

Tentative Rulings for October 13, 2021
Department 501

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.

20CECG02607 *Genevieve Audelo v. OMNI Women's Health Med. Grp., Inc.* –
Defendant's Motions to Compel and Deem Admissions Admitted
are continued to Tuesday, November 9, 2021 at 3:30 p.m. in
Dept. 501

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Tentative Rulings for Department 501

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(20)

Tentative Ruling

Re: **City of Fresno v. Tower Theater Properties, Inc.**
Superior Court Case No. 21CECG01407

Hearing Date: October 13, 2021 (Dept. 501)

Motion: by City of Fresno for Order Permitting Entry of Property for Appraisal Inspection

Tentative Ruling:

To grant. Respondents are directed to make the property available for inspection and appraisal within 30 days of service of the order by the clerk, on a mutually-agreeable date and time. Respondents must undertake best efforts to find a date and time that is acceptable to the City. Prior to the inspection petitioner shall deposit with the court \$140 in compensation to Respondents.

Explanation:

Pursuant to Code of Civil Procedure section 1245.010, a person authorized to acquire property by eminent domain, such as the City of Fresno (Gov. Code, § 37361, subd. (a)), “may enter upon property to make ... appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.”

To enter the property to make the appraisal, the City must either obtain the owner’s consent (which in this case was not given) or obtain a court order for entry. (Code Civ. Proc., § 1245.020, subds. (a), (b).)

Code of Civil Procedure section 1245.030, subdivision (a), provides that the petitioner “shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.”

There is no dispute in this renewed motion that the owner and all tenants have been served and/or given notice.

Code of Civil Procedure section 1245.030, subdivision (b), provides that “the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.”

The purpose of the entry is to assess whether the historical components are being adequately preserved, complete an appraisal, and to engage in similar activities reasonably related to the appraisal. The appraiser states that he will “inspect the interior and exterior of the property including the building and parking lot, and other areas at the premises reasonably necessary to prepare a valuation. I will observe the condition of

Tower Theatre and its structure to gather information affecting market value. My inspection will not include any alteration, cutting, demolition, or material displacement to the structure or fixtures.” (Burger Decl., ¶ 5.) He will also “take photographs, notes and measurements to assess size, structure, and design, which is customary in arriving at market value estimate.” (¶ 6.) The inspection should take 4-5 hours. (¶ 8.)

The court finds the nature and purpose of the entry to be consistent with the statutory scheme and reasonably narrow in scope. Contrary to respondents' arguments, to obtain entry the statutory scheme does not require the City to show that the historical landmark status of Tower Theater is threatened or in any danger.

There is no reason to limit the inspection to just the architectural historian. The statutes do not limit entry to one person only. Section 1245.010 specifically authorizes entry to make an appraisal. Nor is there any cause to double the amount of compensation to respondents merely because two people are attending the inspection, as opposed to just one. Accordingly, \$140 paid to compensate respondents for the expense of making the property available is appropriate under section 1245.030, subdivision (c).

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 10/8/2021.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **Barron v. Athenix Body Sculpting Institute et al.**
Superior Court Case No. 20CECG02887

Hearing Date: October 13, 2021 (Dept. 501)

Motions: (1) Demurrer and motion to strike the claim for punitive damages of the original Complaint by Defendant Kevin Ciresi, M.D.

(2) Motion to strike the claim for punitive damages of the original Complaint by Defendants Athenix Body Sculpting Institute and Andre Marshall, M.D.

Tentative Ruling:

To take the demurrer and motions to strike off calendar for failure to comply with Code of Civil Procedure sections 430.41 (a) and 435.5(a). The parties are directed to meet and confer *in person or via telephone* as required by the statutes. If the meet and confer attempts are unsuccessful, then the demurring and moving parties may calendar a new date for hearing the demurrer and motions to strike the original Complaint.

Explanation:

Code of Civil Procedure section 430.41, subdivision (a), states in relevant part: "Before filing a demurrer pursuant to this chapter, the demurring party **shall** meet and confer **in person or by telephone** with the party who filed the pleading that is subject to demurrer..." Code of Civil Procedure section 435.5, subdivision (a), states in relevant part: "Before filing a motion to strike pursuant to this chapter, the moving party **shall** meet and confer **in person** or by **telephone** with the party who filed the pleading that is subject to the motion to strike..." (Emphases added.)

In the instant case, counsel for defendants Athenix and Dr. Andre Marshall sent an email to plaintiff's counsel in an attempt to "meet and confer" prior to filing their motion to strike. (See Declaration of Jeffrey Behar filed in support of the motion to strike at ¶ 4 and Exh. A attached thereto.) Counsel for defendant Kevin Ciresi, M.D., sent a letter to plaintiff's counsel in a "meet and confer" attempt prior to filing his demurrer and motion to strike. (See Declarations of Cynthia Palin in support of the demurrer and motion to strike at ¶¶ 4 and 2 respectively and Exh. A attached thereto.) These efforts do not comply with the statutes. Therefore, the demurrer and motions to strike must be taken off calendar.

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** 10/11/2021.
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Genevieve Audelo v. OMNI Women's Health Med. Grp., Inc.***
Superior Court Case No. 20CECG02607

Hearing Date: October 13, 2021 (Dept. 501)

Motion: by Defendants Fenglaly Lee, M.D. & OMNI Women's Health
Medical Group, Inc., for Summary Judgment

Tentative Ruling:

To grant the motion for summary judgment. The prevailing parties are directed to submit to this court, within five (5) days of service of the minute order, a proposed judgment consistent with the ruling.

Explanation:

“[I]n 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.” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606, citation omitted.)

The standard of care against which physicians acts are measured is a matter peculiarly within the knowledge of experts. “[I]t presents the basic issue in a malpractice action and can only be proved by their testimony[.]” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Thus, California courts incorporate the expert evidence requirement into their standard for summary judgment in medical malpractice cases. (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985 [“‘When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, [the defendant] is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’”]; see also *Hanson v. Grode, supra*, 76 Cal.App.4th at pp. 606-607 [same].)

Here, defendants submit the declaration of Karie McMurray, M.D. Dr. McMurray is a well-qualified expert. Her declaration concludes that the treatment plaintiff received was at all times within the standard of care. The declaration also sets forth the basis for Dr. McMurray's opinion and reflects a sufficient analysis of the treatment received by plaintiff. Defendants' evidence is sufficient to shift the burden to plaintiff. Considering plaintiff's non-opposition, defendants' motion for summary judgment is granted.

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 10/11/2021.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: **Cardamon et al. v. The Dominion Courtyard Villas et al.**
Superior Court Case No. 16CECG01918

Hearing Date: October 13, 2021 (Dept. 501)

Motion: by Plaintiffs for Order Compelling Defendants to Produce
Yearly Financial Statements

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiffs seek an order compelling defendants to produce yearly financial statements. Plaintiffs cite no legitimate basis upon which the motion is made. Plaintiffs appear to move under Code of Civil Procedure section 2016.010, et seq. (*Compare, e.g.,* Civil Code § 3295.) Specifically, plaintiffs appear to move to compel a further response to Request for Production of Documents, Set Two, Number 22, which seeks from all defendants, “yearly financial statements for 2015-2019, including profit and loss statements, that reflect the components of the total overhead expenses incurred by each of YOUR apartment complexes.” (Declaration of Mark Schallert in Support of Plaintiffs’ Motion to Compel Production of Yearly Financial Statements, ¶ 2, and Exhibit A thereto.) As such, the court considers the motion under Code of Civil Procedure section 2031.310.¹

Under such consideration, the court notes that no separate statement was filed in accordance with rule 3.1345 of the California Rules of Court which states that a motion to compel further responses to a demand for inspection of documents must be accompanied by a separate statement. The separate statement “must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Material must not be incorporated into the separate statement by reference.” (Cal. Rules of Ct., rule 3.1345(c).) The statement must include, among other things, the factual and legal reasons for compelling further production. (*Id.*, Rule 3.1345(c)(3).) As defendants did not object, the court chooses to proceed.

Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017.010.) For discovery purposes, information is relevant if it might reasonably

¹ The Order on Request for Pretrial Discovery Conference authorized the filing of a discovery motion limited to the dispute set out in the Request for Pretrial Discovery Conference. The request, filed by Plaintiffs on July 14, 2021, only raises a dispute as to Request for Production Number 22.

assist a party in evaluating the case, preparing for trial or facilitating settlement. (*Seahaus La Jolla Owners Assn. v. Sup. Ct.* (2014) 224 Cal.App.4th 754, 767.) Statutes governing discovery must be construed liberally in favor of disclosure unless the request is clearly improper. (*Williams v. Sup. Ct.* (2017) 3 Cal.5th 531, 541.) Where possible, partial limitations rather than outright denial of disclosure is favored. (*Greyhound Corp. v. Sup. Ct.* (1961) 56 Cal.2d 355, 383-384 *superseded by statute on other grounds as stated in Coito v. Sup. Ct.* (2012) 54 Cal.4th 480.) Where privilege or work-product are not at issue, the burden is met simply by a fact-specific showing of relevance. (*Glenfeld Development Corp. v. Sup. Ct.* (1997) 53 Cal.App.4th 1113, 1117.) The burden is on the one seeking disclosure. (*Greyhound, supra*, 56 Cal.2d at pp. 378-379; Code Civ. Proc. § 2031.310, subd. (b)(1).)

The disputed response is as follows:

Response to Request for Production No. 22: Defendants object to this Request No. 22 on the basis that it is vague, overly broad, ambiguous, irrelevant, calls for production of thousands of documents, and not reasonably calculated to lead to discovery of admissible evidence. (Cal. Code Civ. Proc. §§ 2017.010; 2017.020.) Defendants further object that this request is not relevant nor reasonably calculated to lead to admissible evidence to the extent that it seeks information which does not concern events, conditions, or matters relating to the alleged actionable conduct underlying this case. (Cal. Code Civ. Proc. § 2017.010.) Specifically, the profit and loss statements are not relevant to Plaintiffs' claims. Defendant also objects that the request for profit and loss statements is made in violation of Civil Code [section] 3295(c). Defendants also objects on the basis that this request is unduly burdensome and oppressive. (Cal. Code Civ. Proc. § 2030.090(b).) Defendants object to this request to the extent that the information sought is protected by the attorney-client and work-product privileges. (Cal. Evid. Code § 954; Cal. Code Civ. Proc. § 2018.020.)

Objection is made to Request no. 22 as invading the rights of privacy of Defendants and the individual shareholders/owners of Defendants. The right to privacy is well established. (See Cal. Const. Art. I, Sec. I; *White v. Davis* (1975) 13 Cal.3d 757, 773; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-371; *Griswold v. Conn.* (1965) 381 U.S. 479, 485-486.) "Protection of information privacy is the [California Constitution's] right of privacy's] central concern." (*Williams v. Superior Court* (2017)) Defendant further objects to the extent that this request seeks documents or information containing and/or reflecting trade secrets, confidential information and/or other proprietary information from Defendant.

Subject to the foregoing objections, and after a diligent search and a reasonable inquiry made in an effort to comply with the request, Defendants collectively respond as follows: What is at issue is the amount of revenue that Defendants have obtained from security deposits and the expenses that defendants incurred with respect to the security deposits as well as the overhead expenses of Defendants. Documents that show the amount of revenue from security deposits and the expenses incurred with respect to the security deposits are being produced as part of the materials

contained in the DropBox. Because discovery is still ongoing, Defendant reserves the right to amend or revise this response accordingly. (Schallert Decl., ¶ 3, and Exhibit B, thereto.)²

Of the many objections listed, plaintiffs argue in chief that the financial statements are relevant, and that defendants' privacy interests are minimal and therefore easily protected.

Plaintiffs fail to meet their burden to show relevance. Plaintiffs point to a declaration of Don Ernst, accounting manager to defendants, for citing to certain financial figures, to argue that plaintiffs are entitled to the entire financial statement in order to rebut claims of losses. Plaintiffs state that a financial statement would quantify security deposit withholdings. However, the declaration already provides such information. (Schallert Decl., ¶ 8, and Exhibit E thereto.) As per plaintiffs' example, Mr. Ernst declared that the security deposit withholdings for 2014 are clearly quantified at approximately \$119,100. (*Id.*, Exhibit E, ¶ 7.)

Plaintiffs state that financial statements would show what percentage of total revenues comes from security deposits. Plaintiffs provide no specific facts to show why such information would be relevant. Instead, plaintiffs generally argue that this information would be used to rebut defendants' contention that the losses incurred in restoration make the administrative fee 'reasonable'. Plaintiffs conclude in the primary that 'reasonableness' is not within the controlling statute of Civil Code section 1950.5. Thus, at best, plaintiffs seek this information to secondarily rebut a presumed argument. Plaintiffs presented no evidence to suggest or support their inference that defendants will argue the justification of the administrative fee as reasonable within the meaning of Civil Code section 1950.5 because it offsets overall losses (Schallert Decl., ¶ 10), rather than restoration losses. (Compare *id.*, ¶ 8 and Exhibit E.) Similar admissions were already given by at least one party, by Mr. Ernst in his deposition as the Person Most Knowledgeable for Dominion. (Declaration of Howard A. Sagaser, ¶ 3, and Exhibit 1 thereto, at p. 51:18-52:7.)

Plaintiffs state no other specific facts to show the relevancy of defendants' complete financial statements to prosecute their claim specifically regarding the use of an administrative fee attached to a security deposit. As the evidence presented in this motion, at best, supports only the inference that defendants will argue the justification of the use of the administrative fee attached to a security deposit as offsetting restoration losses, plaintiffs fail to meet their burden to demonstrate good cause to compel

² The court notes that no verification was included for these responses. Defendants made no objection on these grounds, and so the court proceeds on counsel's declaration as authentication that such responses were made for the purposes of admissibility of evidence in consideration of the present motion. (See Evid. Code § 1401.)

production of further responses to Request for Production Number 22. As such, the court need not address the issue of privacy.

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** 10/12/2021.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: **Humann v. Jacobo**
Superior Court Case No. 20CECG02957

Hearing Date: October 13, 2021 (Dept. 501)

Motion: Petition to Compromise Claim of a Minor

Tentative Ruling:

To continue the hearing to October 26, 2021, to provide petitioner time to submit an amended petition and a proposed order correcting the many errors set out below.

Explanation:

The amounts listed to be paid to Equian and to fund the annuity are inconsistent within the Petition, and in the proposed Order. (See, e.g., Pet. at item 12.a.(4) and item 12.b.(5)(a)(ii), proposed ord. at item 8.a.(3)(a); Pet. at item 15, proposed ord. at item 8.b.) The court continues the hearing on this matter so that petitioner may submit amended pleadings with corrected dollar amounts throughout.

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 10/12/2021.
(Judge's initials) (Date)