

Tentative Rulings for September 22, 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).)

14CECG02914 *Bryon A. Pretzer and Betty J. Pretzer v. Summit Investments; Tom Spino; Jeff Lokey and Mike Irwin and related Cross-Action*
PARTIES ARE ORDERED TO APPEAR IN DEPT. 403 AT 3:30 PM

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

14CECG02305 *Stevenson v. Community Medical* is continued to Thursday
September 29, 2016 at 3:30pm in Dept. 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20)

Tentative Ruling

Re: **Boyd v. J.H. Boyd Enterprises, Inc., et al.**, Superior Court Case No. 14CECG03792, consolidated with

J.H. Boyd Enterprises, Inc. v. Boyd et al., Superior Court Case No. 15CECG00915

Hearing Date: **September 22, 2016 (Dept. 402)**

Motion: Cross-Complainants' Motion for Leave to File First Amended Cross-Complaint

Tentative Ruling:

To grant in part. Within 10 days of service of the order by the clerk, cross-complainants Ken Boyd, individually and with Susan K. Boyd as Trustees of The Boyd Trust Dated December 23, 1999 (collectively, "Cross-Complainants"), may file the proposed First Amended Cross-Complaint ("FACC"), subject to the following conditions. Cross-complainants shall remove from the proposed FACC any allegations or claims directed at Robert Mallek. (Code Civ. Proc. § 473.)

The current trial date of November 28, 2016, is vacated. However, deadlines for discovery between the current parties to this action (i.e., discovery not involving new parties Alice Truscott and Christine Marsh) will be governed by the November 28, 2016 trial date.

Explanation:

First the court notes that all objections to late-filed papers are overruled. While the court encourages all parties to be timely with their filings, since both sides filed documents late, and no party appears to have been prejudiced in any way, the court will consider all papers.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ..." (Code Civ. Proc. § 473(a)(1) (emphasis added).) The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.)

Cross-complainants have shown that facts supporting the claims to be added were recently discovered in the May 2016 deposition of Martha Marsh, and from review of production of over 12,000 pages of documents around the same time. The moving

Tentative Rulings for Department 403

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Tentative Ruling

Re: ***Benevides et al. v. Fuerte et al.***
Case No. 13CECG00302

Hearing Date: September 22, 2016 (Dept. 403)

Motion: Compel responses to supplemental interrogatories, supplemental request for production of documents, initial responses to form interrogatories, set two, and deem requests for admission, set one admitted and sanctions

Tentative Ruling:

To grant defendants Veronica Fuerte and Jeffrey Harrell's motion to compel plaintiff Jorge Diaz Benevides to provide initial verified responses to supplemental interrogatories, supplemental request for production of documents and form interrogatories, set two. Code of Civil Procedure sections 2030.290(b), 2031.300(b). Plaintiff to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant defendants Veronica Fuerte and Jeffrey Harrell's motion that the truth of the matters specified in the requests for admission, set one, is to be deemed admitted as to plaintiff Jorge Diaz Benevides unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

To grant defendants Veronica Fuerte and Jeffrey Harrell's motion to compel plaintiff Griselda Moctezuma to provide initial verified responses to supplemental interrogatories, supplemental request for production of documents and form interrogatories, set two. Code of Civil Procedure sections 2030.290(b), 2031.300(b). Plaintiff to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant defendants Veronica Fuerte and Jeffrey Harrell's motion that the truth of the matters specified in the requests for admission, set one, is to be deemed admitted as to plaintiff Griselda Moctezuma unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. Code of Civil Procedure §2033.280.

Tentative Rulings for Department 501

Tentative Rulings for Department 503

(5)

Tentative Ruling

Re: ***Riddle et al. v. Community Medical Centers et al.***
Superior Court Case No. 14 CECG 02360

Hearing Date: September 22, 2016 (**Dept. 503**)

Motion: By Plaintiffs seeking reconsideration of the ruling on the motion to compel further responses to Request for Production of Documents aka Inspection Demands Set Two

Tentative Ruling:

To grant the motion for reconsideration but deny the motion to compel further responses on the grounds that the moving party has failed to comply with CCP § 2031.310(c).

Explanation:

Motion for Reconsideration

On July 28, 2016, the Court denied the Plaintiffs' motion to compel further responses to Request for Production of Documents aka Inspection Demands Set Two upon Defendant Chaudhry. On August 8, 2016, the Plaintiffs filed a motion for reconsideration. Opposition and a reply were filed.

In the case at bench, the original deadline for filing the motion to compel further responses was September 9, 2016 (responses served on July 21, 2016 plus 5 days for service by mail pursuant to CCP §§ 1010.6(a)(4), 1013 and 2016.050.) In support of reconsideration, Plaintiffs submit that the counsel for the opposing party agreed to extend time for the Plaintiffs to serve and file a motion to compel. See Exhibit A attached to the Declaration of West consisting of email from West to 'Becky Cachia-Riedl' dated September 2, 2016 whereby Mr. West confirms that Ms. Cachia-Riedl granted an extension of time to file a motion to compel regarding these Defendants' responses to Request for Production of Documents Set Two to October 9, 2016. As a result, the motion for reconsideration will be granted.

Motion to Compel Further Responses

Plaintiffs assert that CCP § 2031.310(c) permits the deadline for the motion to be extended by a written stipulation of the parties. This is correct in part.

CCP § 2031.310(c) states:

Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, **or on or before any specific later date to which the demanding party and the responding party have agreed in writing**, the demanding party waives any right to compel a further response to the demand.

In the case at bench, the parties agreed in writing (a confirming email) to extend time to file a motion to compel further response to October 9, 2016. But, Plaintiffs **did not** file the motion on October 9, 2016. Notably, Plaintiffs waited until 2 days before the deadline—October 7, 2016 to fax a “meet and confer” letter. See Exhibit C attached to the Declaration of West. Then, **10 days after the first deadline had passed**, opposing counsel asked for a “two week extension” to respond to Plaintiff’s “meet and confer” letter. See email dated October 19, 2016 from ‘Becky Cachia-Riedl’ to James West attached as Exhibit 3 to the Declaration of West.

But, the second extension cannot be given effect. At the time, opposing counsel extended a “mutual two week extension”, the first extension had already passed. Second, no specific date was stated. To give effect to this type of “floating” extension would turn the statutory deadline into a “nullity.” Plaintiffs may argue that the opposing party had “no problem” with the ensuing extensions of time and the delay of eight months in filing the motion. But, this misses the point. The 45-day time limit is **mandatory and “jurisdictional”** (court has no authority to grant a late motion). [*Sexton v. Sup.Ct. (Mullikin Med. Ctr.)* (1997) 58 Cal.App.4th 1403, 1410]

In *Sexton*, supra, the Second District cited to the decision in *Professional Career Colleges, Magna Institute, Inc. v. Superior Court* (1989) 207 Cal.App.3d 490 regarding the policy behind the Civil Discovery Act of 1986. “This pattern [of the 1986 amendments] of restrictions, sanctions, and the attempt to force cooperation clearly evinces **the legislative intent** that discovery proceed not only smoothly, but **swiftly** as well. Indeed, this goal has been expressly stated with reference to the civil justice system as a whole in the Trial Court Delay Reduction Act of 1986, Government Code section 68600 et seq.” (*Professional Career Colleges, Magna Institute, Inc. v. Superior Court*, supra, 207 Cal.App.3d at pp. 493–494.) The *Sexton* decision points to “the symmetry of section 2030, subdivision (l) and 2031, subdivision (l)” and concludes that the time within which to make a motion to compel production of documents is mandatory and jurisdictional just as it is for motions to compel further answers to interrogatories. *Id.* at 1409-1410. See also *New Albertsons, Inc. v. Sup.Ct. (Shanahan)* (2008) 168 CA4th 1403, 1427-1428--missing the 45-day deadline waives the right to compel a further response to the demand (CCP § 2031.310(c)) or to compel inspection of any documents that might have been identified in such a further response (see CCP § 2031.320(a)).

Here, the statutory clock was “ticking” while the parties “met and conferred” at endless length. See Exhibits 2-9 attached to the Declaration of West. CCP § 2031.310(b)(2) only requires that the moving party submit a “meet and confer”

declaration. It does not require that the moving party engage in an “exhaustive” attempt to resolve the discovery issue on its own. Again, the purpose of the 45 day deadline is to ensure swift resolution of discovery disputes. Therefore, upon reconsideration, the motion at bench must still be denied. See *Corns v. Miller* (1986) 181 Cal.App.3d 195, 202. However, this is without prejudice to a demand for production in a deposition notice, if Dr. Chaudhry has not been deposed. See *Carter v. Sup.Ct. (CSAA Inter-Insurance Bureau* (1990) 218 Cal.App.3d 994, 997.

Pursuant to California Rules of Court, rule 3.1312, subd. (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: A.M. Simpson on 09/20/16
 (Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Genthner v. Liberty Mutual Fire Insurance Company et al.***
Court Case No. 16 CECG 00160

Hearing Date: September 22, 2016 (Dept. 503)

Motion: Defendants Liberty Mutual's, Greg Williams', Ricki Light's and John Graham's Demurrer to Complaint
Plaintiff's Motion for Leave to Amend Complaint

Tentative Ruling:

To sustain the general demurrer to the complaint with leave to amend. A First Amended Complaint will be filed and served on the existing parties no later than 10 days after the clerk's service of this minute order. The First Amended Complaint shall be served on Barbara Taylor no later than 30 days after the clerk's service of this minute order.

To grant the Motion for Leave to Amend. A First Amended Complaint shall be filed and served as set forth above.

Explanation:

Demurrer

Meet and Confer

Plaintiff contends that defense counsel's efforts to meet and confer with her prior to filing this demurrer were inadequate. However, a litigant is expected to have a working telephone. (See Cal. Rule of Court, Rule 2.111(1).) Code of Civil Procedure section 430.41 requires contact either in person, or by telephone. Due to needs of clients, and schedule of business, an attorney who is in the office cannot take every telephone call as it occurs. Nor can an attorney return a telephone call if no return number is left. Plaintiff criticizes defense counsel for not emailing her with a time to call and meet and confer by phone. However, there is no evidence that plaintiff requested that he do this or that she left her email address with defense counsel until July 13th. Moreover, defense counsel sent plaintiff a substantive email the next day. Plaintiff also criticizes defense counsel for not giving her a chance to discuss how she could cure any legal insufficiencies in her complaint to discuss how the adjustors are liable for their conduct. Plaintiff could have accomplished this in an email.

While the parties' efforts to meet and confer do not fully comply with section 430.41, subdivision (a), the fault is primarily on plaintiff for being difficult to contact by telephone. Furthermore, it is not apparent that further time and efforts would resolve any of the issues raised by this demurrer. Section 430.41, subdivision (a)(4) provides, "[a]ny determination by the court that the meet and confer process was insufficient

shall not be grounds to overrule or sustain a demurrer.” Accordingly, the court will address the merits of the demurrer at this time.

Demurrers Generally

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Rylaarsdam & Edmon, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2015) “Attacking the Pleadings” § 7:5.) The demurrer admits the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Defendants demur generally to plaintiff's entire complaint for failure to state facts sufficient to state a cause of action.

First Cause of Action – “Intentional Tort”

Plaintiff does not identify the legal theory she sues under in the first cause of action. However, general demurrer may be upheld “only if the complaint fails to state a cause of action under any possible legal theory.” (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) The gravamen of plaintiff's allegations are that plaintiff was injured by one of defendant Liberty Mutual's insureds and Liberty Mutual's claims adjustors: 1) did not negotiate fairly with plaintiff in settling her claim against Liberty Mutual's insured; 2) did not offer a settlement that included the full costs of plaintiff's medical treatment; 3) did not return her calls; and 4) did not offer fair value for her automobile until she took up the issue with a manager. Plaintiff seeks compensation for her pain and suffering and punitive damages.

These allegations appear to raise a claim of breach of the covenant of good faith and fair dealing or, to put it another way, “bad faith.” Breach of this implied covenant involves something beyond breach of the specific contractual duties or mistaken judgment. (*Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 345.) Although the duties may arise from contract, bad faith is a tort. (*Richardson v. Allstate Ins. Co.* (1981) 117 Cal.App.3d 8, 13.) However, typically, only an insured may sue for bad faith.

A first party bad faith lawsuit involves an insured's claim against the insurer under coverage written for the insured's direct benefit: “The gravamen of a first party lawsuit is a breach of the implied covenant of good faith and fair dealing by refusing, without proper cause, to compensate *the insured* for a loss covered by the policy ... or by unreasonably delaying payments due under the policy.” (*Waters v. United Services Auto. Ass'n* (1996) 41 Cal.App.4th 1063, 1069-1070 (emphasis added).) A third party “bad faith” lawsuit generally involves an insured's suit against his or her liability insurer arising out of the insurer's alleged mishandling of a third party claim against the insured, e.g., by unreasonably refusing to settle within policy limits or unreasonably refusing to provide a defense. Although it is called a “third party” case, the cause of action for breach of the implied covenant belongs to the insured –not the third party. The third party claimant is not a party to the contract or an intended beneficiary of the insurer's

duty to settle claims against the insured. That duty is intended to protect the insured from excess liability, rather than to benefit the third party claimant. (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944.)

Here, plaintiff is a third party and Liberty Mutual and its employees owe no duties to her. Thus, the legal doctrine of bad faith will not provide a theory of recovery for the first cause of action.

Furthermore, suits making allegations similar to plaintiff's on a statutory basis have been barred since the California Supreme Court issued its opinion in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287. The Unfair Claims Settlement Practices Act [Ins. Code, § 790 et seq.] requires insurers "to attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." (Ins. Code, § 790.03, subd. (h)(5).) However, no private action is created thereby; the enforcement power rests exclusively with the Insurance Commissioner. Therefore neither the insured, nor a third-party with a claim against the insured, can sue the insurer for violating this statute. (*Moradi-Shalal v. Fireman's Fund Ins. Cos.*, *supra*, 46 Cal.3d at 313.)

The Court is unaware of any other theory that would arguably support plaintiff's allegations against defendants. Plaintiff's opposition is not helpful in this regard. It is devoted solely to her desire to amend her complaint to add Liberty Mutual's insured, as a defendant. She does not address the defendant's arguments that the complaint states no cause of action against them for their acts as insurance adjustors compromising their insured's claim. Accordingly, the court concludes that the complaint fails to state any cause of action against the named defendants. However, as a matter of fairness, a plaintiff who has not had an opportunity to amend his or her complaint in response to a demurrer should be allowed leave to amend unless the complaint shows on its face it is incapable of amendment. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) Since it is impossible to tell what cause of action is intended by the complaint, the court grants plaintiff an opportunity to amend to state a cause of action against defendants, if she can justifiably do so.

Second through Fifth Causes of Action

The second through fifth causes of action are similar in that each alleges that defendants "conduct during the processing of [plaintiff's] claim" and defendants' failure to follow insurance laws caused plaintiff damages. The causes of action seek recompense for: 1) the whiplash and concussion; 2) the cervical neck sprain and all other neck and back injuries; 3) the bilateral foraminal impingement at the level of C-5 to C-6 of plaintiff's cervical spine; and 4) the injuries to plaintiff's left and right knees, all sustained in the January 9, 2014 accident with defendants' insured. Again, plaintiff seeks compensatory damages for pain and suffering and punitive damages.

In these causes of action, however, plaintiff has cited several case supporting her claims: *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9 (*Johansen*); *Karlsen v. Jack* (1964) 391 P.2d 319, and *Bell v. Fore* (1967) 419 S.W.2d 686. *Karlsen v. Jack* is a case out of the Supreme Court of Nevada and is not persuasive

authority. Nor is *Bell v. Fore*, which is out of Texas. Finally, *Johansen* does not advance plaintiff's case either. In that matter, the third party received, and sued on, an assignment of the insured's bad faith claim. Insureds may assign their claims for economic losses; e.g., for defense expenditures incurred as a result of the insurer's unreasonable refusal to defend the insured (see *Murphy v. Allstate Ins. Co.*, *supra*, 17 Cal.3d at p. 942), or for the full amount of an adverse judgment following the insurer's unreasonable failure to settle a third party claim (see *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 431). Here, plaintiff does not allege an assignment of the insured's claim as she is suing for her own emotional and physical injuries and punitive damages.

As set forth above with respect to the first cause of action, neither bad faith, nor the Unfair Claims Settlement Practices Act will support a cause of action under these allegations. Thus, they do not state a cause of action. However, leave to amend will be granted for the reason stated with respect to the first cause of action.

Motion for Leave to Amend

Plaintiff seeks leave to amend to name defendants' insured, Barbara Taylor, as a defendant. "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading." (Code Civ. Proc. § 473; see also, § 576.) There is generally a strong policy in favor of allowing a plaintiff to amend the complaint. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776-777.)

The motion must comply with California Rule of Court rule 3.1324. Under this rule, a motion to amend must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rule of Court, Rule 3.1324, subd. (a).) Moreover, a separate declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rule of Court, Rule 3.1324, subd. (b).)

The spirit of Rule 3.1324 is complied with. A copy of the proposed pleading is attached which indicates what elements of the proposed pleading are different from the existing complaint. Moreover, plaintiff's declaration meets the requirements of subpart (b) of Rule 3.1324.

A trial court will not ordinarily consider the validity of a proposed amended pleading because grounds for demurrer or motion to strike are premature. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) In any case, defendants have not opposed plaintiff's motion to amend.

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: **A.M. Simpson** **on** **09/20/16**
(Judge's initials) (Date)