bar the cross-claims, so the defense is insufficiently alleged. (Code Civ. Proc. § 458.) Therefore, the court intends to sustain the demurrer to the fifth affirmative defense.

However, the court intends to grant leave to amend as to all of the affirmative defenses to which the demurrer has been sustained.

Finally, both parties have raised the claim that they are or might be entitled to attorney's fees and costs for bringing or opposing the demurrer. However, neither party cites to any legal authority that would allow them to recover attorney's fees for a

demurrer. Nor is the court aware of any such authority. Usually, each party must bear its own attorney's fees and costs for demurrers. Therefore, the court intends to decline to award fees to either party for the cost of bringing or opposing the demurrer.

Pursuant to CRC 3.1312 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: DSB **on** 5/18/16 **.**
(Judge's initials) (Date)

Tentative Rulings for Department 503

2

Tentative Ruling

Re: ***Elizondo v. Sin et al.***
Case No. 14CECG00010

Hearing Date: May 19, 2016 (Dept. 503)

Motion: Compel initial response to form interrogatories, set two, and deem requests for admission, set one admitted and sanctions

Tentative Ruling:

To grant defendant Sotheary Sin's motion to compel plaintiff Anthony Elizondo to provide initial verified responses to form interrogatories, set two. (Code of Civil Procedure sections 2030.290(b).)

To grant defendant Sotheary Sin's motion that the truth of the matters specified in the requests for admission, set one, is to be deemed admitted as to plaintiff Anthony Elizondo unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant defendant Sotheary Sin's motion for sanctions. Anthony Elizondo is ordered to pay sanctions in the amount of \$465 to the law office of Wilkins, Drolshagen and Czeshinski. CCP §§2030.290(c) and 2033.280(c).

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 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: A.M. Simpson on 5/10/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Robbins and Andreen v. Lamb et al.***
Superior Court Case No. 14 CECG 00479

Hearing Date: May 19, 2016 **(Dept. 503)**

Motion: Demurrer to the First Amended Complaint by
Defendants Kimberly F. Lamb and React Medical
Trainers, Inc.

Tentative Ruling:

To overrule the general demurrers. An Answer is to be filed within 10 days of notice of the ruling. Notice runs from the date that the minute order is served plus 5 days for service via mail. [CCP § 1013]

Explanation:

Background

Plaintiffs Sandra Robbins and Kristi Andreen were employed by Defendant Eagle Medical Services, Inc. as CPR trainers. Plaintiffs allege that they were not paid the full amount of wages owed in that they were not paid for the time it took to load supplies onto the company vehicle and they were not given rest breaks, meal periods, etc. On February 19, 2014, they filed a complaint alleging various violations of the Labor Code as well as a cause of action for unfair business practices. On May 1, 2014, Plaintiffs served Kimberly Lamb, agent for service of process via substituted service. On July 9, 2014, default was entered.

On June 23, 2015, upon examination of the request for a court judgment, the Court ordered the entry of default stricken. On July 1, 2015, Plaintiffs filed an amended proof of service in support for a second request for a court judgment. On November 12, 2015, the Court denied the request without prejudice. It noted that Plaintiffs had failed to request the re-entry of default prior to requesting default judgment. It also noted that the complaint was not pleaded in a form to which default judgment could be entered in a sum certain. See Order filed on November 12, 2015.

On December 18, 2105, Plaintiffs filed a First Amended Complaint. It names Kimberly Lamb and React Medical Training, Inc. as additional defendants. It alleges 13 causes of action. On April 6, 2016, Defendants Lamb and React Medical Training filed a general demurrer to each cause of action of the First Amended Complaint. The requirements of CCP § 430.41 have been met. See Declaration of Bauer. Opposition and a reply were filed.

Merits

The demurring Defendants contend that the Plaintiffs have violated the terms of the Court's order of November 12, 2015 on the grounds that the Court did not grant permission to add new Defendants. See Defendants' Memorandum of Points and Authorities at page 3 lines 27-28 and page 4 lines 1-8. But, the Order addressed Plaintiffs' request for a default court judgment and its terms were confined to that issue. As a matter of law, CCP § 472 permits any type of amendment without leave of court. Thus, any part of the complaint may be changed without leave ... including the addition of new parties as plaintiff or defendant. [*Ryan G. v. Department of Transportation* (1986) 180 Cal.App.3d 1102, 1105; where applicable, CCP § 472 prevails over CCP § 473(a) (requiring leave of court to add new parties)]. Accordingly, this argument has no merit.

The demurring Defendants also assert that none of the causes of action can be alleged against them because they did not employ the Plaintiffs citing inter alia ¶ 4 of the First Amended Complaint. However, the allegations against Ms. Lamb state that she was the sole owner of Eagle Medical Services, Inc. and caused its undercapitalization and transfer of assets from Eagle Medical Services, Inc. to React Medical Training, Inc. in order to shield herself and Eagle from liability. See ¶¶ 7 and 8. In other words, the Plaintiffs seek to hold the demurring Defendants liable under a theory of "alter ego."

Ordinarily, shareholders are not personally responsible for corporate liabilities. However, if a corporation has been operated as the "alter ego" of its shareholders, the corporation's creditors—including tort claimants—may be permitted to "pierce the corporate veil" and enforce their claims directly against the shareholders. (Similarly, an action may lie on an "alter ego" theory against the *corporate parent* of a wrongdoing subsidiary.) [*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300; see *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737, 742] The complaint sets forth additional facts of improper domination of the corporation as a basis for judgment against the individuals. [See *Hennessey's Tavern v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1359 and see *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411—complaint must allege unity of interest between alleged alter ego and corporation and that failure to recognize alter ego relationship would lead to inequitable result.] In the pleading at bench, the allegations at ¶¶ 7-8 are sufficient for purposes of pleading "alter ego" liability and the general demurrers will be overruled.

Given that 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* [*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994], it is not necessary to examine the opposition nor the reply. It is not necessary to rule on the evidentiary objections. Notably, the hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. Judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed. See *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal. App. 4th 97 at 114.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 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: A.M. Simpson on 5/18/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Samsung SDS America, Inc. et al. v. Koo***
Superior Court Case No. 16 CECG 00390

Hearing Date: May 19, 2016 **(Dept. 503)**

Petition: Release Mechanic's Lien

Tentative Ruling:

To deny without prejudice on the grounds stated infra. The Clerk is ordered to strike the Order filed on March 25, 2016.

Explanation:

Requirements

If a claimant has not commenced an action to enforce the mechanics lien within the time provided in Civil Code § 8460, the property owner may petition the court for an order releasing the property from the lien. (Civil Code § 8480(a).) A release order does not bar any other action for relief by the claimant. (Civil Code § 8480(b).) A petition for a release order may be joined with a pending action to enforce the lien claim. (Civil Code § 8480(c).)

At least 10 days before petitioning for a release order, the owner must give the claimant a notice demanding that the claimant execute and record a release of the lien claim. The notice must comply with the requirements of Civil Code § 8100 et seq. and state the grounds for the demand. (Civil Code § 8482.) On filing a verified petition for a release order (see Civil Code § 8484), the clerk must set a hearing date not more than 30 days after the filing of the petition. The owner must serve a copy of the petition and notice of hearing on the claimant at least 15 days before the hearing. (Civil Code § 8486.) (See Civil Code § 8488 [burden of proof and right to attorneys' fees].)

Merits

First, the Petition at bench is not verified. This is required. See Civil Code § 8484. In addition, it does not allege all of the necessary information. *Id.* Second, the Petitioner did not attach proof that the claimant was served with a notice demanding that he execute and record a release of the lien claim. See Civil Code § 8100 seq. Instead, the Declaration of Rocha only states that it was served. See ¶ 2. This is insufficient. Therefore, the Petition will be denied without prejudice.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 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: A.M. Simpson on 5/18/16 .
(Judge's initials) (Date)