

Tentative Rulings for June 9, 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).)

15CECG00405 *Rivas v. Rivas et al.* (Dept. 402)
15CECG01234 *Toste et al. v. Gottfried* (Dept. 501)
14CECG00877 *Consolidated Irrigation District v. City of Reedley* (Dept. 403)
16CECG01592 *Vigour Group, LTD v. Mist Enterprises, LLC* (Dept. 403)

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

16CECG00946 *Palmer v. MTC Financial, Inc.* is continued to Thursday, June 23, 2016 at 3:30 p.m. in Dept. 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: **Garcia v. Clovis Unified School District**
Superior Court Case No. 14CECG02186

Hearing Date: June 9, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

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: JYH on 6/8/16 .
(Judge's initials) (Date)

Tentative Ruling

Re: **Solorio v. Fresno Community Hospital and Medical Center**
Case No. 15 CE CG 03165

Hearing Date: June 9th, 2016 (Dept. 402)

Motion: Plaintiff's Motion for Judgment on the Pleadings

Tentative Ruling:

To deny plaintiff's motion for judgment on the pleadings. (Code Civ. Proc. § 438.)

Explanation:

Code of Civil Procedure section 438 provides, in pertinent part, "The motion provided for in this section may only be made on one of the following grounds: (A) If the moving party is a plaintiff, that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Code Civ. Proc., § 438, subd. (c)(1)(A).)

"A motion for judgment on the pleadings is an appropriate means of obtaining an adjudication of the rights of the parties in a declaratory relief action if those rights can be determined as a matter of law from the face of the pleading attacked, together with those matters of which the court may properly take judicial notice. A plaintiff's motion for judgment on the pleadings is analogous to a plaintiff's demurrer to an answer and is evaluated by the same standards." (*Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326, 330-331, internal citations omitted.)

"A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer, and the motion must be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense. For the purpose of ruling on the motion, the trial court must treat all of defendant's allegations as being true, and since the moving party admits the untruth of his own allegations in so far as they have been controverted, all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts." (*MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 812-813, internal citations omitted.)

Here, plaintiff moves for JOP on the ground that its complaint states a valid claim for declaratory relief because the contract fails to set forth a specific price schedule for medical services, or to even mention the Chargemaster schedule that defendant uses to bill self-pay patients. Thus, plaintiff contends that the contract has an "open" pricing term, and that he is entitled to a declaration that defendant can only obtain the reasonable value of its services. (Civil Code § 1611.)

(17)

Tentative Ruling

Re: **Johnson v. City of Fresno**
Court Case No. 16 CECG 00976

Hearing Date: June 9, 2016 (Dept. 402)

Motion: Plaintiff's Motion for Trial Preference

Tentative Ruling:

To grant.

Explanation:

Code of Civil Procedure section 36 states, in relevant part:

A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under 14 years of age unless the court finds that the party does not have a substantial interest in the case as a whole.

(Code Civ. Proc. § 36, subd. (b).)

Here, plaintiff Robert Jenkins was born to Shanney Johnson on March 3, 2003. (Johnson Decl. at ¶¶ 1, 3.) The plaintiff is under 14, and a person within the scope of section 36. The Court must grant his preference motion unless it finds he lacks a substantial interest in the case as a whole. Because Robert is the only plaintiff, and the case concerns his own serious personal injuries, Robert possesses a substantial interest in the case as a whole.

Nevertheless, defendant argues the motion should be denied for three reasons: a lack of adequate time to prepare for trial, a trial conflict for trial counsel, and a need to decide whether to (and time to) tender the defense of the action to a third party. None of these concerns are valid reasons to deny relief to plaintiff.

Section 36, subdivision (b) is mandatory, not directory or discretionary. (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 224.) The Court has no right to balance interests in deciding whether a person is entitled to section 36 preference. (*Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689, 696-697.) Section 36, subdivision (b) "insur[es] timely court access to children under 14 who have suffered personal injury or parental death." (*Peters v. Superior Court, supra*, 212 Cal.App.3d at 226.)

While the City of Fresno seeks to distinguish *Peters v. Superior Court, supra*, 212 Cal.App.3d 218, claiming it "does challenge the statute" – it identifies no legal basis for doing so, and this court will not speculate as to its reasoning. "Decisions of every division of the District Courts of Appeal are binding upon all ... the superior courts of this

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***Abedi v. Ghanouni***
Case No. 15 CE CG 02231

Hearing Date: June 9th, 2016 (Dept. 403)

Motion: Plaintiff and Cross-Defendant's Motion for Sanctions against Defendants and/or Their Counsel

Tentative Ruling:

To deny the motion for sanctions against defendants/cross-complainants and their counsel. (Code Civ. Proc. § 128.7.) Deny defendants/cross-complainants' motion for sanctions against plaintiff and cross-defendant. (*Ibid.*)

Explanation:

"Under Code of Civil Procedure section 128.7, a court may impose sanctions for filing a pleading if the court concludes the pleading was filed for an improper purpose or was indisputably without merit, either legally or factually... A claim is factually frivolous if it is 'not well grounded in fact' and it is legally frivolous if it is 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. A claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.'" (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440, internal citations omitted.)

Also, "Code of Civil Procedure section 128.7 provides for a 21-day period during which the opposing party may avoid sanctions by withdrawing the offending pleading or other document. By providing this safe harbor period, the Legislature designed the statute to be 'remedial, not punitive.' When a party does not take advantage of the safe harbor period, the 'statute enables courts to deter or punish frivolous filings which disrupt matters, waste time, and burden courts' and parties' resources.'" (*Id.* at p. 441, internal citations omitted.)

Here, Abedi and Daneshjoo complied with the 21-day "safe harbor" requirement of section 128.7, since they served a copy of their motion on Laleh and Touraj on April 14th, 2016, more than 21 days before they filed the motion with the court. Their attorney also demanded that the second amended cross-complaint be withdrawn or the motion for sanctions would be filed. (Kharazi decl., ¶ 2.) However, the SACC was not withdrawn, so Abedi and Daneshjoo properly filed their motion for sanctions on May 20th, 2016.

On the other hand, it does not appear that the SACC is so completely without legal or factual merit as to warrant the imposition of sanctions for filing it. First of all, the court has already sustained a demurrer to the SACC with leave to amend, which strongly implies that there is a possibility that the cross-complaint can be amended to state a valid claim. Once the third amended cross-complaint is filed, it will supersede the SACC that forms the basis for the motion for sanctions. Thus, the court's ruling on the demurrer effectively rendered the motion for sanctions moot.

Also, even assuming that the motion is not moot, Abedi and Daneshjoo have failed to show that the SACC is completely without legal or factual merit. They argue that the single claim for implied indemnity¹ is unsupported because there are no allegations of a contractual relationship between Daneshjoo and Laleh that are necessary to support such a claim. However, while the SACC does not clearly allege whether the contract is written, oral, or implied by conduct, Laleh does allege that she entered into some type of contact with Daneshjoo, in which she agreed to sign the title documents for the property in exchange for Daneshjoo promising to pay her costs, legal fees and potential damages related to the transaction. (SACC, ¶ 9.) The lack of allegations as to whether the contract was written, oral, or implied can be cured by amendment, as indicated in the court's ruling on the demurrer, so this defect does not necessarily mean that the SACC is completely without legal or factual merit.

In addition, while Abedi and Daneshjoo argue that there was no consideration for the alleged contract, Laleh has alleged that the consideration was that she would sign the title documents in exchange for Daneshjoo agreeing to pay her transactional costs, legal fees, and any potential damages arising from the transaction. (SACC, ¶ 9.) This would appear to provide adequate consideration for the agreement. Consequently, the alleged lack of consideration does not make the indemnity agreement invalid.

Abedi and Daneshjoo also argue that the alleged agreement is invalid because it violates the statute of frauds, since it is an agreement for sale of real property and there is no allegation that the agreement is in writing. (Civ. Code, § 1624, subd. (a)(3).) However, there is no clear allegation that the agreement in question was not in writing. It appears that the agreement may have been oral, but this fact is not actually alleged in the SACC, so it is not apparent that the agreement fails because it was not in writing.

Even assuming that the agreement was not in writing, the agreement was not for the sale of property, but only for indemnity related to a promise to put Laleh's name on the title for the property. The SACC alleges that Laleh agreed to temporarily put her name on the title as a favor to Daneshjoo, and that Daneshjoo essentially retained ownership of the property and continued to reside there. (SACC, ¶ 9.) In exchange for putting her name on the title, Daneshjoo agreed to pay any transaction costs, legal fees, and potential damages from the transaction. (*Ibid.*) However, there is no allegation that Laleh ever paid Daneshjoo for the property, or that she intended to take ownership or possession of it. Therefore, it does not appear that the agreement was an

¹ The reference to "implied indemnity" appears to be a mistake, as Daneshjoo seems to be alleging that there was an express agreement to indemnify her, not an implied agreement.

agreement for the sale of property, such that the agreement would have to be in writing under the statute of frauds.

Next, Abedi and Daneshjoo argue that the SACC is a sham pleading, since it omits facts and contains allegations that are inconsistent with their prior pleadings, and they have not explained the changes. They claim that the SACC contains allegations regarding the alleged promise to pay Laleh's attorney's fees that were not in the earlier cross-complaints, and therefore the new allegations are a sham. Yet the fact that the earlier cross-complaints did not contain allegations regarding a promise to pay Laleh's attorney's fees does not necessarily mean that such a promise was not made. A party is allowed to allege more detailed facts in an amended pleading in response to a demurrer, or where some important facts have been omitted from the earlier pleading. The new facts are not inconsistent with the earlier cross-complaint's allegations, and they appear to simply add more detail with regard to the nature of the alleged promise. Therefore, the court will not find that the SACC is a sham pleading.

Abedi and Daneshjoo also argue that Laleh and Touraj are guilty of unclean hands, since they are the ones who refused to sign the documents disclaiming any interest in the property and thus necessitated the entire litigation, and thus they have no right to bring an indemnity claim for their attorney's fees. However, Laleh and Touraj's alleged bad faith conduct is an issue of fact that must be resolved through discovery, and possibly summary judgment or trial. It is not a matter that can be determined by the court as a matter of law at this early stage of the case.

In addition, Abedi and Daneshjoo argue that Laleh and Touraj cannot seek their attorney's fees because they have not alleged any specific contract or statute that would allow them to recover such fees. (Code Civ. Proc. § 1021.) However, Laleh specifically alleges that Daneshjoo agreed to pay her attorney's fees if Laleh put her name on title to the property. (SACC, ¶ 9.) Whether this agreement can be proved and is enforceable is not a matter that can be resolved at this point in the case. Thus, the court intends to deny the motion for sanctions against Laleh and Touraj.

Finally, Laleh and Touraj also seek sanctions against Abedi and Daneshjoo for maintaining their motion for sanctions even after the court sustained the demurrer to the SACC with leave to amend. However, the court intends to deny the request for sanctions, since the motion was not necessarily brought for improper reasons or without legal or factual support. Abedi and Daneshjoo had reasonable, good faith legal arguments to support their motion, and even after the court sustained the demurrer, they had legitimate reasons for believing that the cross-complaint lacked merit. Therefore, the court intends to deny the request for sanctions against them.

(24)

Tentative Ruling

Re: **Ramirez v. Doe**
Court Case No. 16CECG01021

Hearing Date: **June 9, 2016 (Dept. 403)**

Motion: Motion by Defendants The Oaks Diagnostics, Inc. and California Imaging Network Medical Group, Inc. to Strike Portions of the Complaint

Tentative Ruling:

To grant with leave to amend, and also without prejudice to plaintiffs' right to make a post-judgment motion under Code of Civil Procedure section 1021.4, if appropriate and applicable at that time. Plaintiffs are granted 10 days' leave to file the First Amended Complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

Explanation:

The only case cited by plaintiffs, *U. S. v. Salvucci* (1980) 448 U.S. 83, 85, does not support their point that moving defendants have no standing to challenge the attorney fee demand. That holding was limited to criminal defendants' standing to raise challenges to the constitutionality of searches and seizures, which is not in issue here.

While the Exemplary Damages Attachment ostensibly only targets the non-moving defendants, the supporting facts paragraphs (under EX-2) incorporate all prior causes of action, including those against moving defendants, and refers generically to "defendants" several times. An employer can be liable for the torts of an employee either under the doctrine of respondeat superior or based on the employer's direction or authorization to perform the tortious action, or its ratification of the act. (Civ. Code §§ 2338-2339; *Kaufman v. Brown* (1949) 93 Cal.App.2d 508, 515 disapproved of on other grounds by *Dragna v. White* (1955) 45 Cal.2d 469—principal responsible for false imprisonment by agents within scope of their authority; *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242—principal's ratification of agent's fraud.)

The Third cause of action alleges that moving defendants either had full knowledge of the acts of Carlos Doe or failed to properly supervise him, and that in so doing they acted with reckless disregard for and in conscious disregard of plaintiff's safety. Thus, plaintiffs' argument that the attorney fee demand is not aimed at moving defendants is not persuasive.

To the extent moving defendants are alleged to be liable for the acts of Carlos Doe and Does 1-2, they have a personal interest in the demand for attorney fees, and thus have standing to bring this motion. (*Roos v. Honeywell International, Inc.* (2015) 241

Tentative Rulings for Department 501

(29)

Tentative Ruling

Re: ***United Security Bank v. Ironhorse Development, Inc., et al.***
Superior Court Case No. 14CECG03854

Hearing Date: June 9, 2016 (Dept. 501)

Motion: Specially appearing Defendant Robert Spencer's motion to quash service of summons and complaint

Tentative Ruling:

To deny. (Code Civ. Proc. §410.10.)

Explanation:

When a defendant moves to quash out of state service for lack of personal jurisdiction, plaintiff has the burden of establishing by a preponderance of the evidence that jurisdiction over the moving party is proper. (*Pennsylvania Health & Life Ins. Guaranty*, supra, 22 Cal.App.4th 477.) Where plaintiff meets this burden, the burden then shifts to defendant to demonstrate that the exercise of jurisdiction would be unreasonable. (*Vons Companies, Inc., v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

California's courts are entitled to exercise personal jurisdiction over foreign defendants "on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc. § 410.10; see *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445 [state's long-arm statute reflects intent to exercise broadest possible jurisdiction limited only by constitutional considerations].) The basic test to determine whether jurisdiction over defendant is proper is whether defendant has had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [Citations.] (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.)

Where a nonresident defendant's activities may be described as "extensive or wide-ranging" or "substantial, continuous and systematic," this is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against that defendant; under such a circumstance, it is not necessary that a specific cause of action alleged be connected with defendant's business relationship to the forum. (*Lundgren v. Superior Court* (1980) 111 Cal.App.3d 477, 483; see also *Vons Companies, Inc.*, supra, 14 Cal.4th 434, 445.)

Where general jurisdiction cannot be established, a court may assume specific jurisdiction over a defendant in a particular case if plaintiff shows: (1) defendant has purposefully availed himself of herself of forum benefits; (2) the controversy is related to or arises out of defendant's contacts with the forum; and (3) the assertion of jurisdiction

would comport with "traditional notions of fair play and substantial justice." (*Id.* at pp. 446–447.)

To establish purposeful availment, plaintiff must show that defendant performed some type of affirmative conduct which allowed or promoted the transaction of business within the forum state. (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 907.) Contracting with an out of state party does not automatically establish purposeful availment in the other party's home forum. (*Burger King Corp.*, *supra*, 471 U.S. at p. 478; *Vons Companies, Inc.*, *supra*, 14 Cal.4th at p. 450.) The court must consider prior negotiations, contemplated future consequences, the parties' course of dealings, and the contract's choice of law provision. (*Burger King Corp.*, *supra*, 471 U.S. at pp. 478–482.) Due process requires a "substantial connection" between the contract at issue and the forum state. (*McGee v. International Life Insurance Company* (1957) 355 U.S. 220, 223.)

California courts generally treat choice of law provisions the same as forum selection clauses. (See *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464–465.) The validity of a contractual forum selection clause is presumed (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 154); a party seeking to defeat such a clause bears the burden of proving that its enforcement would be unreasonable under the circumstances of the case. (*Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1149.)

In the case at bench, specially appearing Defendant Robert Spencer ("Defendant Spencer") moves to quash service of summons based on a lack of personal jurisdiction.

The guaranty executed by Defendant Spencer on July 3, 2006, provides that the guaranty is governed by the laws of California. (Decl. of Steager, Exh. 3, ¶14.) The guaranty was signed by Defendant Spencer individually. (*Id.* at p. 5.) The promissory note on the loan guaranteed by Defendant Spencer includes a forum selection clause specifying California as the exclusive forum should a dispute arise. (Decl. of Steager, Exh. 2.) Defendant Spencer is listed as "Borrower" on the July 20, 2006, commercial loan agreement and promissory note, both of which he signed individually. (*Id.* at Exh. 8.) The guaranty dated May 1, 2009, is signed by Defendant Spencer individually. (Decl. of Steager, Exh. 20.) A renewal note dated July 20, 2009, lists Defendant Spencer as "Borrower;" Defendant Spencer signed individually. (*Id.* at Exh. 13.) Defendant Spencer was made co-manager of California business entities Ironhorse Elm, LLC, Ironhorse Oberti, LLC, Ironhorse Development Madera Avenue, LLC, and Ironhorse Development Tozer Avenue, LLC, in 2012. (Decl. of Steager, Exh. 5.) The change in terms agreement, dated December 6, 2013, is signed by Defendant Spencer, who is listed as a borrower. Each of the aforementioned documents provide that California law governs. Plaintiff has shown that Defendant Spencer was availing himself of the benefits of doing business in California in an on-going manner, up to as recently as the end of 2013. The forum selection clause in the underlying loan is presumed valid, as is the choice of law provision in the loan guaranty signed by Defendant Spencer. Plaintiff has met its burden. Accordingly, the burden shifts to Defendant Spencer to demonstrate that exercise of personal jurisdiction over him would be unreasonable.

Tentative Ruling

Re: ***Nannini v. Arbor Faire Senior Apartments***
Case No. 15 CE CG 01104

Hearing Date: June 9th, 2016 (Dept. 501)

Motion: Motion for Leave to File Second Amended Complaint and
Petition to Maintain Action in Name of Barbara Nannini, Now
Deceased

Tentative Ruling:

To grant the petition to allow Ivy Nannini to maintain the action in the name of Barbara Nannini, who is now deceased. (Code Civ. Proc. §§ 377.32, 377.32.) To grant the motion for leave to file a second amended complaint naming Ivy Nannini as successor-in-interest for decedent Barbara Nannini. (Code Civ. Proc. § 473, subd. (a)(1).)

Plaintiff shall serve and file her second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

“On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent’s personal representative or, if none, by the decedent’s successor in interest.” (Code Civ. Proc., § 377.31.)

“Because a trial cannot proceed without adverse parties, judgment cannot be given for or against a decedent, or for or against the decedent’s personal representative, until the personal representative has been made a party by substitution.” (4 Witkin, Cal. Procedure, Pleading (5th ed. 2008) § 259, p. 334.)

Code of Civil Procedure section 377.32 sets forth the specific requirements that the successor-in-interest must meet in order to be substituted into the action on behalf of the decedent. Here, Ivy Nannini has filed a declaration that complies with the requirements of section 377.32. She states decedent’s name, the date and place of her death, and she attaches a copy of her death certificate. She states that no proceedings for the administration of Barbara’s estate are currently pending in the State of California. She also states that she is decedent’s successor-in-interest and heir. In addition, she states that no other person has a superior right to maintain this action or substitute for decedent in the action. Her statements are also sworn under penalty of perjury under the laws of the State of California. Therefore, Ivy has complied with the requirements of the statute, and she will be allowed to substitute into the action as successor-in-interest for decedent.

Tentative Rulings for Department 502

(23)

Tentative Ruling

Re: **Madison Malan v. Clovis Unified School District**
Superior Court Case No. 15CECG00008

Hearing Date: Thursday, June 9, 2016 (**Dept. 502**)

Motion: Defendant Clovis Unified School District's Motion for Order Granting Leave to File First Amended Answer

Tentative Ruling:

To grant Defendant Clovis Unified School District's motion for order granting leave to file first amended answer. (Code Civ. Proc., § 473, subd. (a)(1).) Defendant Clovis Unified School District shall file and serve its first amended answer within 10 calendar days after service of the minute order. All new allegations must appear in **boldface** type.

Explanation:

Defendant Clovis Unified School District moves the Court for an order granting it leave to file a first amended answer that includes an affirmative defense of release. There is no evidence that Plaintiff, the only other named party in the action, will be prejudiced by the proposed amendment. Therefore, as the amendment is in the interests of justice, the Court grants Defendant Clovis Unified School District's motion for order granting leave to file first amended answer. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. 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** 6/7/16 .
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Nationwide Agricultural Business Insurance Company v. Silva***

Case No. 15CECG02117

Hearing Date: June 9, 2016 (Dept. 502)

Motion: By Plaintiff to strike answer for failure to comply with court order.

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiff filed suit against Defendant Mario Silva on June 29, 2015. Defendant Mario Silva filed an answer on November 18, 2015.

On April 12, 2016, this Court granted a motion to compel responses to Form Interrogatories (Set One). Defendant provided no opposition to that motion. In the Court's order, Defendant was instructed to provide responses within ten days from the date of the order and to pay sanctions.

On May 9, 2016, Plaintiff moved to strike the answer of Mario Silva based on CCP §2023.030, subdivision (d)(1) on the grounds that he has failed to comply with the Court's order to provide responses to the Form Interrogatories. The Declaration in support of the motion says simply: "To date M. SILVA has failed to Respond [sic] to PLAINTIFF'S Form Interrogatories, Set 1." (Declaration of Smith, ¶13.)

Plaintiff seeks to strike Defendant's answer and entering default for failure to comply with the Court's order of April 12, 2016. In short, Plaintiff seeks "terminating sanctions." (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390-92.) However, such severe sanctions for failure to comply with a court order are justified only where the failure was willful. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327 ("Thus, when a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules, preclusion of that evidence may be appropriate, even if such a sanction proves determinative in terminating the plaintiff's case."); *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 495.)

Even where non-monetary sanctions are appropriate, they should be those "such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which

(17)

Tentative Ruling

Re: **Coelho v. Coelho et al.**
Court Case No. 15 CECG 00074

Hearing Date: June 9, 2016 (Dept. 502)

Motion: Applicants' Motion for Attorney's Fees

Tentative Ruling:

To grant, in the amount of \$4,714.00.

Explanation:

Code of Civil Procedure section 1218, subdivision (a) provides in relevant part: "a person ... who is adjudged guilty of contempt for violating [a] court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding." Section 1218 authorizes trial courts to award attorney fees and costs for initiating and prosecuting contempt proceedings in order to encourage parties to prosecute contempt proceedings and to indirectly encourage all parties to abide by the terms of court orders. (*Goold v. Superior Court* (2006) 145 Cal.App.4th 1, 10.)

The "experienced trial judge is the best judge of the value of professional services rendered in his court" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Generally, an award of reasonable attorney fees is based on the product of the number of hours reasonably expended by counsel and the prevailing market rate of comparable legal services. This calculation is commonly referred to as the lodestar method. (*Id.* at p. 48.) Determining "[t]he value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

The court has carefully reviewed the declarations of applicant's counsel and their attachments, and finds the reasonable value of their services expended in connection with the contempt proceeding to be \$4,714.00.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. 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 6/7/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **CBA International, LLC v. Nakata et al.**
Superior Court Case No. 15 CECG 00428

Hearing Date: June 9, 2016 (**Dept. 502**)

Motion: By Plaintiff seeking a preliminary injunction

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

Equity Considerations

The traditional equity considerations and requirements for the granting of injunctions are set forth in CCP § 526. Inadequacy of the legal remedy is listed as follows. . . "(4) where compensation would not afford adequate relief"; and "(5) where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief"). However, injunctions will **rarely** be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. See *Thayer Plymouth Center, Inc. v. Chrysler Motors* (1967) 255 Cal.App.2d 300, 307; *Bush v. Calif. Conservation Corps* (1982) 136 Cal.App.3d 194, 204. In considering the "adequacy" of damages as a remedy, the court may consider whether the party against whom the judgment is sought is able to respond in damages. I.e., if the defendant is shown to be insolvent, a monetary judgment may be inadequate. [*West Coast Const. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 700] Ultimately, the court is looking for more than a mere dispute. Relief is unlikely unless someone will be badly hurt in a way that cannot be later repaired. See *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-871.

Moreover, the threat of "irreparable harm" must be **imminent** . . . as opposed to a mere possibility of harm sometime in the future: "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." See *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084. Conversely, injunctive relief is more likely to be granted where real property is involved. Land is usually deemed "unique" so that injury or loss cannot be compensated in damages and injunctive relief is readily granted. See Civil Code § 3387.

Motion at Bench

Tentative Rulings for Department 503

(19)

Tentative Ruling

Re: ***Orange Cove Full Gospel Temple v. Leeper***
Court Case No. 14CECG03480

Hearing Date: June 9, 2016 (Department 503)

Motion: by Leeper Defendants and Leeper Temple for summary judgment
or, in the alternative, summary adjudication

Tentative Ruling:

To deny.

Explanation:

The first sentence of Code of Civil Procedure section 437c(b)(1) states: "The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." No such evidence was presented by moving parties for this motion. Further, Fact No. 4 in moving parties' separate statement is that the deed asserted by moving parties to prove their interest in the property at issue was fraudulently made, which renders judgment in their favor improper under the statute. Lastly, the points and authorities filed by moving parties contain no citations to any legal authority.

Pursuant to 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 6/6/16 .
(Judge's initials) (Date)

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Tentative Ruling

Re: ***Hamby v. Hovsepien***

Case No. 14CECG01784

Hearing Date: June 9, 2016 (Dept. 503)

Motion: By Defendants Michael Hovsepien and Linda Hovsepien for relief from waiver of jury trial.

Tentative Ruling:

To grant the motion.

Explanation:

California Code of Civil Procedure §631 requires that a party must pay its jury fees in a timely fashion in accordance with other provisions of the section. (Civ.Proc. §631, subdi. (f)(5).) Jury fees are due on or before the date scheduled for the initial case management conference in the action, except for circumstances not relevant here. (Civ.Proc. §631, subd. (c).)

Here, the parties did not file their jury fees in a timely fashion, and therefore waived their right to a jury. Defendants seek to reinstate that right by seeking moving for relief from their waiver.

Defendants rely on Code of Civil Procedure §473 and §631, subdivision (g) as the basis for their relief from waiver, as well as on the argument (first raised in the reply brief) that the minute order of the court stated that jury fees were due 25 days before trial and, therefore, they have not waived their right to a jury.

Because the analysis under Section 631, subdivision (g) is dispositive, the Court need not reach the issues raised by section 473 and whether or not the statement in the minute order is binding.

Code of Civil Procedure section 631, subdivision (g) states:

“(g) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.”

Given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver “unless, and except, where granting such a motion would work serious hardship to the objecting party.” (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1703.) In fact “[w]here doubt exists concerning the

