

Tentative Rulings for October 6, 2020
Departments 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).)

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Berkheiser v. BNSF Railway Company***
Superior Court Case No. 18CECG03675

Hearing Date: October 6, 2020 (Dept. 501)

Motion: by Defendant BNSF Railway Company for Summary Judgment
or Adjudication

Tentative Ruling:

To grant summary judgment in favor of Defendant BNSF Railway Company. Defendant is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

To prevail on summary judgment, a defendant has the burden of proving that there is a complete defense or that plaintiff cannot establish one or more elements of each of his causes of action. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) The facts set forth on defendant BNSF Railway Company's separate statement as to both causes of action are sufficient to make a prima facie showing that plaintiffs will not be able to prevail on either of them. Each fact is supported with sufficient evidence. Therefore, defendant BNSF Railway Company has met its initial burden of production. Plaintiffs have not filed an opposition to the motion and, in fact, they have filed a notice of non-opposition. When a moving party makes the required prima facie showing, the opposing party's failure to file an opposing separate statement may, in the court's discretion, constitute a sufficient ground for granting the motion. (Code Civ. Proc., § 473c, subd. (b)(3).) That is called for here.

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: DTT on 10/2/2020.
(Judge's initials) (Date)

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Tentative Ruling

Re: **Nunez v. Servin**
Superior Court Case No. 08CECG04341

Hearing Date: October 6, 2020 (Dept. 501)

Motion: by Plaintiff to Set Aside or Vacate Order Granting Motion to Vacate Renewal of Judgment

Tentative Ruling:

To deny.

Explanation:

Code of Civil Procedure, section 663

Code of Civil Procedure, section 663, (hereafter Section 663) provides, in part: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: ... Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts ..."

A Section 663 motion must be directed at a final judgment. (*Remington v. Davis* (1951) 108 Cal.App.2d 251, 253.) Furthermore, a motion under Section 663 operates when "the trial judge draws an incorrect legal conclusion or renders an erroneous judgment upon the facts found by it to exist." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 738.) In other words, "[i]n ruling on a motion to vacate the judgment the court cannot "in any way change any finding of fact" [citations]." (*Glen Hill Farm, LLC. v. California Horse Racing Bd.* (2010) 189 Cal.App.4th 1296, 1302.)

Adjudication on a Proof of Service is a Question of Fact

Proper service of summons is required to establish personal jurisdiction over a party. (*In re Jennifer O.* (2010) 184 Cal.App.4th 539, 547.) Furthermore, "no California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service." (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414.)

The question of whether service was effective on a defendant is a question of fact for the trial court. (*Rackoz v. Rackov* (1958) 164 Cal.App.2d 566, 570; see also *Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1010 [rebutting of presumption of service raised by filing of proof of service is a question of fact for the trial court].)

Substitute Service under Code of Civil Procedure, section 415.20

Substitute service is effectuated at the person's "dwelling house, usual place of abode, usual place of business, or usual mailing address" (Code of Civ. Proc., § 415.20, subd. (b); *Espindola v. Nunez* (1988) 199 Cal.App.3d 1389 [substituted service accepted by wife at residence shared with defendant husband held sufficient].)

Service upon Agent

"A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process." (Code of Civ. Proc., § 416.90.) However, there must be facts indicating ostensible authority to accept service on someone else's behalf. (*Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1019; *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1164 [no ostensible authority despite the purported agent's agency for purposes of collecting rent].) A spouse must possess ostensible authority to accept service on behalf of the other spouse. (*Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 835 [process server's handing of summons and complaint to defendant's wife with instructions to see that her "husband gets them" held insufficient].) A purported agent's statements alone are insufficient to establish agency. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1437.)

Analysis

Here, the court's determination that the "substituted service" was ineffective involved a question of fact and thus is not subject to review in a Section 663 motion. (*County of Alameda v. Carleson, supra*, 5 Cal.3d 730, 738; *Glen Hill Farm, LLC. v. California Horse Racing Bd., supra*, 189 Cal.App.4th 1296, 1302; *Rackoz v. Rackov, supra*, 164 Cal.App.2d 566, 570; see also *Glasser v. Glasser, supra*, 64 Cal.App.4th 1004, 1010.)

Furthermore, unlike in *Espindola v. Nunez, supra*, where the location of service occurred at the defendant's residence, here the attempted service purportedly took place at plaintiff's office – a location that was not Elaine Cantu's "dwelling house, usual place of abode, usual place of business, or usual mailing address" (Code of Civ. Proc., § 415.20, subd. (b).)

Additionally, although plaintiff argues that Gilbert Servin accepted service on Elaine Cantu's behalf (Nunez, Decl. ¶15), the authority to accept service must be established by more than the purported agent's conduct and statements alone. (*Sternbeck v. Buck, supra*, 148 Cal.App.2d 829, 835; *Lebel v. Mai, supra*, 210 Cal.App.4th 1154, 1164; *Dill v. Berquist Construction Co., supra*, 24 Cal.App.4th 1426, 1437.)

To the extent plaintiff argues that the presumption raised in Evidence Code, section 641 establishes actual notice, whether the presumption is rebutted is a question of fact. (*Glasser v. Glasser, supra*, 64 Cal.App.4th 1004, 1010.) Additionally, it is effective service which confers jurisdiction over a defendant. (*In re Jennifer O., supra*, 184 Cal.App.4th at 547.)

To summarize, plaintiff's contentions are premised on factual inquiries which have already been determined. The purported service was ineffective because it occurred at a location which was not Elaine Cantu's "dwelling house, usual place of abode, usual place of business, or usual mailing address" (Code of Civ. Proc., § 415.20, subd. (b).) Furthermore, there are insufficient facts to establish that Gilbert Servin possessed sufficient agency authority to accept service on Elaine Cantu's behalf.

Lastly, to the extent plaintiff contends the reply should have been stricken, the court has the discretion to consider late filed papers. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) It should also be noted that plaintiff had sufficient time to file a rebuttal to the reply.

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: DTT on 10/2/2020.
(Judge's initials) (Date)

Tentative Rulings for Department 502

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Tentative Rulings for Department 503

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Tentative Ruling

Re: **Tamayo v. Schulte**
Superior Court Case No. 17CECG03651
(Consolidated with Case No. 18CECG01087)

Hearing Date: October 6, 2020 (Dept. 503)

Motion: By Defendant United Staffing Associates, LLC for Summary Judgment
or, in the Alternative, Summary Adjudication

Tentative Ruling:

To deny.

Explanation:

As an initial matter, the court notes that summary adjudication is not proper here because defendant's separate statement of undisputed material facts fails to set forth, verbatim or otherwise, the specific issue of the duty in question, as required by California Rules of Court, rule 3.1350(b) ("If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, . . . issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts."). Therefore, the court only addresses defendant's motion for summary judgment.

The objections submitted by plaintiffs are rarely specific to evidence. Instead, they are largely directed at disputing facts set forth by defendant as material, or at adding additional facts that plaintiffs seek to have considered. The court sustains the objections to Exhibit E to the Whitehead Declaration on the grounds cited. An attorney cannot testify for her clients or authenticate purported documents of the client. (See *Maltby v. Shook* (1955) 131 Cal.App.2d 349, 351-352; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 72, fn. 6; *Rodriguez v. County of LA* (1985) 171 Cal.App.3d 171, 175.) The Serrota deposition (Exhibit F to the Whitehead Declaration) references a six-page document, signed by Serrota, attached to the deposition, which purportedly includes some of the language set forth in the document attached as Exhibit E to the Whitehead Declaration. However, the document has not been provided. (See Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].) The Court otherwise limits its review to defendant's papers, which fail to show a right to the relief sought.

Defendant's Undisputed Material Fact ("UMF") Nos. 5, 6, 7, 8, 9, and 31 are disputed, in part, because each relies on the inadmissible Exhibit E to the Whitehead Declaration. With respect to UMF No. 7, the evidence does not support the statement that Schulte was "required" to provide information. (See Ex. F to Whitehead Decl., referencing missing document.) With respect to UMF No. 8, there is also disputed evidence from defendant's corporate designee, who referenced spraying, cutting, and pruning vines. (Ex. A to

Whitehead Decl., Priest Depo., at 53:7-22). Further, the deposition page referenced does not contain support for the statement made.

UMF No. 9 purports to set forth defendant's corporate knowledge, but cites only to a statement by one employee about a conversion in 2015. The corporate designee testified otherwise. (Ex. A to Whitehead Decl., Priest Depo., at 53:7-22). It is also disputed by Schulte's testimony that he specifically advised defendant that the worker would be using a tractor/spraying rig. (Ex. B to Whitehead Decl., Schulte Depo., at 117:5-118:16.) UMF No. 31 is also disputed by the Schulte testimony.

The issue of special employee status does not dispose of defendant's potential liability, unless the evidence establishes that defendant retained no control over Price while he was performing work for Schulte. The evidence adduced by defendant shows that Schulte could guide and supervise Price, but fails to establish that defendant relinquished all control over Price. The contractual agreement(s) between defendant and Schulte are not provided, which itself raises questions of what control might have been retained or transferred.

"Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 893, emphasis added.) "[T]o escape liability, the general employer must relinquish full control of the employee for the time being, it not being sufficient that the employee is partially under the control of the third person" (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1488, internal quotations omitted, emphasis added.) "When an employer - the 'general' employer - lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492, emphasis added.)

Defendant's additional argument in support of summary judgment is that the tractor/spraying work done by Price was outside the scope of his employment with defendant. But the evidence submitted by defendant includes testimony by its corporate deposition designee and by Schulte that the spraying work was part of the expected job duties, and that driving a tractor equipped with a spraying rig was specifically expected of Price and known to defendant. The fact that a general farm laborer could reasonably be expected to operate or be involved with tractors or other mobile heavy farm equipment is discussed at length in case law. (See, e.g., *Double D Hop Ranch v. Sanchez* (1997) 133 Wash.2d 793, 796; *Buchanan v. Pankey* (1988) 531 So.2d 1225; *Skerston v. Industrial Commission* (1986) 146 Ill.App.3d 544; *Blackmore v. Auer* (1960) 187 Kan. 434.) There is no evidence in the record that demonstrates that general farm labor at commercial orchards excludes driving tractors with spraying rigs that maintain an orchard's health and productivity.

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

