

Tentative Rulings for June 1, 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).)

15CECG02460 *Martinez v. S & A Auto Parts et al.* (Dept. 503)

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

15CECG01695 *Consolidated Irrigation District v. City of Reedley* (Dept. 402)
[Hearing on motion to change venue and motion for relief from order is continued to Wednesday, June 8, 2016, at 3:30 p.m. in Dept. 402]

13CECG02711 *Harpains Meadow v. Stockbridge* is continued to Tuesday, June 14, 2016, at 3:30 p.m. in Dept. 501

16CECG00868 *Cervantes v. City of Fresno* is continued to Wednesday, June 8, 2016 at 3:30 p.m. in Dept. 502

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***The State of California v. Kozlowski***
Case No. 14 CE CG 01672

Hearing Date: June 1st, 2016 (Dept. 403)

Motion: The Kozlowskis' Motion for Reconsideration of Court's Order
of April 5, 2016

Tentative Ruling:

To deny the Kozlowskis' motion for reconsideration of the court's order of April 5th, 2016. (Code Civ. Proc. § 1008, subd. (a).)

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HEARD ON THURSDAY, JUNE 2, 2016 AT 3:00 PM IN DEPARTMENT 403.

Explanation:

The party moving for reconsideration must show that there are "new or different facts, circumstances, or law" that justify reconsideration of the order or renewal of the motion. (Code Civ. Proc. § 1008, subd.'s (a), (b).) Also, "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212, internal citations omitted.) The requirements of section 1008 are jurisdictional, and failure to comply with the requirement of demonstrating new facts, circumstances or law requires denial of a motion for reconsideration. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.)

Here, the Kozlowskis claim that there are new facts justifying reconsideration of the court's prior order, since they have a prospective buyer, Raminder Atwal, who has allegedly agreed to buy the property from the Bank pursuant to a short sale for \$3,050,000. The Kozlowskis claim that this amount will eliminate the Bank's lien on the property. However, the Bank has alleged that the Kozlowskis owe over \$3,500,000 on the loan, so it does not appear that the entire amount of the loan will be paid off even if the short sale is completed.

Also, the Kozlowskis do not submit a copy of any written agreement to purchase the property by Atwal. They only point to a letter of intent dated April 12th, 2016, which is for sale of the property for \$2,900,000, not the \$3,050,000 claimed by Atwal and Kozlowski. (Exhibit A to Atwal decl.) The letter of intent also shows that the offer to sell the property expired on March 28th, 2016, several days before the letter was even sent to the Kozlowskis. (Letter of Intent, p. 2, ¶ 11.) Therefore, it is not clear that there was ever a valid offer to purchase the property, and there is no evidence that the parties

entered into a final sale agreement. The Bank denies that it agreed to a short sale, and the Bank would be a necessary party to any such agreement. Thus, the Kozlowskis have not presented any evidence that a short sale is actually pending.

Also, since the April 19th, 2016 ex parte hearing date, Atwal allegedly assigned his right to purchase the property under the letter of intent to Producers' Dairy. (Kozlowski decl., ¶ 6.) However, there is no written sale agreement with Producers either, and there is no declaration from anyone at Producers stating that they have agreed to purchase the property. Since Atwal is apparently no longer buying the property, the Kozlowskis would at least need a declaration from the current buyer to show that there is a short sale pending.

The Kozlowskis also have a declaration from an appraiser stating that the property is worth \$4,250,000 even after the taking. (Rick Smith decl. in Support of Ex Parte Application for OST.) However, the declaration appears to be based on an appraisal made by Mr. Smith in April of **2015**, as stated in the appraiser's jurat to his declaration. Also, the bank points out that the Kozlowskis submitted a virtually identical appraisal for the same amount on April 20th, 2015, almost a year before the hearing on the motion to withdraw funds. (Exhibit E to Wu decl.) Thus, it does not appear that Smith's declaration is actually a "new fact or circumstance" that would support reconsideration, but rather it is a fact that has been in the possession of the Kozlowskis for over a year. Since they could have presented the appraisal at the last hearing and apparently chose not to do so, they cannot now use it to support their motion for reconsideration.

The Kozlowskis also contend that, if the property is sold at a short sale, it would result in a "windfall" to the Bank, because the Bank would receive both the proceeds of the sale and also the amount of probable compensation from the State. However, they do not deny that they are in default on their loan, or that they owe the Bank well over \$3,500,000. Even if the Bank does receive the \$752,000 on deposit as probable compensation, this will hardly wipe out the entire amount owed by the Kozlowskis to the Bank. It will not constitute any windfall to the Bank, since the Kozlowskis owe far more than \$752,000. Allowing the Bank to withdraw the amount of compensation will simply reduce the total amount that the Kozlowskis owe to the Bank. Even if it turns out that the property is actually worth more than the amount owed on the loan, which has not been established at this point, then the Bank would simply have to refund the difference to the Kozlowskis after the foreclosure or short sale.

The Kozlowskis have also argued that, since there is going to be a short sale of the property, the "debt equivalency rule" means that the Bank's security interest in the property will be at an end and therefore it should not be allowed to withdraw the probable amount of compensation in addition to selling the property. Again, however, the Kozlowskis have failed to present any evidence that there is actually a binding final agreement to sell the property. At most, they present evidence of letters of intent and expressions of a desire by certain parties to buy the property, not a final, written agreement to buy. At this point, it appears that Mr. Atwal is no longer going to buy the property, since plaintiffs admit that he assigned his right to buy the property to Producers. Nor is there any evidence that Producers has entered into a binding

Tentative Ruling

Re: **Forestiere v. Forestiere**
Case No. 14 CE CG 02771

Hearing Date: June 1st, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Leave to File Second Amended
Complaint

Tentative Ruling:

To deny plaintiff's motion for leave to file a second amended complaint. (Code Civ. Proc. § 473, subd. (a).)

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HEARD ON THURSDAY, JUNE 2, 2016 AT 3:00 PM IN DEPARTMENT 403.

Explanation:

While there is a policy of liberality in granting leave to amend complaints, the court may properly deny leave to amend where the proposed amendment fails to state a valid cause of action. (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) “[A] court is not required to accept an amended complaint that is not filed in good faith, is frivolous or sham.” (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 878, internal citations omitted.) Also, where a plaintiff attempts to amend to resurrect claims that previously failed on demurrer, the court may properly deny leave to amend. (*Leyte-Vidal v. Semel* (2013) 220 Cal.App.4th 1001, 1015.)

Also, where the plaintiff has engaged in a lengthy, unexcused delay in seeking leave to amend that causes prejudice to the defendant, it is not an abuse of discretion to deny leave to amend. (*People ex rel. Dept. of Transportation v. Jarvis* (1969) 274 Cal.App.2d 217, 222.) Furthermore, it is the plaintiff's burden to present affidavits showing the purpose and need for the amendment, and the reason for not raising the issues earlier. (*Loser v. E.R. Bacon Co.* (1962) 201 Cal.App.2d 387, 390; Cal. Rules of Court, Rule 3.1324, subd. (b).)

Here, the case has been pending for over a year and a half, and it has been over a year since the court sustained the demurrer to the first amended complaint and dismissed two out of three of plaintiff's causes of action. The trial date is August 3rd, 2016, just over two months from now. Thus, plaintiff has engaged in a substantial delay in seeking leave to add his new causes of action. However, plaintiff has made no effort to explain why he waited so long to attempt to amend the complaint to add new causes of action.

Plaintiff has submitted a declaration that purports to explain the nature of the amendments and the reasons that he seeks to amend the complaint. However, he never explains when he learned of the facts that support the proposed new causes of action, or why he did not make his request to amend the complaint earlier. In fact, it appears that he has been aware of the facts underlying his proposed SAC from the outset, and indeed he admits in his moving papers that he has been alleging all along that Lorraine was subjected to undue influence by the defendants in order to persuade her to sign the interspousal transfer agreement. (See plaintiff's Points and Authorities brief, p. 3, lines 13-14.) Thus, plaintiff has not shown that he recently learned of new facts that support his proposed amendment, and he has failed to explain why he did not seek to amend the complaint earlier since he has been aware of the underlying facts from the outset of the case. Plaintiff's new causes of action appear to be simply an attempt to allege new theories, rather than being based on newly discovered evidence. Therefore, plaintiff has failed to provide any facts that would excuse his substantial delay in seeking to amend the complaint.

Plaintiff contends that any delay in seeking leave to amend has not prejudiced defendants, since they have been aware of the facts underlying his claims from the beginning of the case and have conducted discovery regarding those facts. Yet defendants have shown significant potential prejudice from the amendment, since the case has been pending for over a year and a half, and plaintiff is now attempting to change his theory of the case only two months before trial. Defendants have filed a summary judgment motion as to the sole remaining cause of action presently alleged, which is set to be heard on June 14th, 2016. If the court grants leave to amend, it may render the summary judgment motion moot, as it will be addressed to a superseded complaint. At the very least, defendants will be deprived of the chance to dismiss all remaining claims through summary judgment, and they may have to go to trial on claims that were not even alleged until just before the trial date. Thus, defendants have shown prejudice from the delay in seeking leave to amend, which supports denial of the motion.

In addition, it would be futile to grant leave to amend, since plaintiff's new causes of action are clearly barred by the statute of limitations. Plaintiff's undue influence and declaratory relief claims are based on the claim that defendants used undue influence to pressure Lorraine into signing the interspousal transfer agreement in February of 2008. (Proposed SAC, ¶¶ 63, 74, 75.) However, the statute of limitations for undue influence claims is four years under Code of Civil Procedure section 343. (*Wade v. Busby* (1944) 66 Cal.App.2d 700, 755.) Since the plaintiff did not file his complaint within four years of the date of the alleged wrongful conduct, his undue influence and declaratory relief claims are barred.

While plaintiff contends that the "relation back" doctrine applies to his new claims and thus they are not barred by the statute of limitations, the relation back doctrine only deems the amended complaint to have been filed at the same time as the original complaint for the purposes of the statute of limitations. (*Barrington v. A.H. Robbins Co.* (1985) 39 Cal.3d 146, 151.) Here, even the original complaint was untimely with regard to the prospective undue influence and declaratory relief claims, so

Tentative Ruling

Re: ***Friant Investors, Inc. v. Kachadoorian***
Case No. 16 CE CG 00302

Hearing Date: June 1, 2016 (Dept. 403)

Motion: Defendant's Motion to Strike Complaint for Damages and
for Sanctions Per CCP § 128.5

Tentative Ruling:

To deny defendant's motion to strike the complaint. (Code Civ. Proc. §§ 435, 436.) To deny the request for sanctions against plaintiff pursuant to Code of Civil Procedure section 128.5.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HEARD ON THURSDAY, JUNE 2, 2016 AT 3:00 PM IN DEPARTMENT 403.

Explanation:

Defendant moves to strike the complaint on the ground that it is essentially an improper or sham pleading, and that plaintiff is attempting to circumvent the ruling of Judge Gamoian in the prior limited civil action, in which she denied the plaintiff's motion to reclassify the action. Defendant contends that plaintiff should not be allowed to avoid the court's earlier ruling denying reclassification of the case by simply dismissing the case and refileing it as an unlimited civil action.

Defendant cites to *Ricard v. Grobstein, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 in support of his position. However, in *Ricard*, the plaintiffs' second action was improperly filed after their claims for fraud, conspiracy and punitive damages had already been stricken and dismissed as unsupported by facts. (*Id.* at 162.) The second complaint was improper because it was a blatant attempt to circumvent the first court's adverse ruling dismissing those claims, which was essentially a final adjudication on the merits of the causes of action. (*Ibid.*) Plaintiffs were also attempting to split their single cause of action into multiple different cases in different courts as a way to avoid the first court's ruling. (*Ibid.*)

Here, on the other hand, the trial court in the limited civil case never made a ruling on the merits of the plaintiff's claims, and it did not strike or dismiss those claims or sustain a demurrer without leave to amend. Nor was any judgment or involuntary dismissal entered against plaintiff. Judge Gamoian simply found that plaintiff had not met its burden of showing that the case should be reclassified under Code of Civil Procedure section 403.040, subd. (b). (Minute Order of January 11th, 2016 in case no. 15 CE CL 02598. The court intends to take judicial notice of the court's order under Evidence Code section 952, subd. (c).) In other words, Judge Gamoian found that plaintiff had not shown that (1) the case was incorrectly classified, and (2) there was

(23)

Tentative Ruling

Re: **William E. Johnson v. Alyssa Marie Villanueva**
Superior Court Case No. 12CECG03291

Hearing Date: Wednesday, June 1, 2016 (**Dept. 403**)

Motion: Plaintiffs William E. Johnson's and Malan Doreen Johnson's Motion to Vacate Dismissal Without Prejudice Under Code of Civil Procedure Section 473

Tentative Ruling:

To deny Plaintiffs William E. Johnson's and Malan Doreen Johnson's motion to vacate dismissal without prejudice under Code of Civil Procedure section 473. (Code Civ. Proc., § 473, subd. (b).)

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HEARD ON THURSDAY, JUNE 2, 2016 AT 3:00 PM IN DEPARTMENT 403.

Explanation:

Plaintiffs William E. Johnson and Malan Doreen Johnson ("Plaintiffs") move the Court for an order vacating the dismissal without prejudice pursuant to Code of Civil Procedure section 473, subdivision (b). There are two provisions for relief in Code of Civil Procedure section 473, subdivision (b) – (1) a mandatory relief provision and (2) a discretionary relief provision. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254-256.) In the instant motion, Plaintiffs seek to vacate their voluntary dismissal without prejudice of this action pursuant to the discretionary relief provision of Code of Civil Procedure section 473, subdivision (b).

The discretionary relief provision of Code of Civil Procedure section 473, subdivision (b) provides, in relevant part, that: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a ... dismissal ... taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for this relief ... shall be made within a reasonable time, in no case exceeding six months, after the ... dismissal ... was taken."

First, Plaintiffs filed their voluntary request for dismissal, and this action was dismissed, on January 6, 2016. According to the declaration of Plaintiffs' counsel, Stephen R. Cornwell, he was reviewing the auto insurance policy for Decedent Regan Johnson's ("Decedent") employer in March 2016 when he realized that Defendant Alyssa Villanueva's fault in killing Decedent may be covered by the uninsured motorist provision of that policy. (Cornwell Decl., ¶ 6.) Since the instant motion was filed on April 28, 2016, less than 2 months after Plaintiffs' counsel realized that Decedent's death may be covered by the auto insurance policy, the Court determines that this motion for discretionary relief under Code of Civil Procedure section 473, subdivision (b) was made

“within a reasonable time, in no case exceeding six months, after the ... dismissal ... was taken.” (Code Civ. Proc., § 473, subd. (b).)

Second, “[a] party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.” (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399.) “In determining whether the attorney’s mistake or inadvertence was excusable, ‘the court inquires whether “a reasonably prudent person under the same or similar circumstances” might have made the same error. [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct failing below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ ” (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th 249, 258.)

In the instant motion, Plaintiffs contend that the voluntary dismissal without prejudice should be set aside on the grounds of mistake, inadvertence, and excusable neglect. Specifically, Plaintiffs assert that the action was dismissed because their attorney made a mistake of fact about Defendant Alyssa Villanueva's financial situation, the court was pressuring Plaintiffs to proceed with proving up the default against Defendant Alyssa Villanueva without any further delays, their counsel had just finished a ten-week long class action trial, and a judgment in this action would have prejudiced their pending separate case against the State of California. (Cornwell Decl., ¶ 5.)

Initially, there is nothing before the Court demonstrating that Plaintiffs' counsel made a mistake of fact about Defendant Alyssa Villanueva's financial situation. Mr. Cornwell states that this action was dismissed in part because, after investigating, he learned that Defendant Villanueva was “judgment proof” and uninsured. While Plaintiffs now want to vacate their voluntary dismissal because an auto insurance policy may provide coverage for decedent's death, this auto insurance policy was issued to Decedent's employer, not to Defendant Villanueva. Therefore, there is no evidence that Defendant Villanueva's financial situation was not exactly what Plaintiffs' counsel believed it was when he filed the dismissal of this action.

Further, it appears that Plaintiffs are actually arguing that Plaintiffs' counsel mistakenly or neglectfully failed to realize that Decedent's employer had an uninsured motorist provision in its auto insurance policy that may provide coverage for Decedent's death before the action was dismissed due to court pressure and press of business. However, at the time that the action was dismissed, the action had been pending for more than 3 years and Plaintiffs' counsel has failed to present sufficient evidence establishing that court pressure and press of business kept him from investigating or reviewing Decedent's employer's auto insurance policy for more than 3 years.

(27)

Tentative Ruling

Re: **Bourne v. Tubbs**
Superior Court Case No. 14CECG03881

Hearing Date: **June 1, 2016 (Dept. 403)**

Motion: Defendant's Motion for an Order Imposing Terminating Sanctions and Dismissing Plaintiff's Complaint

Tentative Ruling:

To Deny, without prejudice.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HEARD ON THURSDAY, JUNE 2, 2016 AT 3:00 PM IN DEPARTMENT 403.

Explanation:

The court may resort to a terminating sanction where, "prior efforts yielded no results." (*Liberty Mut. Fires Ins. Co. v. LcL Adm'rs, Inc.* (2008) 163 Cal.App.4th 1093, 1106 [Discovery Act abuse had continued despite a motion to compel and imposition of monetary sanctions]; see also *Mileikowski v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262 [trial court's granting of the defendant's **fifth** request for terminating sanctions affirmed].) However, sanctions may not be imposed solely as a punishment. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262.)

Here, the present motion asserts the responses had not been served in direct disobedience of the March 15 Order on Pretrial Discovery Conference. However, the proofs of service accompanying the Declaration of Jim A. Trevino in opposition states the date of service of the responses as May 10, 2016. Similarly, the reply brief acknowledges receipt of the responses. (see Reply, pg. 2:28.) Accordingly, as the principal objective of the March 15 Order on Pretrial Discovery Conference has been fulfilled, imposition of terminating sanctions is excessive. Additionally, while service of the responses on May 10 exceeded the deadline specified in the March 15 Order, no alternative sanctions have been requested.

Lastly, although the reply disputes the adequacy of the responses, arguments presented for the first time in reply papers are generally not considered by the court in ruling on a motion. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) The motion is denied, without prejudice.

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

(30)

Tentative Ruling

Re: ***Gahvejian Enterprises, Inc. v. Los Kitos Produce, LLC.***
Superior Court Case No. 16CECG00424

Hearing Date: Wednesday June 1, 2016 (Dept. 501)

Motion: Default Hearing

Tentative Ruling:

To deny.

Explanation:

Plaintiff cannot support a cause of action for breach of contract, which is the foundation for 18% prejudgment interest.

Breach of Contract

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Where "the complaint is based on a written contract, the complaint must either set forth the terms of the contract *verbatim*, or attach and incorporate a copy of the contract" [emphasis added] (*Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459.) The contract terms must be clear enough that the parties can understand what each is required to do. (*Ladas v. Cal. State Auto Assn.* (1993) 19 Cal.App.4th 761, citing *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407; *Richards v. Oliver* (1958) 162 Cal.App.2d 548, 561.); a contract is formed when parties capable of contracting consent to lawful object for sufficient consideration. (*Marshall & Co. v. Weisel* (1966) 242 Cal.App.2d 191; Civ. Code § 1550.) Where writings attached to a complaint conflict with the contents thereof, the writing controls over the complaint. (*Holland v. Morse Diesel Int'l, Inc.* (2001) 86 Cal.App.4th 1443, 1447; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.)

First, Plaintiff attempts to support breach of contract with a written credit application (Complaint, Ex.A). However, the credit application does not include enough essential terms to be considered clear enough for the parties to understand what each was required to do (i.e. consideration: what was the credit application for?). Although Plaintiff asserts the purpose of the credit application "was to, without limitation, create and otherwise evidence certain obligations of said Defendants to Plaintiff in connection said Defendants' purchase of products from Plaintiff on credit" (Complaint, ¶ 8), the written instrument controls. And the written instrument (credit application) is not sufficient to support a cause of action for breach of contract.

(24)

Tentative Ruling

Re: **Loza v. Community Regional Medical Center**
Court Case No. 15CECG03283

Hearing Date: **June 1, 2016 (Dept. 501)**

Motion: Defendant Fresno Community Hospital & Medical Center's
Demurrer to the First Amended Complaint

Tentative Ruling:

To overrule. Defendant Fresno Community Hospital & Medical Center is granted 10 days' leave to file its answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

A bystander claim of NIED involves emotional distress caused by witnessing injury to a close family member. (*Thing v. LaChusa* (1989) 48 Cal.3d 644, 667-668 ("Thing"); see also *Dillon v. Legg* (1968) 68 Cal.2d 728, 741.) In *Thing* the California Supreme court established three requirements for a valid NIED claim based on the bystander theory of recovery; namely, plaintiff: (1) must be closely related to the injury victim; (2) must be present at the scene of the injury-producing event at the time it occurs and be aware at the time that the injury is being inflicted upon the direct victim; and (3) must, as a result, suffer serious emotional distress, i.e., a reaction beyond that which would be anticipated in a disinterested witness. (*Thing, supra*, at pp. 667-668; *Bird v. Saenz* (2002) 28 Cal.4th 910; *Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484 ("Bird"); *Campanano v. California Medical Center* (1995) 38 Cal. App. 4th 1322; *Madigan v. City of Santa Ana* (1983) 145 Cal. App. 3d 607.)

There is no question that Mr. Loza is a sufficiently close relative, that he was present at the scene, and that he has sufficiently alleged he suffered severe emotional distress. Defendant's contention is that he hasn't sufficiently alleged contemporaneous awareness of infliction of injury on the direct victims.

In *Bird, supra*, the California Supreme Court emphasized that plaintiff must allege he observed the "injury-producing event" which he *then* believed, as opposed to concluding later, was causing injury to the direct victim. In other words, he must allege he was "contemporaneously aware of the connection between the injury-producing event and the victim's injuries." (*Bird, supra* 28 Cal.4th at p. 921, emphasis added.) The challenge, in the context of medical treatment, is that without medical expertise a layperson generally cannot "meaningfully be aware that a course of treatment is causing injury." (*Id.* at p. 921.) Thus, the Court observed that generally "courts have not found a layperson's observation of medical procedures to satisfy the requirement of contemporary awareness of the injury-producing event." (*Id.* at pp. 917-918.) Recovery for NIED in this context will generally only be possible in extreme cases (the court in *Bird* cited the example of a relative observing the amputation of the wrong limb). (*Id.*)

Defendant also cites to the cases of *Breazeal v. Henry Mayo Newhall Memorial Hospital* (1991) 234 Cal.App.3d 1329 ("*Breazeal*") and *Morton v. Thousand Oaks Surgical Hosp.* (2010) 187 Cal.App.4th 926 ("*Morton*") as further support for this point. In *Breazeal*, the plaintiff was held unable to recover for NIED based on her observation of unsuccessful efforts to ventilate and resuscitate her son because she had not provided evidence that she knew at that time the conduct constituted an "injury-producing event" as opposed to an unsuccessful attempt to correct an already existing injury. (*Id.* at p. 1342.) In *Morton*, the court refused to expand NIED liability beyond the clear parameters of *Thing, supra*, where plaintiffs' attempted to pin their claim on allegations of their "experience in the medical field," which distinguished them from the typical layperson, especially since they had alleged no facts supporting this conclusory allegation, even when given an opportunity to do so, and even though this was their burden. (*Id.*)

On balance, plaintiffs have added sufficient factual allegations to support their claim at the pleading stage. While *Morton, supra*, is a pleading case (dismissal after demurrer), most of the other cases relied on by defendants were not, but were considering plaintiffs' evidence (or lack thereof). Mr. Loza is not relying on alleging his medical expertise, like the plaintiffs in *Morton*.

In a recent case, *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489, *reh'g denied* (Mar. 11, 2015) ("*Keys*"), the court upheld a jury verdict awarding plaintiffs NIED damages related to a family member's death after complications from thyroid surgery. The court noted that *Bird* did not "categorically bar" NIED claims in the medical malpractice context. (*Keys*, at p. 489.) After the surgery, plaintiffs observed the patient (their mother and sister) having difficulty breathing and watched the medical professionals' inadequate treatment of it, resulting in her death. (*Id.*) At trial, their expert noted evidence of a hematoma in her throat (a common risk of thyroid surgery, which can occur without negligence), but he testified that the critical factor in her death was defendants' failure to realize she had a compromised airway. (*Id.*) The court stated that the negligence was not failure to diagnose the hematoma, but the defendant's "lack of acuity and response to Knox's inability to breathe, a condition plaintiffs observed and were aware was causing her injury." (*Id.*) This provided substantial evidence to support the jury's verdict.

Here, Mr. Loza has alleged he personally witnessed his wife's labor and delivery, where the medical professionals pushed his wife's legs to her chest, placed their feet on the bed and pushed her abdomen while repeatedly and forcefully pulling the baby from his head and arm with extreme force, which he perceived to cause the baby and his wife injuries. As plaintiffs have argued, labor and delivery are more commonly understood by the average layperson than other medical procedures; indeed, it is a procedure in which laypeople are commonly *invited* to participate. The fragility of a baby's head and body is also common knowledge, such that Mr. Loza could appreciate that repeated and forceful pushing on his wife's abdomen and pulling of his baby's head and arm could cause injury. This is sufficient, at the pleading stage, to allege a contemporaneous awareness of the "connection between the injury-producing event and the victim's injuries." (*Bird, supra* at p. 921, *emphasis added.*)

Tentative Rulings for Department 502

(5)

Tentative Ruling

Re: ***Ciolkosz v. West Acres Shopping Center and Chili Night Indian Restaurant***
Superior Court Case No. 15 CECG 00048

Hearing Date: June 1, 2016 (**Dept. 502**)

Motion: By Defendants West Acres, LLC and Chili Night Indian Restaurant to Strike the Second Amended Complaint

Tentative Ruling:

To grant the motions to strike with leave to amend on the conditions stated infra. A Second Amended Complaint in strict conformity with the conditions stated infra must be filed within 15 days of notice of the ruling. Notice runs from the date that the minute order is mailed by the Clerk plus 5 days for mailing. See CCP § 1013.

Plaintiff's counsel, Sofian Dawood is advised that any subsequent failure to follow the Code of Civil Procedure, the Rules of Court and the Local Rules of Fresno County Superior Court may result in the imposition of sanctions pursuant to CCP § 128.7, CCP § 177.5, CCP § 575.2 and/or CRC Rule 2.30(b).

Explanation:

Background

Plaintiff is a refrigeration technician. On or about June 4, 2014, he was hired to repair the AC of the tenant, Chili Nights Restaurant located at 3209 W. Shaw Avenue, Fresno CA. In order to repair the AC, he had to access the roof. Unbeknownst to the Plaintiff, the property owner had installed razor wire on the roof due to past thefts. It is not clearly pleaded, but apparently, Plaintiff slipped while climbing a ladder of some type located somewhere on the roof and cut his arm on the razor wire. He suffered serious injuries requiring surgery. He has suffered loss of feeling in his arm.

Plaintiff filed a Complaint on January 7, 2015. On May 7, 2015, the Court granted a motion to strike the claim for punitive damages with leave to amend. On May 15, 2015, the Plaintiff filed a First Amended Complaint. Answers and a Cross-Complaint were filed.

On March 8, 2016, Plaintiff's motion seeking leave to file a Second Amended Complaint came before the Court. A tentative ruling had been issued on March 7, 2016. After the hearing, the Court took the matter under advisement. On April 1, 2016, notice was mailed to the parties of the Court's decision. Plaintiff was granted

permission to file the Second Amended Complaint. However, the Plaintiff had already filed the Second Amended Complaint, **thirteen days earlier** on March 18, 2016.

Motions at Bench

On April 20, 2016, Defendant West Acres filed a motion to strike the Second Amended Complaint. On April 21, 2016, Defendant Chili Nights Restaurant filed a motion to strike the Second Amended Complaint. On April 28, 2106, Defendant Sanger Fence Company filed a joinder in each motion. Opposition was filed. Defendant West Acres filed a reply.

Both moving Defendants assert that the Second Amended Complaint was filed while the matter was under advisement, and therefore, without permission of the Court. Both Defendants also submit that the Second Amended Complaint filed on March 18, 2016 differs from the proposed Second Amended Complaint that was attached to the motion seeking leave. Specifically, the Second Amended Complaint filed on March 18, 2016 adds causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress against all Defendants. The proposed Second Amended Complaint attached to the motion filed on December 24, 2015 does not allege these causes of action. Indeed, it only alleged a single cause of action for general negligence. In addition, the moving Defendants assert that the claims for punitive damages and attorney's fees in the filed Second Amended Complaint are not properly pleaded.

The opposition submits that the tentative ruling granted permission to the Plaintiff to file a Second Amended Complaint. Accordingly, he argues that did not file the Second Amended Complaint "without permission." He also contends that he found no authority requiring that the amended pleading that is filed be identical to the proposed amended pleading submitted with a motion. Lastly, he lays out his arguments for seeking punitive damages and attorney's fees.

Merits

Plaintiff's arguments in opposition display a serious lack of comprehension of the rules of civil procedure and the rules of court. CCP § 473(a)(1) states in relevant part:

The court may likewise, **in its discretion**, after notice to the adverse party, **allow, upon any terms as may be just**, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

Accordingly, except for amendments encompassed by CCP § 472 entitled "Amendment without leave of court", all amendments (whether in the form of an "amendment" to the pleading already on file or an amended pleading) require permission of the Court via a noticed motion.

California Rules of Court Rule 3.1324. Amended pleadings and amendments to pleadings provides in pertinent part:

(a) Contents of motion

A motion to amend a pleading before trial **must**:

(1) Include a copy of the **proposed amendment or amended pleading**, which must be serially numbered to differentiate it from previous pleadings or amendments;

It is axiomatic that the proposed amendment or amended pleading that was submitted to the court in support of the motion be identical to the one that is filed. Otherwise, it would render as meaningless, the requirement that the court have the opportunity to view the proposed pleading.

Here, for reasons unknown, Plaintiff's counsel filed the Second Amended Complaint while the ruling on the motion seeking leave to amend was under advisement. Therefore, he filed the Second Amended Complaint **without permission**. Accordingly, the motions to strike the entire Second Amended Complaint will be granted.

Leave to amend will be granted on the following conditions only:

1. No cause of action for intentional infliction of emotional distress (IIED) lies under the facts of this case. "A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051) Here, the facts indicate that the plaintiff's injuries were physical and the result of an accident. Most importantly, Defendants' conduct cannot be deemed "outrageous" as a matter of law. See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.
2. No cause of action for negligent infliction of emotional distress (NIED) lies under the facts of this case. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were **not** otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928.) Here, the Plaintiff did suffer physical injuries. As a result, he entitled to claim "pain and suffering" as damages. See *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893. Therefore, a separate cause of action for NIED does not lie under these circumstances.

3. There is no basis for the claim of attorney's fees. According to 7 *Witkin California Procedure "Judgment"* (5th Ed. 2008) § 149: "Attorneys' fees are allowed as costs and awarded as part of the judgment in the following cases:

(a) When they are provided for by contract.

(b) When they are provided for by statute or ordinance.

(c) When the plaintiff in an equitable action recovers or preserves a common fund, or obtains benefits for the plaintiff and others."

Here, the Plaintiff may have been employed under a contract, but he is not suing "on the contract." See *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84. His other theory that doctrine of "tort of another" applies is meritless. He is not bringing this action against "third parties to protect his or her interests." He is suing three defendants alleged to be joint tortfeasors. The doctrine does not apply. See *Gorman v. Tassjara Dev. Corp.* (2009) 178 Cal.App.4d, 78, 81. Finally, there is no "common fund" at issue and claiming attorney's fees on this ground is meritless. See *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.

4. The Plaintiff must **carefully plead** any claim for punitive damages in conformity with Civil Code § 3294. Here, the allegations are "all over the map." See ¶¶ 8-10, 26, 39, and 49 of the Second Amended Complaint filed on March 18, 2016. In fact, by micro-focusing on pleading facts in support of punitive damages, the Plaintiff has created ambiguity. Notably, he neglects to plead how the injury occurred.

Pursuant to California Rules of Court, rule 3.1312(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: DSB **on** 5/31/16.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: **McDonald v. Beck et al.**, Superior Court Case No.
13CECG03807

Hearing Date: **June 1, 2016 (Dept. 502)**

Motion: Defendant's Motion to Expunge Lis Pendens

Tentative Ruling:

To continue the hearing to July 6, 2016 at 3:30 p.m. in Dept. 502.

Explanation:

In the section entitled "Plaintiff's Evidentiary Presentation Establishes by a 'Preponderance of the evidence the Probable Validity of Her Claim,'" plaintiff mentions the four declarations that she filed, three of which attach deposition transcripts. The Opposition then says,

Because this testimony is lengthy but extremely relevant, **McDonald requests that this evidence consisting of deposition testimony of Beck, McDonald and Petty attached to McDonald's Declaration be reviewed and considered by the Court as such evidence establishes the factual basis for the causes of action in issue, the contract, and title documents which evidence the claims.**

(Oppo. 12:1-5, emphasis original.)

It is plaintiff's burden to show the probable validity of her claims. A memorandum of points and authorities "must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (Cal. Rules of Court, Rule 3.1113(b).) Here, there is no discussion at all of the evidence, or application of law to admissible evidence.

Although the motion could be granted on that basis, the court prefers to address the motion on the merits and so continues the hearing to July 6, 2016. Defendant is ordered to file a supplemental memorandum of points and authorities which complies with Rule 3.1113(b) not later than June 13, 2016. Plaintiff may then file any supplemental reply not later than June 24, 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 5/27/16.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Arnoldo Lua v. H/S Development Company, LLC***
Superior Court Case No. 14CECG02057

Hearing Date: Wednesday, June 1, 2016 (**Dept. 502**)

Motion: Cross-Complainant Mendota Investment Company Ltd., L.P.'s
Motion for Summary Adjudication Against Lee Construction

Tentative Ruling:

To deny Cross-Complainant Mendota Investment Company Ltd., L.P.'s motion for summary adjudication against Lee Construction. (Code Civ. Proc., § 437c.)

Explanation:

Cross-Complainant Mendota Investment Company Ltd., L.P. ("Cross-Complainant") move for summary adjudication of its sixth and seventh causes against Cross-Defendant Lee Construction ("Cross-Defendant").

Code of Civil Procedure section 437c, subdivision (f)(1) provides that: "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." California Rules of Court, rule 3.1350(b) states, in relevant part, that: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts."

In their notice of motion and motion for summary adjudication, Cross-Complainant "move[s] the Court for summary adjudication against Cross-Defendant LEE CONSTRUCTION ("Lee") as follows: [¶] As to the Sixth Cause of Action contained in MENDOTA'S operative Cross-Complaint for Breach of Contract – Duty to Defend and the Seventh Cause of Action for Declaratory Relief, MENDOTA requests that the Court declare that Cross-Defendant LEE has breached its duty to defend MENDOTA with respect to Plaintiffs' claims in this action, and to order LEE to accept the tender of MENDOTA's defense in this case." Since Cross-Complainant's notice of motion asks the Court to declare that Cross-Defendant has breached its duty and to order Cross-Defendant to accept the tender of Cross-Complainant's defense, the Court determines

that Cross-Complainant's motion seeks to summarily adjudicate the entirety of Cross-Complainant's sixth and seventh causes of action, not just the singular issue of Cross-Defendant's duty to defend. (*Paramount Petroleum Corporation v. Superior Court* (2014) 227 Cal.App.4th 226, 244 ["A plaintiff may seek summary adjudication on the existence or nonexistence of a contractual duty ([citation]), but there is simply no statutory basis for an order summarily adjudicating that a party breached a duty."].)

1. Cross-Complainant's Sixth Cause of Action

Cross-Complainant's sixth cause of action is for breach of contract – duty to defend. "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) When a plaintiff or cross-complainant moves for summary judgment or summary adjudication, the plaintiff or cross-complainant "has the burden of showing there is no defense to a cause of action. [Citation.] That burden can be met if the plaintiff 'has proved each element of the cause of action entitling the party to judgment on that cause of action.' [Citation.] If the plaintiff meets this burden, it is up to the defendant 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 388.)

Cross-Complainant's undisputed material facts establish that, on February 2, 2010, Cross-Complainant and Cross-Defendant entered into a subcontract agreement wherein Cross-Defendant agreed to install stucco on various homes in a residential construction project. (Cross-Complainant's Undisputed Material Fact ("CUMF") No. 1.) The contract provided, in relevant part, that: "To the fullest extent permitted by law, Subcontractor shall indemnify, defend (at Subcontractor's sole expense) and hold harmless Subcontractor, Contractor, the owner, ... from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses ... which arise directly or indirectly or are in any way connected with the work performed, materials furnished or services provided under this Subcontract by Subcontractor or its agents. [¶] Subcontractor acknowledges and agrees that if Builder notifies Subcontractor of a claim pursuant to the Code, such notice will immediately trigger Subcontractor's obligations under these indemnification provisions." (CUMF No. 3.) Cross-Defendant worked on 14 of the 58 homes in the residential construction project. (CUMF No. 2.)

In the complaint filed by Plaintiffs against Cross-Complainant, Plaintiffs allege, among other things, that there are defects in the homes pertaining to stucco, which falls within Cross-Defendant's scope of work at the construction project. (CUMF Nos. 4 & 5.) On December 16, 2014, Cross-Complainant filed a cross-complaint against various subcontractors, including Cross-Defendant. (DUMF No. 6.) On April 6, 2015, Cross-Complainant, through its counsel, tendered its defense to Cross-Defendant. (CUMF No. 7.) As of when the motion for summary adjudication was prepared, Cross-Defendant has not accepted Cross-Complainant's tender of defense. (CUMF No. 8.)

This construction defect action is ongoing and no parties or issues have settled. (CUMF No. 9.)

However, “[a]s damages are an element of a breach of contract cause of action ([citation]), a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later.” (*Paramount Petroleum Corporation v. Superior Court*, *supra*, 227 Cal.App.4th 226, 241.) Here, Cross-Complainant has failed to assert any undisputed material fact and/or present any evidence establishing that it has been damaged in a specific amount due to Cross-Defendant's breach of contract. Therefore, even assuming *arguendo* that Cross-Complainant has established the first three elements of its breach of contract cause of action, the Court finds that Cross-Complainant has failed to establish the fourth element – the damages to Cross-Complainant due to Cross-Defendant's breach.

Consequently, since Cross-Complainant has failed to meet its initial burden of establishing each element of its cause of action for breach of contract, the burden does not shift to the Cross-Defendant to establish a triable issue of material fact. Accordingly, the Court denies Cross-Complainant's motion for summary adjudication of its sixth cause of action for breach of contract – duty to defend.

2. Cross-Complainant's Seventh Cause of Action

Cross-Complainant's seventh cause of action is for declaratory relief. Code of Civil Procedure section 1060 provides, in relevant part, that: “An person interested ... under a contract[] ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties ..., including a determination of any question of construction or validity arising under the ... contract.” “To qualify for declaratory relief, [Plaintiff] would have to demonstrate its action presented two essential elements: ‘(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [Plaintiff's] rights or obligations....’ ” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

Here, Cross-Complainant contends that it is entitled to a judicial determination of whether or not Cross-Defendant has a contractual duty to defend Cross-Complainant in the construction defect action. However, in the seventh cause of action, Cross-Complainant pleads that an actual controversy now exists between Cross-Complainant and Cross-Defendant, in that Cross-Complainant contends that it is entitled to defense, total indemnity, equitable indemnity, implied indemnity, contractual indemnity, apportionment and/or contribution while Cross-Defendant denies such obligations. (Cross-Complainant's Cross-Complaint, ¶¶ 57-58.) Therefore, because Cross-Complainant seeks a judicial declaration about indemnity, apportionment and/or contribution in addition to a judicial declaration about Cross-Defendant's duty to defend, a judicial declaration on the issue of Cross-Defendant's duty to defend would not completely dispose of Cross-Complainant's seventh cause of action. Since a “motion for summary adjudication shall be granted only if it completely disposes of a cause of action,” the Court denies Cross-Complainant's motion for summary

(5)

Tentative Ruling

Re: ***Jane Doe No. 1 .v Estate of Lance Clement et al.***
Superior Court Case No. 14 CECG 03347 **Lead Case**
Consolidated with:

Jane Doe No. 2 v. Estate of Lance Clement et al.
Superior Court Case No. 14 CECG 03348 (Non Lead)

Jane Doe No. 3 v. Estate of Lance Clement et al.
Superior Court Case No. 15 CECG 00174 (Non Lead)

Jane Doe No. 4 v. Estate of Lance Clement et al.
Superior Court Case No. 15 CECG 01033 (Non Lead)

Jane Doe No. 5 v. Estate of Lance Clement et al.
Superior Court Case No. 15 CECG 01937 (Non Lead)

Hearing Date: June 1, 2016 (**Dept. 502**)

Motion: By Defendant Orange Center Elementary School
District seeking to compel an IME of Jane Doe No. 5

Tentative Ruling:

To deny that part of the motion that seeks to compel Mrs. Vasquez Lopez to submit to an interview with Dr. Richard J. Shaw. To grant the remaining part of the motion pursuant to CCP § 2032.320(a).

The IME of Jane Doe No. 5 will take place on Thursday, June 9, 2016 at 10:00 a.m. at U.S. Legal Support located at 5200 North Palm Avenue, Suite 110, Fresno, CA. The examination will be conducted by Dr. Richard J. Shaw. Dr. Shaw is board certified in both psychiatry and child and adolescent psychiatry. The IME will be conducted as follows:

1. A one-on-one interview of Jane Doe 5, which interview is not anticipated to exceed three (3) hours;

2. The completion by Jane Doe 5 of the following three short psychiatric questionnaires:

- a. Child Depression Inventory
- b. Multidimensional Anxiety Scale for Children
- c. UCLA PTSD Index

Explanation:

Code of Civil Procedure section 2032.320 sets forth the *only* procedure as to which a court order is still required *before* commencing discovery. Notice and hearing are deemed essential to protect against unreasonable examinations and to safeguard the examinee's bodily and mental privacy and other constitutional rights. [See *Reuter v. Sup.Ct. (Tag Enterprises)* (1979) 93 Cal.App.3d 332, 343]

The court may order the examination of:

- Any party to the action;
- An *agent* of any party; or
- Anyone in the *custody or control* of party. [CCP § 2032.020(a)]

The court may order a physical or mental examination of a nonparty who is a party's "agent." [CCP § 2032.020(a)] As for persons "in custody or control" of party, the phrase is given a "common sense" interpretation. [See *Holm v. Sup.Ct. (Misco)* (1986) 187 Cal.App.3d 1241—dead body not a "party" or "person under control of party" in will contest case] The court may order physical examination of a party's *employees* (e.g., the driver of D's truck); or a *minor* in the custody of a party. But, the court has *no* power to order a nonparty witness, who is neither an agent nor in the custody or control of a party, to submit to *any* examination ... even if stipulated to by the parties.

The examination will be limited to whatever condition is "in controversy" in the action. [CCP § 2032.020(a)] This means the *specific injury or condition* that is the subject of the litigation. The examination must be *directly* related thereto. [See *Roberts v. Sup.Ct. (Weist)* (1973) 9 Cal.3d 330, 337] A party's *pleadings* will put his or her mental or physical condition in controversy, as when a plaintiff claims *continuing* mental or physical injury resulting from defendant's acts: "A party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy." [See *Vinson v. Sup.Ct. (Peralta Comm. College Dist.)* (1987) 43 Cal.3d 833, 839—plaintiff claimed ongoing emotional distress from sexual harassment by former employer]

But, allegations of injury to one person cannot support an order for an examination of another. [*Reuter v. Sup.Ct. (Tag Enterprises)* (1979) 93 Cal.App.3d 332, 342] In *Reuter, supra*, a minor's suit claimed psychiatric trauma from an accident in which he was injured and his father killed. An order for mental examination of the minor was proper. But the court could *not* order the minor's *mother* to submit to a mental examination even though she was the minor's guardian ad litem. *Her* mental condition was *not* in controversy. [*Reuter v. Sup.Ct. (Tag Enterprises)*, *supra*, 93 Cal.App.3d at 340]

A court order for physical or mental examination must be based on a showing of "good cause." [CCP § 2032.320(a)] This generally requires a showing both of:

- “Relevancy to the subject matter”; and
- *Specific facts* justifying discovery: i.e., allegations showing the *need* for the information sought and *lack of means for obtaining it elsewhere*. [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)* (1987) 43 Cal.3d 833, 840]

The purpose is to protect an examinee's privacy by preventing annoying “fishing expeditions”; i.e., one party may not compel another to undergo psychiatric testing “solely on the basis of speculation that something of interest may surface.” [*Vinson v. Sup.Ct. (Peralta Comm. College Dist.)*, *supra*, 43 Cal.3d at 840]

The moving party has met its burden as to the IME of Jane Doe. No. 5. She has placed her mental condition at issue. See Complaint filed in Case N. 15 CECG 01937 at ¶¶26 and ¶4 of the prayer. The parties have engaged in an extensive “meet and confer.” See Declaration of Anwyl at ¶¶ 3-6 filed in support of the motion. The “good cause” requirement has been met.

But, the moving party has not met its burden regarding the interview of Mrs. Vasquez Lopez. The case of *Cruz v. Superior Court (Advanced Obygn Med. Group)* (2004) 121 Cal.App.4th 646, 650, [former § 2032, subd. (a) (now § 2032.020, subd. (a))] is not controlling. In that case, the trial court ordered a **physical examination and blood testing of the mother of the minor plaintiff**. At issue was the negligent treatment of the minor “in utero.” Consequently, blood tests were necessary to determine whether any genetic defect was the cause of the brain damage to the minor. *Id.* at 649. Notably, the case was decided under the language in CCP §2032(a) that permits a physical examination of an agent of the party. *Id.* at 650.

Here, the order seeks a mental examination not a physical one. It is immaterial whether Mrs. Vasquez Lopez is “an agent” of the minor. See *Reuter v. Sup. Ct. (Tag Enterprises)* (1979) 93 Cal.App.3d 332, 342. Importantly, the case of *Jonnie Roe v. Superior Court (Hollister School District et al.)* (2015) 243 Cal.App.4th 138 is directly on point. To reiterate, the Sixth District Court of Appeal found that even though the mother was a plaintiff, the IME was directed only to the minor. Thus, the interviews of the parents were “collateral.” The appellate court determined that CCP § 2032.020 does not encompass “collateral interviews” of a minor’s parents as part of an IME of the minor. *Id.* at 144-145. Notably, the opinion stated: “While interviewing the parents of a child to gain background and information about that child may be a sound professional practice from a psychiatrist's viewpoint, section 2030.020's plain language does not empower a trial court to make a discovery order requiring such parental interview as part of a mental examination of a party who is a minor. Such authority must come from the Legislature.” *Id.* At 145. That is exactly the scenario at bench. There is no authority to require Mrs. Vasquez Lopez to submit to an interview. Therefore, that part of the motion must be denied. The remainder of the motion will be granted.

Pursuant to California Rules of Court, rule 3.1312(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: DSB **on 5/27/16 .**
(Judge's initials) (Date)

Tentative Rulings for Department 503

(20)

Tentative Ruling

Re: ***Gutierrez v. Karing 4 Kids et al.***, Superior Court Case No. 13CECG03620

Hearing Date: **June 1, 2016 (Dept. 503)**

Motion: Plaintiff's Motion to Set Aside Dismissal and to Enforce Settlement

Tentative Ruling:

To grant the motion to set aside the dismissal entered on February 29, 2016.

To deny the motion to enforce the settlement. (Code Civ. Proc. § 664.6.) To deny the request for sanctions. (Code Civ. Proc. § 128.5.)

Explanation:

Since plaintiff's current counsel was not served with the notice of dismissal hearing, the court will excuse the failure to appear and set aside the dismissal. However, the motion to enforce the settlement must be denied.

On April 1, 2015 plaintiff Rigoberto Gutierrez and Claudia Gutierrez entered into a written settlement agreement with defendant Karing 4 Kids, pursuant to which defendant agreed to pay plaintiffs a total of \$80,000, in exchange for a general release. The Settlement Agreement states that the parties intend for the agreement to be binding and enforceable under Code of Civil Procedure section 664.6. Regarding the terms of payment, at paragraph 3 the agreement states, "Payments will be made to plaintiff(s) as follows: \$20,000 upon approval of Board & \$10,000.00 30 days after approval & \$10,000.00 per month until paid in full." On April 6, 2015 plaintiff's counsel Kevin Little filed a notice of conditional settlement of the entire case.

After the mediation and the execution of this settlement agreement at the mediation, the parties worked together to draft a more comprehensive and complete written agreement, but it was never executed.

A settlement agreement is a contract. When interpreting a contract, the court's goal is to give effect to the mutual objective intent of the parties as it existed at the time the contract was formed. (Civ. Code § 1636; *Palmer Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) That objective intent must be determined, whenever possible, by reference to the contract's words. (Civ. Code §§ 1638, 1639.) "In construing a contract, it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties." (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 19.)

(28)

Tentative Ruling

Re: **Manmohan et al. v. Anheuser-Busch Inbev Worldwide, Inc. et al.**

Case No. 14CECG03039

Hearing Date: June 1, 2016 (Dept. 503)

Motion: By Plaintiffs for Admission of Daniel C. Hedlund to Appear as Counsel Pro Hac Vice

Tentative Ruling:

To grant the motion.

Explanation:

Plaintiff has filed an application for the admission of Daniel C. Hedlund *pro hac vice* in the above-entitled case. The application appears to comply with the requirements of California Rule of Court 9.40 and no opposition has been filed in this matter. Therefore, the Court grants the application.

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: A.M. Simpson **on** 5/31/16 .
(Judge's initials) (Date)