

Tentative Rulings for September 15, 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).)

- 15CECG03900 *Fagan et al. v. Ronald McBride, Trustee of the Ronald A. McBride Family Trust et al.* (Dept. 503)
- 16CECG02450 *Samrai v. Samrahi, et al.* (Dept. 503)
- 15CECG01004 *Andrade v. Fresno Unified School* (Dept. 501)
- 16CECG02679 *In Re: Kevin J Klassen* (Dept. 503)
- 13CECG01745 *De La Luz Lopez v. Gibson Wine Company* (Dept. 503)
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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

- 11CECG04395 *Switzer v. Flournoy Management* is continued to October 5, 2016 at 3:30 p.m. in Dept. 501
- 16CECG00653 *State of California v. Lamoure's Incorporated* is continued to Thursday, October 6, 2016, at 3:30 p.m. in Dept. 501.
- 13CECG02711 *Harpains Meadow, L.P. v. Stockbridge* is continued to Thursday, October 6, 2016, at 3:30 p.m. in Dept. 501.
- 13CECG03906 *Arteaga v. Fresno Community Regional Medical Center* is continued to Thursday, September 29, 2016, at 3:30 p.m. in Dept. 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(24)

Tentative Ruling

Re: **Green v. CDCR**
Court Case No. 15CECG03951

Hearing Date: **September 15, 2016 (Dept. 403)**

Motion: Plaintiff's Motions for **1)** Sanctions against defendants California Department of Corrections and Rehabilitation ("CDCR") and Pleasant Valley State Prison ("PVSP") and for Default Judgment against said defendants, filed on May 2, 2016; and **2)** Sanctions and for Court Order re Plaintiff's Access to Phone to make Court Call Appearance, filed on August 3, 2016

Tentative Ruling:

To deny both motions. **Oral argument on this matter will be heard on Thursday, September 15, 2016, at 3:30 p.m. in Dept. 403, as the court has already arranged for the Plaintiff to be present for oral argument via Court Call.**

Explanation:

Although plaintiff apparently did not serve either motion on defendants CDCR or PVSP, the court will rule on these motions. The clerk sent a notice to plaintiff and defense counsel Onyeagbako that a sanctions motion would be heard on September 15, 2016 (filed on July 28, 2016).

On the first motion, apparently the "sanction" plaintiff is requesting is either default judgment or summary judgment. These are not "sanctions" in a civil case. Furthermore, neither relief can be granted at this stage. Default judgment cannot be entered as no defaults have been taken against defendants CDCR and PVSP, nor is a motion for sanctions the proper method to seek entry of default judgment. Summary judgment cannot be granted, as plaintiff has not filed a proper motion for summary judgment, and furthermore such a motion is premature: a motion for summary judgment cannot be made until at least 60 days after the general appearance of the party against whom it is directed. (Code Civ. Proc. § 437c, subd. (a).) Neither defendant has made a general appearance yet; their motion to quash does not constitute a general appearance. (Code Civ. Proc. § 418.10, subd. (e)(1).)

Also, the motion does not cite conduct subject to sanctions in a civil case. Plaintiff's accusations concerning prison living conditions (deprivation of property and legal papers, confinement to his cell, no access to law library) cannot be addressed in this action, and must be addressed by other legal means at plaintiff's disposal. Plaintiff's claimed injury of contracting coccidioidomycosis is the subject of this lawsuit, and does not constitute "sanctionable conduct" for purposes of a motion for sanctions.

The second motion is now essentially moot, as it concerned plaintiff's desire to appear via Court Call on defendants' initial motion to quash, and he was able to appear at that motion when it was heard on August 17, 2016. The information plaintiff was given by prison employees about continuances of that motion appear to have been accurate. The motion was originally scheduled for July 27, 2016, and the court continued it to August 3, 2016, on its own motion. On August 3, 2016, a Tentative Ruling was initially posted with its ruling on the motion and an advisement that the hearing was continued to August 17, 2016, to allow plaintiff to appear via Court Call. The court itself arranged Court Call for plaintiff, and corresponded with the prison and with plaintiff regarding these arrangements. Plaintiff appeared on August 17, 2016, and the court adopted its Tentative Ruling. There was no sanctionable conduct on defendant's part, and the court will not direct the prison as to its internal procedures regarding inmate access to phones.

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

Tentative Ruling

Issued By: KCK **on** 09/12/16
(Judge's Initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Ivory v. Selma Pallet, Inc.***
Case No. 14 CE CG 02433

Hearing Date: September 15th, 2016 (Dept. 501)

Motion: Defendant Selma Pallet's Motion for Summary Judgment

Tentative Ruling:

To deny defendant Selma Pallet's motion for summary judgment. (Code Civ. Proc. § 437c.)

Explanation:

Defendant Selma Pallet argues that, since plaintiff signed a release of liability, he cannot prevail on his claims for negligence and premises liability, and therefore defendant is entitled to summary judgment as to the entire complaint.

"Release, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are ... 'clear, explicit and comprehensible in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.' " (*Powers v. Superior Court* (1987) 196 Cal.App.3d 318, 320.)

"The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it." (*Smith v. Occidental etc. Steamship Co.* (1893) 99 Cal. 462, 470-471.)

Here, the release in question appears to be clear, explicit and comprehensible as a matter of law. The release is less than one page long, so it is not excessively lengthy, and the relevant language is not buried in fine print. The document is clearly titled "Release of Claims Against Labor Ready Customers and Transitional (Light) Duty Work Agreement." (Exhibit D to Jones decl.) The release states in bold face type in the second paragraph that "**Workers' Compensation shall be my sole remedy for on the job injuries.**" (*Ibid.*) The next paragraph goes on to state that, "If I am ever Injured in the course of my work for Labor Ready, I agree I will look only to Labor Ready's Workers' Compensation coverage and not to Labor Ready's customer for any recovery. For

myself and on behalf of my heirs, executor personal representatives and assigns, I waive, release, and forever discharge any claim that I may now have or that may later accrue against any customer of Labor Ready which directly or indirectly arises out of any injuries which may occur to me while on a temporary work assignment for Labor Ready. I further elect and agree that the only remedy for any injury sustained while working for Labor Ready and Labor Ready's customer (my special employer) is exclusively the Workers' Compensation coverage provided by Labor Ready. I understand that I am not waiving or releasing any claims which I may have against the Workers' Compensation coverage provided by Labor Ready." (*Ibid.*)

After two more paragraphs concerning drug testing and light duty work following any injury, there is a line stating "I have read and understand the above statements." (*Ibid.*) There is a signature on the line just beneath this statement, and the signature is dated. (*Ibid.*)

Thus, the court intends to find that the language of the release is clear, unambiguous, and explicit. While plaintiff claims that the language is confusing and filled with obscure legal terms, the effect of the release is clearly spelled out in bold type, and is not buried in a lengthy document, or in fine print. Indeed, the release states in bold face type that "**Workers' Compensation shall be my sole remedy for on the job injuries**", and the following paragraphs explain the nature of the release in simple, clear and direct terms. Plaintiff does not contend that the terms of the release were ambiguous or capable of any other interpretation than the one that is obvious from the face of the agreement.

Plaintiff argues that there is a triable issue of material fact as to whether he admitted that he signed the release, and in fact he stated that he did not remember signing the agreement. In his deposition, plaintiff was asked whether he remembered signing the release. He stated, "No, I don't remember signing it, *but I see my signature.*" (Exhibit C to Jones decl., Ivory depo., at p. 76, lines 6-8, emphasis added.) Thus, while plaintiff claimed that he did not remember signing the release, he did recognize his signature on the agreement. As a result, it does not appear that there is any real dispute as to whether he signed the agreement.

Significantly, plaintiff has not provided his own declaration denying that he signed the release, nor does he point to any other evidence, such as deposition testimony or responses to written discovery, in which he makes any such denial. While he did testify that he did not sign some of the other documents that appear to have been signed by him, he never denies signing the release in question here. Therefore, the court intends to find that there is no triable issue of material fact as to whether plaintiff signed the release.

Nor does plaintiff ever state that he suffered from any condition or incapacity that made it difficult for him to read and understand the agreement and its legal meaning at the time he signed it. Also, he does not attempt to provide any evidence that the agreement was obtained as a result of fraud, coercion, or duress. Thus, there is no evidence that plaintiff did not actually agree to the release.

Nevertheless, plaintiff argues that the release is unenforceable, as it violates Civil Code section 1668 and public policy. Under section 1668, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (Civ. Code, § 1668.)

However, "[d]espite its broad language, section 1668 does not apply to every contract' or every violation of law." (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 233, internal citation omitted, emphasis in original.)

"As summarized by Witkin, 'The present view is that a contract exempting from liability for ordinary negligence is valid where no public interest is involved ... and no statute expressly prohibits it [citation]. [Citations.] Limitation of liability provisions are valid in similar circumstances. [Citations.] [¶] But there can be no exemption from liability for intentional wrong, gross negligence, or violation of law.' (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 631, p. 569, italics added.)" (*Id.* at p. 234.)

"It is now settled - and in full accord with the language of the statute - that notwithstanding its different treatment of ordinary negligence, under section 1668, 'a party [cannot] contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law,' regardless of whether the public interest is affected." (*Ibid*, internal citations omitted.)

"However, a contract exempting from liability for ordinary negligence is valid where no public interest is involved and where no statute expressly prohibits it. [Citation.]" (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc.* (1988) 200 Cal.App.3d 1518, 1534.) "The converse is also true, however. Under Civil Code section 1668 [a service provider] cannot exempt itself from liability even for ordinary negligence if the service it provides implicates the public interest." (*Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 716.)

"In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of

the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92, 98–101, fns omitted.)

However, to meet the test for a release that affects the public interest, a contract does not have to meet all of the above characteristics. (*Id.* at p. 101) In *Tunkl*, the California Supreme Court held that a release that purported to exempt a hospital from all liability for its treatment of a patient was void as against public policy. (*Id.* at pp. 101 – 102.)

Plaintiff cites to *Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, which is similar to the facts of the present case in the sense that it involved an employer which required its prospective employees to sign a release of liability for on-the-job personal injuries. Some prospective employees refused to sign the release and were denied employment as a result. The employer then filed a declaratory relief action to obtain an order stating that the release was valid and did not violate public policy. The trial court entered a declaratory judgment stating that the release was valid and did not violate public policy, but the Court of Appeal reversed.

"Here, the broad release clearly includes a release from liability for fraud and intentional acts and thus on its face violates the public policy as set forth in Civil Code section 1668. The trial court erred in determining the release was 'not void as against public policy or otherwise.'" (*Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1154.)

The plaintiff in the present case argues that *Baker Pacific* supports his position that the release here violates section 1668 because it purports to waive claims for fraud and willful conduct as well as negligence. However, the *Baker Pacific* court specifically noted that the factual context underlying its decision was different than most other cases where such releases are challenged, because in *Baker* the prospective employees had refused to sign the releases at all, and were denied employment as a result. (*Id.* at 1156.) This was different from the other cases cited by the dissent, which were decided in the context of releases that had been signed by the plaintiffs, and where the plaintiffs then sued the defendants despite the release. (*Ibid.*)

"*Werner, Hulsey, and Madison* simply stand for the proposition that where a plaintiff/releasor has knowingly and willingly contracted to exculpate the defendant releasee from liability, accepts the benefits of the agreement, and then sues the releasee on causes of action not statutorily proscribed by Civil Code section 1668 (i.e., negligence, warranty, strict liability), the releasor will not be permitted to avoid his agreement on public policy grounds by urging that statutorily proscribed actions, *irrelevant to the actions pursued by the releasor*, can be inferred as included within the broad exculpatory language of the agreement." (*Ibid.*, emphasis in original.)

Thus, while plaintiff cites *Baker* for the proposition that the release in the present case violates Civil Code section 1668 because its broad language would cover fraudulent or willful conduct, *Baker* actually undermines the plaintiff's position. Plaintiff is not alleging that he was injured by defendant's willful or fraudulent conduct, but only

that defendant was guilty of negligence in failing to properly instruct him in the safe use of the pallet notcher, or failing to implement proper safety measures or warnings regarding the machine. Therefore, the fact that the release might also encompass other types of conduct, including willful or fraudulent acts, does not make the release unenforceable as to plaintiff. (*Werner v. Knoll* (1948) 89 Cal.App.2d 474, 476-477.)

Nevertheless, it does appear that the release here violates Civil Code section 1668 and is therefore unenforceable. As discussed above, section 1668 prohibits releases that seek to exempt a person from violations of statutory law. (*Health Net of California, Inc. v. Department of Health Services, supra*, 113 Cal.App.4th at p. 233.) Here, the release in question violates section 1668 because it purports to waive any claims that the employee might have for negligence against the special employer and requires the employee to look only to Labor Ready's Workers' Compensation coverage if the employee is injured, even though the Workers' Compensation statute itself includes exceptions for certain types of claims that might potentially arise.

For example, under Labor Code section 4558, an employee is not limited to only seeking Workers' Compensation benefits and may bring a civil action for damages if he or she is injured by a power press and the employer knowingly removed or failed to install a point of operation guard on the press. (Labor Code § 4558, subd. (b).) It is unclear from the facts presented here whether the pallet notching machine that injured plaintiff in the present case qualifies as a "power press", or whether Selma Pallet removed or failed to install safety guards on the pallet notcher. However, construing the facts liberally in favor of plaintiff, it appears that the machine might qualify as a power press, and it does not appear that there were any point of operation guards on the machine to prevent the injury that occurred. Also, the release purports to prevent plaintiff from filing a civil action for damages against Selma Pallet even if the machine that injured him was a power press, and even if Selma Pallet removed or failed to install safety guards. The release limits plaintiff to only making claims under the Workers' Compensation scheme, even though the Workers' Compensation law specifically provides for exemptions for the types of claims that plaintiff might attempt to raise. Thus, the release seeks to bar statutory claims that are expressly provided under the Workers' Compensation statutes, and it is therefore void and unenforceable under Civil Code section 1668.

The fact that the release attempts to limit plaintiff's statutory remedies for workplace injuries also shows that the release violates public policy, since there is clearly a strong public policy in favor of enforcing statutory laws regarding workplace safety and adequately compensating employees for their injuries. Consequently, the court does not need to engage in further analysis of the *Tunkl* factors in order to determine that the release is void because it affects the public interest, since the release seeks to limit the plaintiff's statutory rights under the Workers' Compensation scheme. As a result, the court intends to deny Selma Pallet's motion for summary judgment.

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

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Tentative Ruling

Re: **Katzenbach v. Xtreme Manufacturing, LLC, et al.**

Case No. 15CECG00474

Hearing Date: September 15, 2016 (Dept. 501)

Motion: By Defendant Xtreme Manufacturing, LLC for Summary Judgment or, in the alternative, Summary Adjudication of Issues

Tentative Ruling:

To deny motion for summary judgment.

To grant the motion for summary adjudication as to punitive damages. To deny the motion for summary adjudication in all other respects.

Explanation:

To obtain summary judgment, "all a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853. If a defendant makes this showing, the burden shifts to the plaintiff to demonstrate that one or more material facts exist as to the cause of action or as to a defense to a cause of action. (CCP § 437(c), subdivision(p)(2).)

In a summary judgment motion, the pleadings determine the scope of relevant issues. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) A defendant need only "negate plaintiff's theories of liability as alleged in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original).)

The court examines affidavits, declarations and deposition testimony as set forth by the parties, where applicable. (*DeSuza v. Andersack* (1976) 63 Cal.App.3d 694, 698.) Any doubts about the propriety of summary judgment are to be resolved in favor of the opposing party. (*Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, 1050.)

A court will "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

The first issue is whether the order given to Plaintiff to take the property in question was an order to commit a lawful act, or whether Plaintiff had a good faith, reasonable belief that such an order was an unlawful act.

Plaintiff's claim is, at heart, a *Tameny* claim for wrongful discharge in violation of public policy. A *Tameny* claim may be based on the employee's performing a statutory obligation or refusal to violate a statute. (*Gantts v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1090-91 (overruled on other grounds by *Green v. Ralee Eng. Co.* (1988) 19 Cal.4th 66, 80).) Although there are citations in Defendant's papers to the need that any purported statutory violation must represent a breach of public policy, Defendant substantively argues that there simply was no crime. In short, Defendant argues that the record shows that ordering Plaintiff to take the cranes was not "stealing."

There is authority that could be construed as holding that where a plaintiff is mistaken as to whether a particular crime is committed, a *Tameny* claim cannot be made. (Compare *DeSoto v. Yellow Freight Systems, Inc.* (9th Cir. 1992) 957 F.2d 655, 659 ("Because it was legal to drive the trailer, and because no fundamental public policy concern was involved, the district court properly determined that DeSoto's proposed amendment would be futile." with *Chin, Wiseman, Employment Litigation* para. 5:281 "No *Tameny* claim lies where the employee is discharged for *refusing to perform work* that he or she *mistakenly* believes is unlawful." (emphasis in original, citing *DeSoto, supra.*).

However, where a Plaintiff is basing their claim on the assertion that the plaintiff reported a possible violation of an applicable law and then suffered adverse employment consequences, all that is required is that the plaintiff have a reasonable good faith belief that there was a violation. (*Barbosa v. Impco Technologies, Inc.* (2009) 179 CA4th 1116, 1123.) The parties have not expressly briefed which category of cases this case falls under.

Reviewing the evidence in the light most favorable to Plaintiff, Plaintiff has presented evidence that there is at least a question of fact that Plaintiff had a reasonable good faith belief that the equipment was being taken without legal rights to do so and that he reported as such to the Vice President for Defendant, which resulted (one way or another) with Plaintiff losing his job. None of the facts presented by Defendant have any bearing on Plaintiff's actual belief-reasonable or otherwise. Moreover, in the opposition papers, Plaintiff has presented evidence which, if credited, show that, when the opportunity presented itself, Defendant did not try to correct Plaintiff's belief. (E.g., Undisputed Material Fact Nos. 42, 55.) Defendant did not dispute these claims. There is at least a question of fact as to whether either Defendant had permission to take the property in question at the time the order was given or whether such permission, if it existed, was communicated to Plaintiff.

There is therefore a question of fact as to whether Plaintiff reported and/or resisted an order which he had a reasonable, good faith belief was an illegal order.

The second issue is whether there was an actual actionable termination. Plaintiff alleges that he was constructively terminated for failure to agree to engage in unlawful

behavior as required by his employer. In order to amount to a constructive discharge, the adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation was deemed to be intolerable. (*Turner v. Anheuser-Busch* (1994) 7 Cal.4th 1238, 1247.) The test is that the plaintiff must show "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.* at 1251.) Therefore, Defendant's burden is to show that Plaintiff has no evidence to support this allegation. In support of its position, Defendant points to the fact that this was the only incident at issue, and that this was the only reason for his resignation.

According to the undisputed facts, Plaintiff was first told to bring the cranes from Building 79 on June 23, 2014. (UMF No. 17.) Plaintiff makes the argument that he discussed this issue with Plaintiff on two other occasions. (UMF No. 37.) Plaintiff then asserts that he told Mr. Vallejo on June 30, 2014, that he would rather resign than steal the cranes, but that Mr. Vallejo refused to change course. (UMF No. 44.) It was only after this that Plaintiff resigned. (UMF No. 45.) Plaintiff asserts that he approached Mr. Vallejo in an effort to keep his job on July 9, 2014 (UMF No. 48.)

Reading the facts in the light most favorable to Plaintiff, it is possible that that a jury could find that (1) Plaintiff had a reasonable good faith belief that he was being asked to steal items from Defendant's landlord; (2) that Plaintiff tried repeatedly to prevent this from happening over the course of a week, but that Defendant refused to rescind the order; (3) that Plaintiff resigned because he did not see any other alternative; and (4) that his attempt to retain his position on July 9, 2016 constitutes a termination by Defendant. For these reasons, summary judgment and adjudication on this ground is inappropriate.

Finally, Defendant moves for summary judgment as to the award of punitive damages. In order to justify an award of punitive damages, a plaintiff must show circumstances of aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. (*Mock v. Michigan Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 328.) In order to defeat a motion for summary judgment/adjudication as to punitive damages, a Plaintiff must produce "clear and convincing evidence" of malice, fraud, or oppression. (*Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1120.) Here, although there are probably questions of facts as to the causes of action, there appears to be no "clear and convincing facts" that support malice, fraud, or oppression. At worst, Defendant instructed Plaintiff to appropriate property for its use: although this could be a crime, there are no facts that the instructions were with malicious, fraudulent or oppressive intent (there is nothing to suggest that Plaintiff was being set up to take the fall for any theft, for example). Therefore, the motion for summary adjudication should probably be granted as to the claims for punitive damages.

The objections filed by Defendant as to the fact that the deposition transcripts were not marked in accordance with California Rule of Court 3.116, subdivision (c) are

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Tentative Ruling

Re: **C.A. Vanderham and Sons Dairy, et al. v. J&D Wilson and Sons Dairy**

Case No. 15CECG02755

Hearing Date: September 15, 2016 (Dept. 502)

Motion: By Various Plaintiffs for Writs of Attachment against Defendant J&D Wilson and Sons Dairy.

Tentative Ruling:

To continue the hearing on the Application for Writ of Attachment by Hidden Valley to October 6, 2016 at 3:30 p.m. in Department 502. Defendant shall file and serve any evidence of satisfaction of the debt by September 22. Plaintiff may file any response or objection by September 29, 2016.

To continue the hearing on the Application for Writ of Attachment by D&V Dairy to October 6, 2016 at 3:30 p.m. in Department 502. The parties are to address the applicability of the statute of limitations to D&V Dairy's claim, if any. Defendant may file and serve a short brief addressing this issue on or before September 22, 2016. Plaintiff may file any responsive brief on or before September 29, 2016.

The remaining Applications for Writs of Attachment are denied.

Explanation:

Attachment is a prejudgment remedy that allows a creditor to have a lien on the debtor's assets until final adjudication of the claim sued upon. (Code Civ. Proc., §481.010, *et seq.*) A creditor must follow statutory guidelines in applying for the attachment and establish a *prima facie* claim. (*Lorber Industries of Calif. v. Turbulence, Inc.* (1985) 175 Cal.App.3d 532, 535.)

An attachment may be issued only if the claim sued upon meets the following requirements: (1) it is a claim for money based on a contract, express or implied; (2) the contract is for an amount not less than \$500; (3) the claim is either unsecured or secured by personal property; and (4) it is a commercial claim. (Code Civ. Proc., §483.010.)

The procedural requirements for obtaining a writ are:

- (1) The claim upon which the attachment is based is one upon which an attachment may issue;
- (2) Plaintiff has established the probable validity of the claim;

- (3) The attachment is not sought for a purposes other than recovery of the claim upon which the attachment is based;
- (4) The amount to be secured by the attachment is greater than zero.
(Code Civ. Proc., §484.090, subd.(a).)

Defendant generally does not dispute that each of these claims is commercial in nature, that the purported amounts are greater than \$500, or that they are unsecured. Rather, Defendant contests whether there is a contract and/or that the Plaintiff has established the probably validity of the claim.

A claim has "probable validity" where "it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (Code Civ. Proc. §481.190.) The evidence presented must be admissible under the applicable rules of evidence. (*Generale Bank Nederland, N.V. v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1390.) The Court has the power to determine disputed facts on the basis of a preponderance of the evidence as disclosed in the affidavits and declarations. (*Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 80.) The court is not required to accept as true the truth of unopposed testimony. (*Bank of America v. Salinas Nissan, Inc.* (1989) 207 Cal.App.3d 260, 273-74.) Any facts asserted in the evidence in support of the application must be stated "with particularity." (Code Civ. Proc. §482.040.)

Further, determinations of fact in the attachment proceeding have no effect on issues in the main action and are inadmissible at trial. (Code Civ. Proc. §484.100.)

Here, the Court must consider the following writs of attachment:

- 1) By Plaintiff Vanderham for \$485,730.45 based on the alleged breach of two leases.
- 2) By Plaintiff Vanderham for \$3,372,848.58 based on a Farm Credit West Loan.
- 3) By Plaintiff Vanderham for \$7,408,436.07 for the "Western Miller Debt."
- 4) By Plaintiff Resource Buyers for \$475,898.82 as debt owed for the provision of feed and related goods.
- 5) By Plaintiff Hidden Valley for \$103,123.89 for "calf raising services."
- 6) By D&V Dairy for \$25,000.00 for "wheat chopping services."

There does not appear to be any opposition or reply brief on file for the application for writ of attachment by Resource Buyers. The Court notes that one of the motions was taken "off calendar" on January 27, 2016. However, the notation does not indicate which motion was intended to be dropped. The Court assumes that it is Plaintiff Resource Buyers' motion.

Furthermore, although all the moving papers mention other causes of action in passing, Plaintiff presents its writs as based on the oral contracts between Plaintiff and Defendant. In many of the reply briefs the plaintiff, for the first time, analyzes the possibility of seeking attachments on other theories such as common counts. The Court will not consider such arguments.

1) Applications By Vanderham Based on Alleged Breach of Leases

Plaintiff Vanderham and Sons Dairy files the first application for writ of attachment in the amount of \$485,730.45 for alleged breach of separate 94- and 825-acre leases. Plaintiff alleges that Defendant has failed to pay as much as \$485,730.45. Specifically, Plaintiff claims Defendant has failed to pay \$101,630.50 for back rent and property taxes on the 94-acre lease and \$384,099.95 on the 825-acre lease.

As evidentiary support for the claim, Plaintiff Vanderham provided the declaration of Dennis Vanderham, a partner in Defendant Vanderham. Dennis Vanderham testified that the amounts were owed under the lease, but provided no spreadsheets, accounting, or estimate of how much Defendant had paid under the lease or when the payments stopped.

In the reply brief, Plaintiff cites to the declaration of Kevin E. Derenzis, which was filed with the Court two months after the initial papers were filed. Mr. Derenzis states that he is a CPA and partner at DeRenzis and Associates, LLP which has provided services to Defendant since 1990. (DeRenzis Declaration re: Leases, ¶¶2-3.) He includes two invoices provided in support of Vanderham's proof of claim in the J&D Wilson bankruptcy case on February 7, 2014. (DeRenzis Declaration re: Leases, ¶¶10-11, exh. A & B.) DeRenzis concludes by stating that "Based on my review of the records, J&D Wilson has failed to pay rent and property taxes required pursuant to the Leases. A total sum of \$485,730.45 is due and owing." (DeRenzis Declaration re: Leases, ¶¶13.)

Defendant opposes this writ on two grounds: first that the leases were amended in part during the bankruptcy and, second, that Defendant has made payments on the Lease and currently owes nothing.

As Plaintiff points out, the bankruptcy court never approved the amendment of the lease, and, therefore, the Court will not consider that amendment.

Defendant also notes that it was allowed a credit for capital improvements and for general improvements to the leased land and that this was agreed to by Vanderham's principal. Plaintiff does not appear to dispute this.

Defendant presents evidence by its principal that it made payment or capital improvements that account for all the amounts owed to Plaintiff. (Declaration of Wilson, ¶21.)

Plaintiff objects to the evidence on the grounds that it lacks foundation. However, the evidence provided by Plaintiff suffers from the same defect. While Plaintiff has provided invoices showing the state of affairs as of 2014, it has presented no current invoices, nor do there appear to be any offsets or allowances made for whatever improvements there may have been. On balance, Plaintiff has not shown the probable validity of its claim with particularity. For this reason, this application is denied.

2) Application by Plaintiff Vanderham based on a Farm Credit West Loan.

Plaintiff alleges that it obtained a loan from Farm Credit West, FLCA, secured by real property, and used the proceeds of the loan for the benefit of J&D Wilson and two other entities. There is a promissory note and loan agreement between Vanderham and Farm Credit to that effect. The parties are alleged to have orally agreed that J&D Wilson would pay to Farm Credit West in monthly installments of \$19,057.77 from January 1, 2010 until July 1, 2034. (Vanderham Declaration re: Farm West Loan, ¶17.) Wilson allegedly made payments from January 1, 2010 through January 1, 2014, and has made no payments since. (Vanderham Decl. re: Farm West Loan, ¶18.) Plaintiff asserts this as a breach of an oral contract.

In opposition, Defendant asserts that the "loan" of \$3,750,000 was reported by Corry Vanderham as a capital contribution in J&D Wilson's 2009 tax returns. Defendant asserts that J&D Wilson was asked to service the debt, which it did until the bankruptcy. Defendant contends that it never agreed to repay the funds for the 2009 contribution. Defendant cites the deposition of Dennis Vanderham which, Defendant asserts, confirms this version of events.

Further, Defendant contends that if there had been a contract, the oral contract would run afoul of the statute of frauds because it was intended to be performed in more than one year and is made for a loan of more than \$100,000 by a credit lending business. (Civil Code §1624, subdivision (a)(1) & (7).)

Plaintiff presents the declaration of DeRenzis who states he also provided accounting services to J&D Wilson and Sons Dairy from 2006 through 2013, just prior to its filing for bankruptcy. DeRenzis asserts that the loan proceeds were accounted for on J&D Wilson's financials as an unsecured note payable to C.A. Vanderham. (DeRenzis Decl. re: Farm West Loan ¶18.)

Again, the problem with Plaintiff's evidentiary showing is that it has not presented any current detail showing the amounts owed by Defendant to Farm West.

Likewise, according to Plaintiff's moving papers and the declaration of Vanderham, "The parties orally agreed that J&D Wilson would pay to Farm Credit West directly the monthly installments of \$19,057.77, including principal and interest from January 1, 2010 until July 1, 2034." (Vanderham Decl. re: Farm West Loan ¶17.) This is, by its own terms, an agreement that cannot be performed within one year. (*Hall v. Puente Oil Co, et al.* (1920) 47 Cal.App. 611, 616 (agreement to pay \$15 a month for 100 months was within the statute of frauds).) Plaintiff's citation to *Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189, 195-96, is inapposite since, by Plaintiff's own words, the contract "itself contain(s) language whose reasonable interpretation shows a clear intention that it cannot be performed within the year." (*Id.* (exercise of option to extend a contract did not have to be in writing since option could be exercised anytime, including within one year of agreement).)

For all these reason, Plaintiff has not presented evidence "with particularity" that its claims have probably validity such that it is more likely than not that it will succeed on its claims. Therefore, the application for this writ of attachment is denied.

3) Application by Plaintiff Vanderham for the "Western Miller Debt."

In June 2012, a promissory note for \$2,861,400 was executed between various parties and non-parties to pay the debt of J&D Wilson to Western Milling. (Declaration of D. Vandherham re: Western Milling, ¶¶6-7.) Plaintiff alleges that Plaintiff and Defendant entered into an oral contract whereby Plaintiff would use the proceeds from the sale of some property in San Bernardino to pay the debt to Western Milling and then Defendant would reimburse Plaintiff. (Declaration of D. Vandherham re: Western Milling, ¶8.) Plaintiff disbursed \$7,408,436.07 to Western Milling in full satisfaction of Western Milling's claim. (Declaration of D. Vandherham re: Western Milling, ¶9.) Dennis Vanderham states that Defendant has never paid on this debt. (Declaration of D. Vandherham re: Western Milling, ¶10.)

It is unclear to the court why Plaintiff disbursed approximately \$7.4 million to pay a \$2.8 million debt, and no explanation appears in the papers.

In the supplemental declaration of Dennis Vanderham, submitted on February 23, 2016, he presents an email he states is from a James Wilson (who is presumably the James Wilson who is the principal of Defendant) wherein he states to various people, including Dennis Vanderham "The intentions of myself and family are to someday payback [sic] the C.A. Vanderham entity for the monies owed." (Ex. A.) However, this purported debt is not specifically included in this email and an "intention" is not a promise. This e-mail is therefore irrelevant.

Defendant contends, among other things, that this loan is likewise subject to the statute of frauds. Plaintiff responds that Defendant cannot rely on the statute of frauds because of the part performance and promissory estoppel doctrines. As to part performance, Dennis Vanderham's declaration states that no payment was ever made, therefore this doctrine is not available. (*MacMorris Sales Corp. v. Kozak* (1968) 263 Cal.App.2d 430, 442 [part performance found where both parties performed on the oral contract].) The Reply brief asserts that Defendant made payments "for years" on the debt, but the cited evidence relates to payments made directly to Western Milling and not on the purported debt between Plaintiff and Defendant. (Declaration of D. DeRenzis re: Western Milling, ¶¶7-9.)

The elements of a promissory estoppel are: "1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 416.) However, the only evidence that there was an oral agreement between the parties is Dennis Vanderham's statement that "J&D Wilson and C.A. Vanderham entered into an oral contract whereby C.A. Vanderham would

use the proceeds from the sale of the San Bernardino Property to pay J&D Wilson's debt to Western Milling and then J&D Wilson would reimburse C.A. Vanderham for the amount C.A. Vanderham disbursed to Western Milling on J &D Wilson's behalf." (Declaration of D. Vandherham re: Western Milling, ¶17.) This is no evidence presented with any "particularity" of a "clear and unambiguous promise" on the part of J&D Wilson. As a result, the promissory estoppel and part performance doctrines do not apply to prevent the enforcement of the statute of frauds as to this purported oral contract. Therefore, Plaintiff has not established the probable validity of the claim, and this application for writ of attachment is denied.

4) Application by Plaintiff Hidden Valley for "calf raising services."

Plaintiff Hidden Valley Cattle Company seeks a writ of attachment in the amount of \$103,123.89 for calf raising services incurred on behalf of Defendant. In opposition, Defendant claims that James Wilson, as a partner in Hidden Valley Cattle Company, has instructed that the amount be paid out of his capital account in Hidden Valley. He does not otherwise contest the debt or its collectability. Plaintiff asserts that "the debt to Plaintiff is owed by J&D Wilson, while the Wilson's partnership interest [sic] in Hidden Valley is owned by the Jim Wilson and Darla Wilson as trustees of the Wilson Family Revocable Trust of January 27, 2009."

The Court will continue the hearing to give Defendant the chance to show satisfaction of the debt. The Court therefore continues the hearing on the Application for Writ of Attachment by Hidden Valley to October 6, 2016 at 3:30 p.m. in Department 502. Defendant shall file and serve any evidence of satisfaction of the debt by September 22. Plaintiff may file any response or objection by September 29, 2016.

5) Writ of Attachment by D&V Dairy for "wheat chopping services."

D&V Dairy asserts that on March, 2013, it entered into an oral contract with J&D Wilson whereby D&V Dairy would pay Defendant's 2012 wheat chopping bill to Netto Ag., Inc. and J&D Wilson would reimburse D&V Dairy for that expense. (Vanderham Decl. re: D&V Dairy, ¶14.) Plaintiff asserts Defendant breached the oral agreement when it failed to pay in April, 2013. (Vanderham Decl. re: D&V Dairy, ¶15.)

Defendant asserts that this was a capital contribution by Corry Vanderham, and that there is no evidence of a loan.

Neither party raises the issue that appears on the face of these declarations, which is the statute of limitations defense. (Code of Civil Procedure §339, para. (1).) If, as Plaintiff contends, the oral contract was breached in April, 2013, then the statute of limitations expired in April, 2015. The present action was filed on August 31, 2015.

The parties will therefore be given the opportunity to file a short brief as to why the statute of limitations should or should not prevent Plaintiff from pursuing this claim.

The Court therefore continues the hearing on the Application for Writ of Attachment by D&V Dairy to October 6, 2016 at 3:30 p.m. in Department 502. The

Tentative Rulings for Department 503