

Tentative Rulings for November 2, 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).)

16CECG02505 *King et al. v. Avila* (Dept. 402)

15CECG01841 *Calderon v. Inman* (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.

15CECG01374 *Watanabe et al. v. Castech Pest Services et al.* is continued to November 9, 2016 at 3:30 p.m. in Dept. 501

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: **Price v. King**
Case No. 16 CE CG 02526

Hearing Date: November 2nd, 2016 (Dept. 402)

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer to the entire complaint, with leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc. § 430.10, subd. (e), (f).) Plaintiff shall serve and file his first amended complaint within 30 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

First of all, defendants have not shown that they complied with the meet and confer requirement under Code of Civil Procedure section 430.41 before bringing their demurrer. There is no declaration submitted showing any efforts to meet and confer with plaintiff before filing the demurrer. While section 430.41's meet and confer requirements do not apply to plaintiffs who are "incarcerated in a local, state, or federal correctional institution" (Code Civ. Proc. § 430.41, subd. (d)(1)), here plaintiff is not incarcerated in a correctional institution. He is a patient confined in a hospital under the Sexually Violent Predator Act. Therefore, the meet and confer requirement still applies to cases filed by the plaintiff.

Nevertheless, under section 430.41, subd. (a)(4), "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Therefore, despite the defendants' failure to meet and confer, the court will still hear the merits of the demurrer.

Next, with regard to the merits of the demurrer, plaintiff's complaint attempts to state various claims for violations of the Fourteenth Amendment of the United States Constitution and unspecified portions of the California Constitution, as well as a claim for breach of contract based on the alleged violation of his "Consent for Participation in Sex Offender Treatment" contract. Plaintiff also captions his complaint as if it were a claim under 42 United States Code section 1983, although none of the separate causes of action cite to section 1983. Plaintiff names Audrey King, Dorian Hughes, Jerry Kasdorf, Alan Asizian, Virginia Greer, Robert Withrow, James Lopez, and Chariti Messer as individual defendants, but does not name any entities or Doe defendants.

However, plaintiff alleges no facts whatsoever regarding any of the named defendants, and in fact, other than naming them in the caption, he does not mention them at all in the body of the complaint. He does not even identify who they are or what their relationship is to him. It appears that they may be employees or supervisors at Coalinga State Hospital (CSH) or the Department of State Hospitals (DSH), but plaintiff does not allege any facts showing that the defendants are employees of the hospital or the State. He also never alleges any facts showing that they breached any legal duties to him, or that they even owed him any such duties. Nor does he allege that anything that defendants did or failed to do caused him any harm.

Assuming that plaintiff is alleging that defendants were employees of the hospital or the State, in order to state a claim under section 1983, plaintiff must allege that (1) defendants were acting under color of state law at the time the complained of acts were committed, and (2) the defendants' conduct deprived plaintiff of the rights, privileges, or immunities secured by the Constitution or laws of the United States. (*Lindgren v. Curry* (2006) 451 F.Supp.2d 1073, 1075.) Also, “[i]n a section 1983 action a supervisory official cannot be held liable under the theory of respondeat superior. A supervisory official may be liable for constitutional claims if he or she was personally involved in the constitutional deprivation, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.” (*Ibid.*) “A plaintiff must allege facts, not simply conclusions that show that an individual was personally involved in the deprivation of his civil rights. Liability under § 1983 must be based on the personal involvement of the defendant.” (*Barren v. Harrington* (9th Cir. 1998) 152 F.3d 1193, 1194, internal citation omitted.)

In the present case, plaintiff has not alleged any facts whatsoever showing that any of the named defendants were personally involved in any of the allegedly wrongful conduct that resulted in violations of plaintiff's constitutional rights. It is not even clear which defendants did which acts that may have resulted in a constitutional violation, or whether they were directly or indirectly involved in the wrongful acts. Nor has plaintiff alleged that the defendants were acting under color of state law when they committed the acts, since he never alleges that they were State officials, employees, or agents. He does allege in the caption of the complaint that his constitutional rights were violated “under color of authority”, but he alleges no facts to support this assertion, nor does he explain which defendants did which acts, or how they were acting under color of law at the time of the acts. Simply alleging in conclusory fashion that defendants were acting under color of state law and violated plaintiff's constitutional rights is not sufficient. (*Barren v. Harrington, supra*, 152 F.3d at p. 1194.)

Thus, plaintiff has not stated any valid claims based on the alleged violation of his constitutional rights. The claims are also uncertain, since it is unclear who the defendants are or what they might have done to violate plaintiff's rights. Therefore, the court intends to sustain the demurrer to the first through sixth causes of action, with leave to amend.

Finally, with regard to the seventh cause of action for violation of the Consent to Treatment contract, plaintiff again fails to allege any facts showing how the individual defendants could be held liable for a breach of the contract. Plaintiff does not even

allege that any of the named defendants were parties to the contract, or why they should be personally liable for breach of the agreement. He alleges that the "Defendants actively participated in or supported the inadequate treatment policies as implemented by CSH SOTP, which resulted in the failure to comply with the contract to provide me treatment." (Complaint, p. 6, lines 10-11.) However, in order to state a claim for breach of contract, plaintiff must allege the existence of a valid contract *between the parties*. "Under California law, only a signatory to a contract may be liable for any breach." (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 452, internal citations omitted.) Since plaintiff has not alleged that the named defendants were parties to the contract, plaintiff has not stated a valid claim against them.

In addition, plaintiff has not attached or incorporated a copy of the Consent to Treatment form that forms the basis of the breach of contract claim, nor has he alleged verbatim all of the essential terms of the alleged contract, so he has not properly alleged the existence of a written contract between the parties. "If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 459, internal citation omitted.)

Furthermore, to the extent that plaintiff is seeking to sue the defendants as agents of the State for breaching the contract, he has not alleged that he has complied with the Government Claims Act, Government Code section 945.4. "[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with section 900.)" (Gov. Code, § 945.4.) "[T]he language of the amended claim presentation statutes 'make[s] it clear that ... a plaintiff must still allege in his complaint that he has complied with the claim statute in order to state a cause of action against a public employee.'" (*State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1243, internal citation omitted.) "[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action." (*Ibid.*)

Here, it is not clear that plaintiff is even alleging that defendants were acting as employees of the State at the time of their actions. However, assuming that plaintiff is alleging that they were State officials, agents or employees, then he must allege that he complied with the Government Claims Act in order to bring a claim for money damages based on the alleged breach of contract. Since he has not done so, he has not stated a valid claim for breach of contract. In addition, the complaint is uncertain as to the named defendants. As a result, the court intends to sustain the demurrer to the seventh cause of action, with leave to amend.

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.

Tentative Ruling

Issued By: _____ **JYH** _____ **on** _____ **11/1/2016** _____.
(Judge's Initials) (Date)

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Tentative Ruling

Re: ***Emilio V. Calzada, individually and dba Emilio V. Calzada Sheep Company v. William K. Samarin; Anita M. Samarin; Timothy R. Samarin; and Mendota Pistachios, LLC***
Superior Court Case No. 13 CECG 01848

Hearing Date: November 2, 2016 **(Dept. 402)**

Motion: By Defendant Mendota Pistachios, LLC to Enter Judgment pursuant to CCP § 664.6

Tentative Ruling:

To grant the motion pursuant to CCP § 664.6. Defendant is ordered to submit a proposed judgment consistent with the decision in *Hines v. Lukes* (2008) 167 Cal.App.4th 1174. The proposed judgment is to be submitted within 10 days of notice of the ruling. Notice runs from the date that the Clerk places the Minute Order in the mail.

Explanation:

Background

On January 16, 2015 a mandatory settlement conference was attended by all parties in Dept. 403. Plaintiff and Cross-Defendant Emilio Calzada and Defendant and Cross-Complainant Mendota Pistachios reached a settlement that was reduced to writing signed by the parties. See Declaration of Stephen Carroll at ¶¶ 2-3 and Exhibit A attached thereto. The terms of the Settlement were also placed on the record before the Honorable Kristi Culver Kapetan. See Exhibit A.

Initially, Mr. Calzada was to pay Mendota Pistachios the sum of \$30,000 on March 12, 2015. Later, counsel agreed to defer the payment to June 15, 2015. See Declaration at ¶ 4 and Exhibit B attached thereto. For reasons unknown, no payment was made. Counsel for the Plaintiff and Mendota Pistachios continued to communicate regarding the issue until July 15, 2016. At that time, Defendant's counsel sent an email to Plaintiff's counsel asking for a reassurance of Mr. Calzada's ability to pay. No reassurance or payment was made. See Declaration of Carroll at ¶5 and Exhibit C attached thereto.

On September 22, 2016, Mendota Pistachios filed a motion seeking to enter judgment pursuant to the terms of its settlement under CCP § 664.6. No opposition was filed.

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Tentative Ruling

Re: **Zepeda v. San Joaquin Medical Transportation, Inc.**
Superior Court Case No.: 15CECG02469

Hearing Date: November 2, 2016 (**Dept. 403**)

Motion: By Defendant Fresno Skilled Nursing & Wellness Center, LLC
dba Rehabilitation Centre of Fresno for summary judgment

Tentative Ruling:

To grant. The prevailing party is directed to submit directly to this Court, within 5 days of service of the minute order, a proposed judgment consistent with the summary judgment order.

Explanation:

A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc. § 437c, subd. (p)(2).)

Analysis of a motion for summary judgment or summary adjudication is a three-step process. First, the court identifies the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, the court determines whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503; *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.)

This is a wrongful death action based on allegations of professional negligence. The undisputed facts demonstrate that the Defendant, Fresno Skilled Nursing & Wellness Center, LLC dba Rehabilitation Centre of Fresno, did not breach the standard of care, and did nothing to contribute to or cause Decedent's death. (Decl. of Steven Lee McIntire, M.D., Ph.D.; decl. of Christopher Monroe.)

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Tentative Ruling

Re: ***Rickard v. White Science Worldwide, LLC et al.***, Superior Court Case No. 14CECG01881

Hearing Date: **November 2, 2016 (Dept. 403)**

Motion: Request for Default Judgment

Tentative Ruling:

To deny unless plaintiff calls in to request oral argument and addresses the deficiencies discussed below with additional declarations or live testimony.

Explanation:

The purpose of the prove-up hearing is to set the amount of damages. The trial court may not require plaintiff to tender evidentiary facts supporting the complaint's allegations of liability. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 899-900 ["The only evidentiary facts that have a place at a prove-up hearing are those concerning the damages alleged in the complaint"].)

The court is required to render default judgment only "for such sum ... as appears to be just." (Code Civ. Proc. § 585(b).) Therefore, it is up to plaintiff to "prove-up" the right to relief, by introducing sufficient evidence to support his or her claim. Without such evidence, the court may refuse to grant a default judgment for any amount, notwithstanding defendant's default. (*Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.)

The declarations submitted in support of the request for default judgment include no documentation of any of the sums paid. Plaintiff states in his declaration that he paid \$90,000 pursuant to the agreements, and \$25,000 in other unspecified expenses, but offers no documentary proof.

Plaintiff also seeks \$100,000 in emotional distress damages. Though plaintiff filed a declaration in support of the motion, he has not submitted any evidence or testimony supporting such an award.

The court also notes that the last page of plaintiff's declaration is illegible.

There remain six defendants in this case, but plaintiff only seeks default judgment as to two of them. There are four remaining entity defendants that should either be dismissed, or plaintiff should apply for a separate judgment pursuant to Code Civ. Proc. § 579.

Finally, plaintiff seeks \$26,433.15 in interest. Counsel should provide a declaration that shows and explains the calculation so it can be verified by the court.

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Tentative Ruling

Re: ***Murshed v. HSBC Bank USA, National Association, as Trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4***
Superior Court Case No.: 15CECG02839

Hearing Date: November 2, 2016 (**Dept. 501**)

Motions: (1) By Plaintiff Wally Murshed to set aside judgment in favor of Defendants HSBC Bank USA, National Association, as trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4, Mortgage Electronic Registration Services, Inc., and PHH Mortgage Corporation;

(2) By Plaintiff Wally Murshed to set aside judgment of dismissal in favor of Aztec Foreclosure Corporation;

Tentative Ruling:

To deny both motions.

Explanation:

Initially Defendant Aztec Foreclosure Corporation filed a notice of non-monetary status which Plaintiff objected to on November 25, 2015. Afterwards, after Plaintiff Wally Murshed ("Plaintiff") filed a notice of objection, Aztec Foreclosure Corporation sought and obtained an order extending its time to respond to the complaint.

On February 3, 2016, the Court sustained the demurrer to the original complaint of Defendants HSBC Bank USA, National Association, as trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4, Mortgage Electronic Registration Services, Inc., and PHH Mortgage Corporation.

In the interim, on February 1, 2016, Plaintiff had filed a first amended complaint. Before the adoption of Code of Civil Procedure section 430.41 and the amendment of Code of Civil Procedure section 472 which both became effective on January 1, 2016, this would have rendered the demurrer moot, because the Plaintiff would be entitled to amend once of right before the answer or demurrer is filed and before the demurrer hearing. However, Code of Civil Procedure section 472, subdivision (a), as amended effective January 1, 2016, makes it clear that in order to amend once "of right," the amended pleading must be filed and served no later than the date for filing an opposition to the demurrer, which here would have been nine court days before the hearing. (Code Civ. Proc., § 1005, subd. (b).) In other words, filing the first amended complaint on February 1, 2016, was of no legal effect.

Afterwards, Aztec Foreclosure Corporation demurred to the first amended complaint. Its demurrer was sustained, without leave to amend, on April 13, 2016.

In the interim, Plaintiff filed a second amended complaint on May 6, 2016. The second amended complaint contained allegations on page two that the previous demurrer of Aztec Foreclosure Corporation should not have been sustained because a first amended complaint had been filed in the interim. Leave to amend to file the second amended complaint had not been sought or obtained.

On May 6, 2016, the court executed a judgment of dismissal in favor of Aztec Foreclosure Corporation.

On May 11, 2016, the Court, in addition to striking the second amended complaint, sustained the demurrer to the first amended complaint by HSBC Bank USA, National Association, as Trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4, Mortgage Electronic Registration Services, Inc., and PHH Mortgage Corporation, without leave to amend. The Court noted the first amended complaint had only minor variations from the original and, in part, denied leave to amend because Plaintiff had originally been given "wide open" leave to amend any valid cause of action he had and further because Plaintiff had not filed opposition to show how he could amend to state a valid cause of action. A judgment of dismissal of these Defendants was executed on May 16, 2016. Notice of entry of the judgment was served on May 31, 2016.

The minute orders reveal that for the demurrers heard on April 13, 2016, and May 11, 2016, Plaintiff did not appear at either hearing. Plaintiff appeared at the February 3, 2016 hearing, but there is nothing on the minute order to indicate that Plaintiff raised anything about his filing of the first amended complaint on February 1, 2016 and even if he had, as already discussed, it would have been of no legal effect because it was not filed nine court days before the hearing. (Code Civ. Proc., § 1005, subd. (b).)

Plaintiff has not articulated in his declarations any facts showing mistake, inadvertence, surprise, or excusable neglect. As to the filing of the first amended complaint on February 1, 2016, that information was always within Plaintiff's knowledge. As to the court's rulings on the demurrers, each minute order indicates that it was served on Plaintiff, usually the following day. The May 11, 2016 minute order, was served by mail on May 12, 2016. Plaintiff did not file written opposition to any of the demurrers. From documents in the court file, it is clearly shown that Plaintiff knew of the "errors" no later than May 12, 2016 (as to Aztec Foreclosure Corporation, by the allegation in the stricken second amended complaint filed on May 6, 2016).

These motions were not filed and served until September 21, 2016, four months after Plaintiff should have discovered the "error(s)," without explanation for the delay in seeking relief. In addition to not showing mistake, inadvertence, or excusable neglect, Plaintiff's motion was not brought within the "reasonable time" requirement of the statute. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 531-532.)

Both motions are denied.

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Tentative Ruling

Re: ***Hedstrom v. Comprehensive Addiction Programs Incorporated***

Superior Court Case No.: 16CECG00038

Hearing Date: November 2, 2016 (**Dept. 501**)

Motion: By Defendant Comprehensive Addiction Programs, Inc., for judgment on the pleadings

Tentative Ruling:

To deny.

The Court intends to deny the request for judicial notice of the legislative history. (Evid. Code, § 456.)

Explanation:

Business and Professions Code section 4999.47 provides, in relevant part:

(d) Clinical counselor trainees, interns, and applicants who provide voluntary services or other services, and who receive no more than a total, from all work settings, of five hundred dollars (\$500) per month as reimbursement for expenses actually incurred by those clinical counselor trainees, interns, and applicants for services rendered in any lawful work setting other than a private practice shall be considered an employee and not an independent contractor.

Business and Professions Code section 4989.43 provides, in relevant part:

(k) Trainees, interns, or applicants who provide volunteered services or other services, and who receive no more than a total, from all work settings, of five hundred dollars (\$500) per month as reimbursement for expenses actually incurred by those trainees, interns, or applicants for services rendered in any lawful work setting other than a private practice shall be considered employees and not independent contractors. The board may audit applicants who receive reimbursement for expenses, and the applicants shall have the burden of demonstrating that the payments received were for reimbursement of expenses actually incurred.

Both statutes are unambiguous on their face: Business and Professions Code sections 4999.47, subdivision (d) and 4980.43, subdivision (k) require, for an intern or volunteer to be considered an employee, to have received no more than a total of \$500, "from all work settings" as reimbursement for employee expenses in any unlawful

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Tentative Ruling

Re: ***State of California v. Derrel's Mini Storage, L.P., et al.***
Court Case No. 15 CECG 01554

Hearing Date: November 2, 2016 (Dept. 501)

Motion: Verified Application by Derrel's Mini Storage, L.P. for Withdrawal of Probable Compensation
Verified Application by Sun Life Assurance Company of Canada for Withdrawal of Probable Compensation

Tentative Ruling:

To grant Derrel's Mini Storage, L.P.'s Application in the amount of \$2,651,000. To deny Sun Life Assurance Company of Canada's Application. To order Derrel's to post an undertaking in favor of Lamar Central Outdoor, LLC in the amount of \$20,000. To order counsel for Derrel's and Sun Life to appear so that a suitable bond amount to secure Sun Life's security interest in the property may be discussed.

Explanation:

Under Code of Civil Procedure section 1255.010(a), "[a]t any time before entry of judgment, the plaintiff [in an eminent domain proceeding] may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding."

Under section 1255.210, "[p]rior to the entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property. . . ." Also, under section 1255.220, "Subject to the requirements of this article, the court shall order the amount requested in the application, or such portion of that amount as the applicant is entitled to receive, to be paid to the applicant." (Code Civ. Proc., § 1255.220.)

Section 1255.230 sets forth the procedures by which the other parties can object to the request to withdraw funds. Under section 1255.230, subdivision (d), "If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom." (Code Civ. Proc., § 1255.230, subd. (d).)

Apportionment of the Probable Compensation:

Upon a partial taking of the secured property by eminent domain, the condemnation proceeds must be allocated between the lender and the owner. The lender is entitled to receive the portion of the proceeds only to the extent that the security has been impaired by the part of the property taken. (Code Civ. Proc., § 1265.225, subd. (a).) The determination and the amount of the award to be

apportioned to the lienholder is made by the court. (Code Civ. Proc., § 1265.225, subd. (a); See *Sacramento etc. Drainage Dist. v. Truslow* (1954) 125 Cal.App.2d 478, 498-500.)

The question whether a lienholder's security has been impaired by a partial condemnation which is normally a question of fact to be determined in light of the circumstances of the particular case considering all of the relevant factors. (*People Ex Rel Dept. of Transportation v. Redwood Baseline, Ltd.* (1978) 84 Cal.App.3d 662, 688.) Relevant facts include: whether the debt and security transaction resulted from a sale or a loan; whether or not a deficiency judgment is legally permissible; the terms for repayment; the interest rate charged compared with the prevailing interest rate in similar transactions; the original, pre-take and post-take security to debt ratios; the length of time the transaction has been in effect; the amount of the debtor's equity and the amount actually invested by the debtor in the property constituting the security; the payment record of the debtor prior to the partial condemnation; the length of time the transaction is to continue in force after the partial condemnation; whether or not the partial condemnation necessitates repair to or reconstruction of the property; the amount of the annual taxes and assessments against the property; whether the debt is currently paid or is in default; facts bearing on the likelihood of default by the debtor; the nature of the security property; whether or not the security property is likely to be readily salable; and whether or not it is likely it can be sold at a foreclosure sale for a price approximating its fair market value. (*Ibid.*)

Evidence of nearly all of these factors is absent from the record before us. Certainly Derrel's is entitled to the probable compensation that exceeds the amount currently owed on the loan. However, Derrel's is willing to post an undertaking pursuant to Code of Civil Procedure section 1255.240. Subdivision (a) of that section provides, in relevant part: "If the court determines that an applicant is entitled to withdraw any portion of a deposit *that another party claims or to which another person may be entitled*, the court may require the applicant, before withdrawing such portion, to file an undertaking. *The undertaking shall secure payment to such party or person of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the proceeding, together with interest as provided in Section 1255.280. ...*" (Emphasis added.) Derrel's does not indicate the value of the undertaking it intends to post. Sun Life does not admit that any undertaking would be sufficient. The court finds that an undertaking would be sufficient to protect Sun Life's interests and orders counsel or both parties to attend the hearing ready to discuss the appropriate amount of such a bond.

The Security Agreement Grants Sun Life No Rights in the Condemnation Award:

An agreement between the beneficiary and the trustor allocating the award is not effective to override the statute unless it is entered into *after* commencement of the condemnation proceeding. (Code Civ. Proc., § 1265.225, subd. (b).) The statutory provision for the allocation of the condemnation award in section 1265.225 based on the impairment of the security is controlling and supersedes the provisions in the deed of trust. (See Law Rev. Commission Comment to Code Civ. Proc., § 1265.225 (1975) ["The statute codifies the prior holdings in cases It is expressly intended to supersede

Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Aujaneek Moore v. Antonio Solorio***

Superior Court No. 15CECG03017

Hearing Date: Wednesday November 2, 2016 (**Dept. 502**)

Motion: Defendant Fresno County's Motion to Dismiss
Defendant Fresno County's Request for Sanctions

Tentative Ruling:

To find the motion to dismiss moot.

To deny the Request for Sanctions.

Explanation:

Dismissal

Following the filing of the motion, a dismissal was entered as to the moving party, rendering the motion to dismiss moot.

Sanctions

To impose sanctions under Code of Civil Procedure section 128.5 against an attorney, the notice itself must clearly provide that sanctions are being sought against the attorney. (*Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166.) Here, the notice does not specify whether Defendant is seeking sanctions against Plaintiffs or their attorney. Therefore, sanctions are not available against Plaintiffs' attorney.

Code of Civil Procedure section 128.5, subdivision (f) states: "Any sanctions imposed pursuant to this section shall be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7." Section 128.7, subdivision (c)(1) mandates a 21-day safe harbor (after service), to allow counsel to withdraw an offending paper.

Here, Defendant filed the motion at the same time as it was served and so did not comply with section 127(c)(1) by delaying filing of the motion by at least 21 days after service.

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

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Tentative Ruling

Re: ***Wortham v. Turning Point of Central California, Inc.***

Case No. 15CECG02618

Hearing Date: November 2, 2016 (Dept. 502)

Motion: By Cross-Defendant Wortham Demurring to Cross-Complaint of Turning Point of Central California, Inc.

Tentative Ruling:

To overrule the demurrer in its entirety. Cross-Defendant shall have ten (10) days from the date of this order to respond to the Cross-Complaint.

Explanation:

[As of October 31, 2016, no reply brief in support of the demurrer appears in the Court's files.]

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Misappropriation of Trade Secrets

A claim for misappropriation of trade secrets requires plaintiff to demonstrate: (1) the plaintiff owned a trade secret; (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff. (*Cytodyn, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 297; Civ. Code §§3426, *et seq.*) Here, the cross-defendant contends that the cross-complaint does not adequately allege a "trade secret" or that the use of the trade secret caused cross-complainant damages.

A trade secret is defined in the statutes as "information that (1) derives independent economic value from not being generally known to the public... and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code §3426.1, subd.(d).) Contrary to cross-defendant's contention,

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Tentative Ruling

Re: **Gateway Business Bank v. Leist**
Court Case No. 14CECG01830

Hearing Date: **November 2, 2016 (Dept. 502)**

Motion: Plaintiff's Motion for Terminating Sanctions, or for Issue and/or Evidence Sanctions, and for Monetary Sanctions

Tentative Ruling:

To deny terminating sanctions, but to grant issue and evidence sanctions as to defendants First Affirmative Defense, that being their claim that they were bona fide purchasers for value. Defendants Donald L. Fulbright and Mary Fulbright are precluded from raising this defense at trial and from presenting any evidence, documentary or otherwise, related to this defense. To grant the request for monetary sanctions and to award sanctions in the amount of \$1,410.00 against defendants Donald L. Fulbright and Mary Fulbright, payable within 20 days of the date of this order, with the time to run from the service of this minute order by the clerk.

Explanation:

Once a motion to compel discovery is granted, continued failure to comply may support a request for more severe sanctions. Code of Civil Procedure Section 2023.010, subdivision (g) makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process," but sanctions are only authorized to the extent permitted by each discovery procedure. (Code Civ. Proc. § 2023.030.) For failure to obey the court's orders compelling responses to interrogatories and for production of documents, the court may "make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010)," and "in lieu of or in addition to that sanction, the court may impose a monetary sanction." (Code Civ. Proc., §§ 2030.290, subd. (c) and 2031.300, subd. (c).)

Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. Sanctions should not constitute a "windfall" to the requesting party; i.e. the choice of sanctions should not give that party more than would have been obtained had the discovery been answered. (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305—terminating sanctions found excessive where an issue sanction would have given plaintiff the full benefit of the discovery propounded, and would not have deprived defendant of the right to a defense on the merits.) Any sanctions imposed must be "suitable and necessary" to allow the propounding party to obtain the information sought, but they are not designed to "impose punishment." (*Id.* at p. 304.) It is only when a party persists in disobeying the court's orders that sanctions such as striking an answer are justified. The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested.

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