

Tentative Rulings for November 23, 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).)

15CECG01554 *State of California v. Derrel's Mini Storage, L.P., et al.* (Dept. 501.)

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 402

Tentative Rulings for Department 403

Tentative Rulings for Department 501

(24)

Tentative Ruling

Re: ***Ali v. Asurea Insurance Services***
Court Case No. 16CECG02443

Hearing Date: **November 23, 2016 (Dept. 501)**

Motion: Defendant Asurea Insurance Services' Demurrer to complaint

Tentative Ruling:

To sustain the demurrers to each cause of action, without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).) Defendant Asurea Insurance Services is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action.

Explanation:

The court grants defendant's request to take judicial notice of the Third Amended Complaint ("TAC") filed in Case #12CECG01068.

Third, Fourth, Sixth, and Seventh Causes of Action:

Plaintiff's attempt to reassert dismissed claims is improper. While no immediate appeal lies when demurrer is sustained without leave to amend as to some but not all causes of action, a plaintiff may seek review of the ruling by way of an extraordinary writ. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 893.) Trying to shortcut this process by filing a new lawsuit on causes of action as to which demurrer has already been sustained without leave to amend has been held as improper. (*Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162—court had authority to sustain demurrer based on its authority to strike sham pleadings.) If plaintiff believed the demurrer ruling was improper, her remedy was to seek appellate review via extraordinary writ. As these causes of action are improperly raised, demurrer must be sustained, without leave to amend.

First, Second, Fifth, and Eighth Causes of Action:

As for these causes of action, they are each subject to demurrer, without leave to amend, because they are barred by the relevant statutes of limitation. A complaint is subject to demurrer if it is clear from the face of the complaint or from matters judicially noticeable that this defense lies. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1324; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) A voluntary dismissal of an action does not toll the statute of limitations. (*Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1127—"California courts have concluded that absent express statutory language, a plaintiff's voluntary dismissal will not entitle him to toll the statute of limitations (citing to *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 360 and *Thomas v.*

Gilliland (2002) 95 Cal.App.4th 427, 433.) Thus, the timeliness of these causes of action is considered based on the date this current complaint was filed, August 1, 2016.

Furthermore, there are several key allegations which must be disregarded under the sham pleading doctrine, as indicated below. All the allegations of this current complaint are nearly identical to the complaint filed in Case #12CECG01068, as amended by the TAC. It is based on the same operative facts, and raises the same causes of action. Where allegations of a later pleading differ materially from an original pleading and there is no satisfactory explanation as to why the earlier judicial admissions are incorrect, the earlier allegations are "read into" the complaint and the inconsistent allegations are treated as a sham and disregarded on demurrer. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384; *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 945.)

- *Fraud-Based Claims (First and Fifth Causes of Action)*

The face of the complaint indicates the events giving rise to the claims occurred in or around September and October 2011. While defendant argues there are no other allegations that plaintiff did not discover facts constituting the alleged fraud until a later date, there actually is one such allegation. She alleges in her introductory section that the true facts were discovered "when Plaintiff and Plaintiff's agents confronted Defendants for their commission." (TAC, p. 4:1-2; Compl., p. 3:5-6.) When this happened does not clearly and affirmatively appear on the face of the complaint. Further, plaintiff cannot be deemed to have discovered the fraud *when the fraudulent representations and misrepresentations were made*: if she had discovered them at that time, then either the attempt at fraud would have been unsuccessful, or (at the very least) plaintiff could not possibly allege *reasonable reliance* if she then knew the statements were fraudulent.

The Fifth cause of action does allege that "[o]n or about October 2011 several agents contacted Integrated Benefits concerning their commission," and that the agents were told they should seek payment from plaintiff, which prompted plaintiff to respond that Integrated Benefits should pay the commissions or "litigation will commence." (TAC, p. 16:13-17; Compl., pp. 13:26-14:2.) This might be the "confrontation" referred to in the introductory section, but it may not.

Even so, at the very least it is clear plaintiff was aware by April 3, 2012, when she initially filed her complaint, of the facts giving rise to her fraud-based claims. The statute of limitations on an action for fraud is three years. (Code Civ. Proc. § 338, subd. (d).) If plaintiff was aware of facts giving rise to these claims on April 3, 2012, she had until April 3, 2015, to file her claim. This current action was filed on August 1, 2016, after the statutory period had run.

- *Breach of Contract (Second Cause of Action)*

The statute of limitations on a written contract is four years after the breach occurred. (Code Civ. Proc. § 337.) The limitations period for an oral contract is two years after the breach. (*Id.*, § 339.)

(28)

Tentative Ruling

Re: ***Vazquez, et al. v. OR Express Logistics, et al.***

Case No. 15CECG03738

Hearing Date: November 23, 2016 (Dept. 501)

Motion: By Defendant Hyundai Translead to compel initial responses to First Set of Form Interrogatories, Special Interrogatories, and Requests for Production of Documents and for a Statement of Damages from Plaintiffs Jesse Delgadillo, Olivia Vazquez, and the Estate of Jessie Delgadillo, respectively, and for monetary sanctions.

Tentative Ruling:

To grant the respective motions. Each Plaintiff shall have ten (10) days in which to respond to the discovery requests.

The request for sanctions as to motions to compel the Requests for Production of Documents, and the Special and Form Interrogatories are granted, and \$450.00 is awarded against each of the plaintiffs.

The request for sanctions as to the motion to compel a response to the request for statement of damages is denied.

Explanation:

On June 20, 2016, Defendant Hyundai Translead served a set of Requests for Production of Documents on Plaintiffs Jesse Delgadillo, Olivia Vazquez and the Estate of Jesse Delgadillo. On the same date, Defendant Hyundai Translead served a set of Special Interrogatories and Form Interrogatories on each of the same Plaintiffs.

The due date for responses to all of this discovery was July 25, 2016. According to the declarations filed by counsel for Defendant, no responses to any of these discovery requests were ever received.

On June 20, 2016, Defendant Hyundai Translead also served a set of Requests for Statements of Damages on Plaintiffs Jesse Delgadillo, Olivia Vazquez and the Estate of Jesse Delgadillo. The response date for these requests was July 5, 2016. According to counsel for Defendant, no responses were ever received.

Defendant filed these motions on October 19, 2016.

As of November 21, 2016, no opposition has appeared in the Court's files.

Form Interrogatories, Special Interrogatories and Requests for Production.

When a party has not responded to Interrogatories all a moving party need show is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (Cf. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06; CRC 3.1345 (no need for separate statement or meet and confer).

Here, the moving party has presented evidence to show that the interrogatories were properly served and that no responses have been served.

Likewise, when a party has not responded to Requests for Production, a responding party waived all objections, including privilege and work product. (CCP §2031.300.) There is no timeline on the motion and no need for a meet and confer. (CCP §2031.300.)

Here the moving party has presented evidence to show that the Requests for Production were properly served and that no responses were ever received.

Therefore, the motions to compel responses to the Form Interrogatories, Special Interrogatories, and Statement of Damages are each granted as to each of the Plaintiffs.

Statement of Damages

A request for a statement of damages in a personal injury or wrongful death case is enforceable by the Court pursuant to California Code of Civil Procedure §425.11, subdivision(b). Again, the moving party has presented evidence that the request was served and not responded to.

Therefore, the motions to compel responses to the Statement of Damages as to each Plaintiff are granted.

Sanctions

The statutes applicable to the interrogatories and requests for production of documents allow for the awarding of sanctions absent substantial justification. (Code Civ.Proc. §§2023.010, subd. (d)-(f) (interrogatories); 2023.030, subd.(a) (reasonable expenses), 2030.010, subd. (d) (misuse of discovery process includes failure to respond), 2033.280 (sanctions for misuse of discovery process), 2033.290, subd.(d) (requests for admissions), 2031.300, subd.(c) (inspection demands).)

The successful party is entitled to reasonable expenses incurred, including attorney's fees, in enforcing discovery. (Code Civ.Proc. §2023.030, subd.(a).)

(17)

Tentative Ruling

Re: ***Sanchez v. Tang, M.D., et al.***
Court Case No. 14 CECG 00823

Hearing Date: November 23, 2016 (Dept. 501)

Motion: Jolyn Chen, M.D.'s Motion for Summary Judgment/Adjudication
Minh Tien Tang, M.D.'s Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny both motions.

If oral argument is requested, it will be heard on December 7, 2016, at 3:30 p.m. in Department 501.

Explanation:

First Cause of Action – Medical Malpractice – Drs. Chen and Tang

Healthcare providers must possess and exercise “that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances.” (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.) Thus, in “any medical malpractice action, the plaintiff must establish: “(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.” [Citation.]” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

“Whenever the plaintiff claims negligence in the medical context, the plaintiff must present evidence from an expert that the defendant breached his or her duty to the plaintiff and that the breach caused the injury to the plaintiff.” (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.) “ ‘California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’ ” (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984–985.)

However, an expert's declaration submitted in connection with a summary judgment motion must not be speculative, lacking in foundation, and must be made with sufficient certainty. “It is sufficient, if an expert declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion. [Citation.]” (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 718.) A defendant's expert declaration

must be detailed, explaining the basis for the opinion and the facts relied upon. (*Powell v. Kleinman, supra*, 151 Cal.App.4th 112, 125; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 521, 524–525.) Moreover, because expert opinion may not be based on assumptions of fact that are without evidentiary support and experts may not recite hearsay as fact, properly authenticated medical records reviewed by the experts must be included in the motion for summary judgment. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

Under these standards, the Declaration of Dr. Maurice Druzin, defendants Dr. Chen's and Dr. Tang's expert is sufficient. The question remains, however, as to whether the doctors have met their burden of production. Although plaintiffs have not raised formal objections to the evidence in support of Facts 1-34 relating to Dr. Tang's motion for summary Judgment and the standard of care portion of Dr. Chen's motion, the separate statements are technically defective for failure to follow the California Rules of Court, rules 3.1350(d)(3) and 3.1116.

Formal Deficiencies

First, the evidence cited in support of the majority of the "facts" is defendants' expert's declaration. This is improper. An expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons for an opinion present incompetent hearsay evidence. (*People v. Price* (1991) 1 Cal.4th 324, 416; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524–25 ["Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact."].)

Second, defendants' citation to an entire body of medical records is insufficient to support a material fact. California Rule of Court 3.1359(d) provides: "[c]itation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers." The medical records should have been Bates stamped and referred to by page number.

Third, the deposition testimony was improperly submitted. California Rule of Court 3.1116 requires that when using deposition transcripts as exhibits, only the relevant portions should be submitted and the relevant text should be highlighted. Defendants have simply submitted the entire deposition of plaintiff Sanchez, without highlighting any portion or even citing to any specific testimony.

However, while these failures are serious and greatly handicap the court's ability to review the motion Dr. Tang's motion and Dr. Chen's motion, insofar as it relates to the standard of care and causation, fail because plaintiff has submitted a qualified expert's declaration raising triable issues of fact.

Opposing Expert Declaration

Where a defendant in a medical malpractice action presents expert testimony in support of a summary judgment motion showing that the defendant's care and

treatment did not fall below the standard of care, the burden shifts to plaintiff to offer contrary expert testimony demonstrating that the defendant's care and treatment did not fall below the standard of care. (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 412; *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844.) The plaintiffs have met their burden with the declaration of Dr. Rabin. Dr. Rabin's opinions that the standard of care required Dr. Chen alert Dr. Tang, no later than 3:15 a.m., to discuss and review the abnormal pattern on the fetal heart monitor, that Drs. Chen and Tang should have performed an immediate cesarean section no later than 3:15 a.m., that it was a breach of the standard of care for both Dr. Chen and Dr. Tang to attempt a vacuum assisted delivery, and to a reasonable degree of medical certainty, had Drs. Chen and Tang began the process for an emergency cesarean section at 3:15 a.m., Jayden would have been born healthy by 3:35 a.m., and survived, raise triable issues of fact as to UMF Nos. 28-31 and 34.

Dr. Chen's Statute of Limitations Argument

As a general rule, an amended complaint that adds a new defendant after the expiration of the statute of limitations does not relate back to the original complaint. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176 (*Woo*).) Code of Civil Procedure section 474 is an exception to this rule and allows substitution of a new defendant for a fictitious Doe defendant named in the original complaint if certain requirements are met. (*Ibid.*)

Code of Civil Procedure section 474 states, in relevant part, "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . ."

Section 474 is restricted to the knowledge of the plaintiff *at the time of the filing of the complaint*. (*Baton v. Drost* (1993) 20 Cal.App.4th 483, 487.) "A . . . nonprocedural requirement for application of the section 474 relation-back doctrine is that [the plaintiff] must have been genuinely ignorant of [the defendant's] identity at the time she filed her original complaint. [Citations.] The omission of the defendant's identity in the original complaint must be real and not merely subterfuge for avoiding the requirements of section 474. [Citation.] Furthermore, if the identity ignorance requirement of section 474 is not met, a new defendant may not be added after the statute of limitations has expired even if the new defendant cannot establish prejudice resulting from the delay. . . ." (*Woo, supra*, 75 Cal.App.4th at p. 177.)

A plaintiff must rely on section 474 in good faith. (*Breceda, supra*, 267 Cal.App.2d at p. 176.) "[T]he relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is *what facts the plaintiff actually knew* at the time the original was filed. [Citation.]" (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170, original italics.) However, a plaintiff "need not be aware of each and every detail concerning a person's involvement before the plaintiff loses his ignorance." (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 594, citing *Dover v. Sadowinski* (1983) 147 Cal.App.3d 113, 116-117.)

Further, for the plaintiff to be acting in good faith he must “review readily available information that discloses the defendant's identity.” (*Woo, supra*, 75 Cal.App.4th at p. 180.) The *Woo* court explained that this requirement is consistent “with the cases that impose no duty of inquiry on plaintiffs who never knew the defendant's identity, and assures the good faith of plaintiffs who seek to use the section 474 relation-back doctrine.” (*Ibid.*) Therefore, although the plaintiff must be subjectively ignorant under section 474, he must also be acting in reasonable good faith based on the evidence available to him when filing the complaint.

Thus, while a plaintiff has no duty to search for facts that are not within his knowledge at the time he files his original pleading, he cannot take advantage of the statute if he knows actual facts that cause a reasonable person to believe a cause exists. (*General Motors, supra*, 48 Cal.App.4th at p. 595.)

Dr. Chen's moving papers rely on the case of *Dover v. Sadowinski* (1983) 147 Cal.App.3d 113. In that matter, the plaintiff filed a medical malpractice action naming several defendants and Doe defendants. Plaintiff alleged that the defendants negligently caused the death of his wife while she was a patient in the hospital. The complaint did not include the wife's attending physician as a defendant even though the physician's name appeared throughout the medical records as the physician in charge of her care and there was undisputed evidence that the physician met with the plaintiff in person at least once and spoke to him on a number of occasions during the hospitalization. (*Id.* at pp. 115-117.) Plaintiff served the physician with the complaint as a Doe defendant 19 months after filing the original complaint. (*Id.* at p. 115.) During oral argument, counsel for plaintiff admitted “We knew he was involved, but we had no idea . . . how deeply as a negligent individual, he was involved.” (*Id.* at p. 117.) The appellate court upheld summary judgment in favor of the physician finding the plaintiff was not “ignorant” of his identity or the facts giving rise to the cause of action. (*Id.* p. 118.)

Dover, however, is distinguishable on its facts. Here, there is no evidence as to when plaintiff received a copy of her medical records. Dr. Chen argues that plaintiff Sanchez must have obtained Dr. Tang's name from Sanchez' medical records, therefore she had them prior to filing the complaint and Dr. Chen's identity was available to her at that time. This is mere conjecture and is insufficient to support a grant of summary judgment.

Even though plaintiff Sanchez recalled being treated by a “young Asian physician,” she could not recall this physician's name at the time of her deposition. It was defense counsel who suggested to her that this physician was Dr. Chen. Plaintiff believed Dr. Chen was male. Finally, plaintiff Sanchez was never asked during her deposition what she knew about Dr. Chen when her complaint was filed. Plaintiff Sanchez' declaration submitted with her opposition to Dr. Chen's summary judgment confirms she was not aware of identity of Dr. Chen and her role in plaintiff Sanchez' labor and delivery. In fact, when plaintiff Sanchez attended the deposition of Dr. Chen she did not recognize her as the Asian physician who treated her. (Sanchez Decl. ¶ 5.)

(24)

Tentative Ruling

Re: ***Harpains Meadow, L.P. v. Stockbridge***
Court Case No. 13CECG02711

Hearing Date: **November 23, 2016 (Dept. 501)**

Motion: Cross-Defendants' Motion for Judgment on the Pleadings as to the Third Amended Cross-Complaint

Tentative Ruling:

To deny.

Explanation:

Rescission/Restoration of Consideration:

Cross-defendants again argue, as they did on the earlier JOP, that these causes of action cannot be maintained because cross-complainant is required to seek rescission of the contract and offer to restore consideration received in order to plead fraud in the inducement. They rely on the case of *Village Northridge Homeowners Ass'n v. State Farm Fire and Cas. Co.* (2010) 50 Cal.4th 913 ("*Village Northridge*"), where plaintiff had resolved a suit against his insurer by executing a settlement agreement which included a release of all claims against the insurer. The Court held that the insured could not pursue damages in a second lawsuit under a theory of fraud in the inducement without also rescinding the release. "A settlement agreement is considered presumptively valid, and plaintiffs are bound by an agreement until they actually rescind it." (*Id.* at p. 930.) It noted that the Legislature "has created a fair and equitable remedy to address the alleged fraud problem: rescission of the release, followed by suit...[o]ur statutory scheme...effectively ensures that plaintiffs who may have been defrauded in the settlement process will be allowed access to the courts." (*Id.* at p. 931.)

On further reflection, it appears that important exceptions to this rule are applicable here, such that cross-complainant is not required to seek rescission and offer restoration to maintain these causes of action. Where an exception is applicable, the one claiming to have been defrauded can choose to either rescind the contract or to simply affirm the contract and sue for damages for fraud. (*Campbell v. Birch* (1942) 19 Cal.2d 778, 791; *Montes v. Peck* (1931) 112 Cal.App. 333, 340. See also 1 Witkin, Summary 10th Contracts § 942 (2005)—noting that the requirement of restoration has been criticized and is subject to several exceptions.)

One important exception to the rule is where "circumstances have arisen that make it impossible to effect a full rescission, and the other is where the rights of the defendant can be fully protected by the decree of a court of equity." (*Stegeman v. Vandeventer* (1943) 57 Cal.App.2d 753, 761; *Carruth v. Fritch* (1950) 36 Cal.2d 426, 430; *Farina v. Bevilacqua* (1961) 192 Cal.App.2d 681, 685.) This is particularly the case where

the party alleges, as cross-complainants do here, their full performance of the obligations imposed on them by the Settlement Agreement.

In *Village Northridge*, *supra*, 50 Cal. 4th at p. 926, the court affirmed (although found inapplicable) the rule stated in *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 750, which allowed plaintiff to stand on the contract and sue for damages for fraud where he fully complied with the terms of the contract. Here, cross-complainants allege SDI has dismissed the underlying lawsuit between SDI and Fig Tree and released its mechanic's liens against the subject property, and that SDI has substantially performed all the construction improvements it was committed to perform under Building Construction Contract. It is now impossible for cross-defendants to reactivate the prior lawsuit, un-release the mechanic's liens, recoup funds SDI paid to subcontractors, or destroy the improvements constructed on the subject property in furtherance of the Settlement. It is impossible to restore the parties to their pre-contract economic positions.

Furthermore, the Settlement Agreement and Mutual Release in the case at bench differs materially from the one in *Village Northridge*; in the case at bench the parties contemplated and provided for future obligations against each other, whereas in *Village Northridge* the court noted several times that the "sole object of the contract" was to obtain the release. (*Village Northridge*, *supra*, 60 Cal.4th at pp. 925-926.)

Sufficiency of the Causes of Action:

Cross-defendants argue that as to each of the three causes of action which are subject to this motion, it is impossible for Vanilla to claim fraud against Meadow because Vanilla is one of the General Partners of Meadow, and as such it necessarily acted on behalf of Meadow (along with the other General Partner, Right Field) in signing all documents required under the Settlement Agreement. The Meadow partnership agreement required Vanilla and Right Field to act in unanimity, and if they could not, then a designated third party would do so. Thus, Vanilla can't allege that since Right Field did not intend to perform then Meadow did not intend to perform. They argue this also means that Vanilla's allegation that "Meadow" defrauded it amounts to Vanilla alleging that it lied to itself, which is an absurd position.

This argument is not persuasive, given the totality of the Settlement Agreement and related Settlement documents, as alleged. The plan the parties agreed to in order to settle the earlier lawsuit was clearly a complicated one, but it necessarily – and with the full knowledge of all involved – meant Vanilla (a Stockbridge-affiliated entity) would serve in two roles: as the construction lender, and as one of the General Partners of the developer (i.e., the "successor developer," Meadow). Thus, Vanilla was necessarily on both sides of the Promissory Note (as lender and promisee) and the Deed of Trust (representing the owner granting the security interest and as beneficiary entitled to enforce the security interest). And since SDI still remained as the general contractor, a Stockbridge-affiliated entity was also on both sides of the Construction Contract between Meadow and SDI. Cross-complainants have clearly alleged that Stockbridge (with hat on as contractor SDI) was not going to be paid for his contractor work until

Stockbridge (with hat on as Vanilla) was repaid under the Promissory Note or until Vanilla foreclosed under the Deed of Trust. On this motion, this ultimate goal must be considered the central purpose of the Settlement Agreement and related agreements.

At the core of every cause of action is the claim that the Barbis-affiliated side of the equation, as to all related Settlement documents, *did not actually intend for this ultimate payment to occur*, and yet the Barbis-affiliated entities fraudulently entered into the Settlement Agreement and related documents which were designed to fulfill this stated end. Vanilla is not seeking to *avoid* the obligations and responsibilities it agreed to as General Partner of Meadow in signing the various documents along with Right Field on behalf of Meadow; rather, it is seeking damages for cross-defendants' alleged role in causing Meadow to not perform according to those obligations (i.e., to not pay Vanilla under the Promissory Note, and thereby to fail to pay SDI for its construction work, and to not allow Vanilla to foreclose on the Deed of Trust).

The causes of action are sufficiently stated.

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: MWS **on** 11/22/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

(30)

Tentative Ruling

Re: ***Efrain Garcia v. CCS Companies***
Superior Court No. 15CECG03847

Hearing Date: Wednesday November 23, 2016 (**Dept. 502**)

Motion: (1) Defendant CCS Companies' demurrer to second amended complaint
(2) Defendant Rosenberg's demurrer to second amended complaint

Tentative Ruling:

To **sustain** demurrers based on Code of Civil Procedure section 430.10(e) to causes of action one, two, and three.

To **overrule** demurrer based on Code of Civil Procedure section 430.10(e) to cause of action four.

To **sustain** demurrers based on the litigation privilege to causes of action one, two, and three.

To **overrule** demurrer based on the litigation privilege to cause of action four.

To **overrule** demurrers based on the statute of limitations.

To **deny** sanctions.

Leave to amend is denied because though the court previously granted leave to amend after defendants' demurrer to plaintiffs' first amended complaint, plaintiffs have failed to make any substantial change to the allegations of causes of action one, two and three.

Defendants are ordered to file their answers to plaintiffs' fourth cause of action for malicious prosecution within 20 days of service of the minute order adopting this Tentative Ruling.

Explanation:

1. Memorandum Rules

Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages. (California Rules of Court, rule

3.1113.) However, no memorandum is required for a general demurrer. (*Dickers v. Superior Court* (1948) 88 Cal.App.2d 816, 818-819.)

Here, Defendant Rosenberg's ("Rosenberg") memorandum in support of demurrer is 47 pages long. Since the limit is 15 pages, the Court will *only* consider his general demurrers without regard to the supporting memorandum.

2. Code of Civil Procedure section 430.10(e)

Fraud and Deceit, concealment or nondisclosure of facts

In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294.) However, it is essential that the facts and circumstances which constitute the fraud be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 553.)

Here, Plaintiffs fail to specifically allege which facts Defendants failed to disclose. And Plaintiffs' assertion that Defendants "failed to disclose the facts regarding the purpose of the initial lawsuit" (SAC, p5 ¶ 4) does not sufficiently appraise Defendants of the nature of the claim.

Fraud

Generally, the elements of deceit are: (1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation) (*Mosier v. Southern Calif. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1045 citing *Marketing West, Inc. v. Sanyo* (1992) 6 Cal.App.4th 603, 612.) Particularity is also required. (*Scafidi, supra*, 72 Cal.App.2d at 553.)

Here, Plaintiffs fail to specifically allege a representation or *any other elements*.

Negligent Misrepresentation

The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.)

Here, Plaintiffs fail to allege the material fact that Defendants misrepresented or any other elements.

Malicious Prosecution

The elements of a claim for malicious prosecution include a prior action commenced by or at direction of defendant that lacked probable cause and was initiated with malice, coupled with a termination of the action in plaintiff's favor. (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 458.) Malice must consist of actual ill will or some other improper motive. (*Gogue v. MacDonald* (1950) 35 Cal.2d 482, 485, see *Goland v. Peter Nolan & Co.* (1934) 2 Cal.2d 96, 97 [allegations that claim was fictitious and known to be such, and that attachment was levied with design to injure, harass, and annoy plaintiffs were sufficient to show malice]; *Axline v. St. John's Hosp. & Health Center* (1998) 63 Cal.App.4th 907, 918 disapproved on other grounds [malicious prosecution of administrative proceeding was initiated by hospital; effect of allegation that hospital knew information on which it acted was inaccurate was that hospital did not believe its claim was valid, and this was sufficient allegation of malice.]

Here, Plaintiffs adequately allege all elements of malicious prosecution. They allege that Defendants commenced a prior action in subrogation, for which they lacked probable cause and which was initiated with malice, i.e., with knowledge that Plaintiffs were not the owners of the vehicle. Plaintiffs also allege that the action was dismissed in their favor.

3. Litigation Privilege

Causes of action one, two, and three

Here, causes of action one, two and three mirror Plaintiffs' initial Complaint and First Amended Complaint, as to which the Court has *already* sustained demurrers based upon the litigation privilege.

Causes of action four, malicious prosecution

The litigation privilege does not apply to malicious prosecution. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)

4. Statute of Limitations

Where the running of the statute of limitations appears "clearly and affirmatively" from the face of the complaint, a general demurrer lies. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321.) However, a plaintiff is entitled to "plead around" the statute of limitations. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324.) For example, there are a number of causes of action that do not accrue until the plaintiff discovers or should discover the facts creating the cause of action (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 240); successfully pleading of this "discovery

rule" may extend the statute of limitations. (*Cleveland v. Internet Specialties West, Inc.*, (2009) 171 Cal.App.4th 24, 32.)

Discovery Rule

Where a plaintiff relies on the "discovery rule," the complaint must specifically plead facts that show (i) the time and manner of discovery, and (ii) plaintiff's inability to have made an earlier discovery despite reasonable diligence. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174-175.) The burden is on the plaintiffs to establish, not only the late discovery, but also their inability to discover the relevant facts earlier. (*Id.* at 177-178.) The essential question is when the plaintiff should have discovered the facts using reasonable diligence. (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1469-71; *Sylve v. Riley* (1993) 15 Cal.App.4th 23, 26.) Whether reasonable diligence was exercised is generally a question of fact. (*Ibid*; *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 409 citing *Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 419.)

Here, Plaintiffs have pleaded the time and manner of discovery as well as facts showing an inability to have discovered Defendants' involvement earlier with reasonable diligence. Plaintiffs allege that they did not learn of Defendant CCS ("CCS") or that Rosenberg was acting *independently* until they were provided discovery in the federal case, on or about April 23, 2014. (SAC, pp7 and 8.) And Plaintiffs allege that they possessed no factual basis to suspect involvement by CCS *specifically* because there was "never a mention ANYWHERE of ANY reference to CCS Companies and their involvement in this action in any pleadings or correspondence." (SAC, p8 ¶ 5.)

Plaintiffs' assertions prevent a determination that the statutes have clearly and affirmatively run. Applying the "discovery rule" tolls the statute, which makes *all* causes of action timely (fraud and deceit – three years [Code Civ. Proc., § 338, subd. (d)]; negligence - two years [Code Civ. Proc., § 335.1]; malicious prosecution – one or two years from date of judgment [Code Civ. Proc., § 335.1; *Stavropoulos v. Sup.Ct.* (2006) 141 Cal.App.4th 190, 197; *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716, 719]). *There is a split in authority as to whether malicious prosecution is subject to a one or two year limitation when a plaintiff is suing the attorney of the party who instituted the malicious prosecution. However, the Court will not consider Rosenberg's memorandum and CCS did not raise this issue. Therefore, this issue will not be addressed.*

CCS's objections based on Plaintiffs' lack of reasonable diligence (CCS Demurrer, filed 10/4/16 p8 Ins20-23), present questions of fact which cannot be decided on demurrer. This is because reasonable minds can draw more than "one conclusion from the evidence." (*E-Fab, supra*, 153 Cal.App.4th at 13s20.) Further, CCS's arguments regarding service of motions or receipt of written discovery identifying CCS (CCS Demurrer, filed 10/4/16 p9) is extrinsic evidence that cannot be considered on demurrer. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 859, 862 disapproved on other grounds.) Demurrer overruled.

5. Sanctions

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) requires that a motion for sanctions under this section be made separately from other motions and mandates a 21-day safe harbor (after service), to allow counsel to withdraw an offending paper.

Here, Rosenberg makes a request for sanctions concurrently with his Demurrer. This *alone* violates the terms of the statute. But he also served notice and filed his request for sanctions on the same day, October 5, 2016. (Demurrer, filed 10/5/16, proof of service.) Therefore, he *also* failed to comply with the mandatory 21 day safe harbor.

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

Tentative Ruling

Issued By: DSB **on** 11/22/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: **Jose Moreno Torres v. City of Fresno, et al.**
Superior Court Case No. 15CECG02247

Hearing Date: November 23, 2015 (Dept. 502)

Motion: Deem request for admissions admitted; sanctions

Tentative Ruling:

To grant Defendant City of Fresno's motion that the truth of the matters specified in the request for admissions be deemed admitted as to Plaintiff, unless Plaintiff serves, before the hearing, a proposed response to the request for admissions that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.240. (Code Civ. Proc. §2033.280.)

To grant Defendant's motion for sanctions. Plaintiff is ordered to pay sanctions in the amount of \$566.25 to the Manning & Kass, Ellrod, Ramirez, Trester, LLP law firm, within 30 days after service of this order.

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

Tentative Ruling

Issued By: DSB on 11/22/16
(Judge's initials) (Date)

Tentative Rulings for Department 503