Tentative Rulings for November 10, 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.

21CECG00570 ***Dawson v. Athenix Body Sculpting Institute*** **is continued to Tuesday, December 14, 2021 at 3:30 p.m. in Dept. 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Fassett v. Foxley***
Superior Court Case No. 21CECG01768

Hearing Date: November 10, 2021 (Dept. 501)

Motion: Petition to Perpetuate Testimony and Preserve Evidence

Tentative Ruling:

To deny the petition to perpetuate testimony and preserve evidence. (Code Civ. Proc. §§ 2035.010 – 2035.060.)

Explanation:

Petitioners seek to obtain a copy of a complaint filed against respondent Dr. Foxley with Blue Cross, and which is allegedly in the possession of attorney Steven Cohen. However, petitioners have not yet filed a civil action against Dr. Foxley or anyone else to the court's knowledge, and it is not clear if they intend to do so in the future. Nevertheless, they seek to preserve the complaint and to compel its production, citing to Code of Civil Procedure sections 2035.010 to 2035.060.

Under section 2035.010, "One who expects to be a party or expects a successor in interest to be a party to an action that may be cognizable in a court of the state, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Chapter 2 (commencing with Section 2017.010), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), for the purpose of perpetuating that person's own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed." (Code Civ. Proc. § 2035.010, subd. (a).)

However, "[o]ne shall not employ the procedures of this chapter for purposes of either ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed." (Code Civ. Proc., § 2035.010, subd. (b).)

Also, under section 2035.030, "[o]ne who desires to perpetuate testimony or preserve evidence for the purposes set forth in Section 2035.010 shall file a verified petition in the superior court of the county of the residence of at least one expected adverse party, or, if no expected adverse party is a resident of the State of California, in the superior court of a county where the action or proceeding may be filed." (Code Civ. Proc. § 2035.030, subd. (a).)

In addition, under section 2035.030, subdivision (b), the petition shall set forth all of the following:

(1) The expectation that the petitioner or the petitioner's successor in interest will be a party to an action cognizable in a court of the State of California.

(2) The present inability of the petitioner and, if applicable, the petitioner's successor in interest either to bring that action or to cause it to be brought.

(3) The subject matter of the expected action and the petitioner's involvement. A copy of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the proposed discovery, shall be attached to the petition.

(4) The particular discovery methods described in Section 2035.020 that the petitioner desires to employ.

(5) The facts that the petitioner desires to establish by the proposed discovery.

(6) The reasons for desiring to perpetuate or preserve these facts before an action has been filed.

(7) The name or a description of those whom the petitioner expects to be adverse parties so far as known.

(8) The name and address of those from whom the discovery is to be sought.

(9) The substance of the information expected to be elicited from each of those from whom discovery is being sought. (Code Civ. Proc., § 2035.030, subd. (b)(1)-(9).)

"Occasionally, a deposition (or other discovery) may be sought although no lawsuit has yet been filed. Usually, it is where the person seeking discovery expects to be sued and wishes to preserve evidence that may be unavailable later on. (For example, persons may wish to perpetuate testimony of a favorable witness who is about to move overseas; or to preserve their own testimony, if they are ill and fear imminent death.) The statutory procedure for preserving evidence and perpetuating testimony in such cases requires a court order." (Weil & Brown, Cal. Prac. Guide Civ. Pro. Before Trial (2021) Ch. 8E-1, § 8:421, internal citation omitted.)

Here, petitioners have not met the requirements of section 2035.010 or section 2035.030. First of all, section 2035.010 requires the petition to be filed in the same county where one of the expected adverse parties resides, if that person is a resident of California. (Code Civ. Proc. § 2035.030, subd. (a).) Here, the only expected adverse parties named in the petition are Dr. Foxley and possibly attorney Steven Cohen. However, Dr. Foxley states that he is a resident of Tulare County, not Fresno County. There is no evidence regarding the residence of Mr. Cohen. Therefore, it does not appear that Fresno County is the proper venue for the petition.

Also, petitioners do not state that they expect to be a party to a future lawsuit, or that they cannot bring a lawsuit now. (Code Civ. Proc. § 2035.030, subd. (b)(1), (2).) They do refer vaguely to certain torts that they believe they can state against Dr. Foxley, or

perhaps other potential defendants, but they do not explain why they have not filed a complaint based on the alleged misconduct already, nor do they explain why they cannot do so before seeking to obtain evidence. They also fail to state what methods of discovery they intend to employ. (Code Civ. Proc. § 2035.030, subd. (b)(4).) It is also unclear what facts petitioners hope to learn that would tend to support their potential claims. (Code Civ. Proc. § 2035.030, subd. (b)(5).) Nor do they explain why they need to preserve the testimony or evidence now, before a lawsuit has been filed. (Code Civ. Proc. § 2035.030, subd. (b)(6).)

Thus, it appears that petitioners are attempting to use the pre-litigation evidence preservation procedures under section 2035.010 to improperly conduct pre-litigation discovery to learn whether they can state potential future claims or to identify which people they might sue. Section 2035.010, subdivision (b), specifically prohibits using the pre-litigation evidence procedures for such purposes. It is unclear what facts petitioners hope to obtain, or how those facts would be relevant to any future claims. Nor is it clear why petitioners could not simply file a lawsuit against Dr. Foxley, Blue Cross, or other expected adverse parties now, rather than attempting to obtain discovery from them before a lawsuit is filed. Petitioners do not allege any facts that indicate that evidence or witnesses will be lost if the petition is not granted. This is not a situation where a witness is about to die or leave the country, or a document is likely to be destroyed if the petitioners cannot obtain discovery immediately.

Therefore, the court intends to deny the petition to perpetuate testimony and preserve evidence.

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 11/5/2021.
(Judge's initials) (Date)

(20) **Tentative Ruling**

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

Hearing Date: November 10, 2021 (Dept. 501)

Motion: by Plaintiffs for Summary Adjudication

Tentative Ruling:

To deny. (Code Civ. Proc., § 437c, subd. (f), (t).)

Explanation:

This is a class action in which plaintiffs allege that defendants violated Civil Code section 1950.5 (hereinafter referred to as "section 1950.5") by applying a markup or administrative fee (ranging from 10-40%) on amounts withheld from tenants' security deposits.

The First Amended Complaint ("FAC") filed on July 28, 2016, alleges causes of action for (1) Unfair Competition (Bus. & Prof. Code § 17200); (2) Preliminary and Permanent Injunction; (3) Declaratory Relief; and (4) Violation of Civ. Code § 1950.5. All causes of action are premised on violation of section 1950.5. The FAC simply alleges that "[t]he 40% administration fees deducted from the security deposits violates Civil Code section 1950.5." (See FAC ¶ 52.)

Plaintiffs move for summary adjudication pursuant to Code of Civil Procedure section 437c, subdivision (f), as follows:

> Issue 1: Plaintiffs are entitled to summary adjudication of their Third Cause of Action for a declaration of rights stating that Defendants have violated Civil Code section 1950.5.
> Issue No. 2: Defendants' 14th Affirmative Defense, which alleges that Defendants' standard practices are not "unfair" or "unlawful" under Business and Professions Code §17200 et seq., is barred because Defendants' standard practices violated Civil Code §1950.5.
> Issue No. 3: Defendants' 30th Affirmative Defense, which alleges that Defendants acted in good faith, is barred because Defendants violated Civil Code §1950.5 knowingly and in bad faith.
> Issue No. 4: Defendants' 18th Affirmative Defense, which alleges that Plaintiffs cannot be awarded statutory or liquidated damages because Defendants acted in good faith, is barred by Defendants' bad faith conduct.
> Issue No. 5: Plaintiffs' First Cause of Action for Violation of Business & Professions Code §17200 et seq. should be summarily adjudicated because Defendants violated Civil Code §1950.5 in bad faith. This finding entitles the class to statutory damages under subdivision (1).

(NOM 2:10-23.)

The motion is denied because it improperly seeks summary adjudication of issues that would not resolve any cause of action or affirmative defense, without following the procedure set forth in Code of Civil Procedure section 437c, subdivision (t). Summary judgment statute is "unforgiving [and] a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.)

If special statutory conditions are met, pursuant to the stipulation of the parties and approved by the court, the court may summarily adjudicate any legal issue or a claim for damages (other than punitive damages) that does not completely dispose of a cause of action, an affirmative defense, or an issue of duty. (Code Civ. Proc., § 437c, subd. (t).)

That is what this motion in reality seeks, but there was no such stipulation, and no approval by the court to seek summary adjudication of issues pursuant to subdivision (t). Rather, the motion is brought pursuant to subdivision (f)(1) (see NOM 2:8-9), which provides:

> A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. **A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty**.

(Emphasis added.)

"[A] plaintiff may, despite the confusing language of the statute [Code Civ. Proc., § 437c, subd. (f)(1)], move for summary adjudication of a cause of action, if the plaintiff asserts there is 'no defense' to that cause of action. Further, the plaintiff's burden of proof on such a motion is defined by subdivision (p)(1) of Code of Civil Procedure, section 437c; the plaintiff must "prove[ ] each element of the cause of action entitling the party to judgment on that cause of action." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241.) That includes proving up damages when damages are an element of the cause of action. (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2020) ¶ 10:32.)

First, the court will address summary adjudication of the first and third causes of action of plaintiffs' FAC. The court cannot grant summary adjudication of these causes of action because plaintiffs in the motion do not address the amount of damages or restitution that should be awarded if plaintiffs prevail, though those remedies are sought in the pleadings. The motion would not completely dispose of the causes of action.

Pursuant to the first cause of action, plaintiffs seek "restitution on unlawfully collected money from the aggrieved tenants, declaratory and injunctive relief, statutory damages pursuant to Civil Code section 1950.5 and all other equitable remedies owing to them." (FAC ¶ 39.) Yet plaintiffs' motion does not address the damages and statutory penalties that they seek. These are major issues that are not resolved by this motion, even if the court were to find that defendants violated section 1950.5 in bad faith.

Accordingly, plaintiffs are seeking summary adjudication of issues raised in the cause of action (whether defendants violated section 1950.5, and whether they did so in bad faith), but not the entire cause of action. The motion is therefore improper. The challenge to the third cause of action is defective for the same reason.

Plaintiffs seek summary adjudication of the third cause of action for Declaratory Relief. That *might* be a proper cause of action to summarily adjudicate if the FAC cleanly sought an adjudication that defendants' actions violated section 1950.5. But the cause of action is ambiguous, failing to clearly state what plaintiffs want the court to adjudicate.

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Orange Cnty. Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 113.) "The purpose of the motion for summary judgment is to determine whether issues presented by the pleadings actually are triable issues." (*Craig v. Earl* (1961) 194 Cal.App.2d 652, 655.) Here, the third cause of action alleges,

> 47. An actual controversy has arisen between Plaintiffs and members of the Class, on the one hand, and Defendants, on the other hand, as to their respective rights, remedies and obligations. Specifically, Plaintiffs contend and Defendants deny, that:
>
> > (a) During the Class Period, Plaintiffs and members of the Class have rented, or were renting, apartment units managed or owned by defendants, in which defendants applied an administrative fee of up to forty percent on costs being deducted from security deposits when the Class members vacated the units, at any time during the four years preceding the filing of this action, and continuing while this action is pending.
>
> 48. Plaintiffs further allege that members of the Class are entitled to recover unlawfully collected money from the aggrieved tenants along with statutory damages as herein above alleged.
>
> 49. Accordingly, Plaintiffs seek a declaration as to the respective rights, remedies, and obligations of the parties.

Paragraph 47 does not allege an actual controversy. In this motion plaintiffs want the court to adjudicate that defendants violated section 1950.5. But the third cause of action says nothing of seeking a declaration that there was a statutory violation. It basically just says that plaintiffs contend, and defendants deny, that defendants applied the markup. For one, there actually is no dispute in that regard. Defendants do not deny applying the markup / administrative fee. The court issuing a declaration that defendants

imposed the markup would not help clarify the parties' rights and responsibilities. It is merely a background fact – it does not present an issue to adjudicate.

"[A]n actual, present controversy must be pleaded *specifically* and the facts of the respective claims concerning the [underlying] subject must be given." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80 (second brackets in original; internal quotes omitted).) Here, the FAC clearly fails in terms of specificity of what relief is sought pursuant to this cause of action. With this motion Plaintiffs "seek a declaratory judgment finding that Defendants have violated the California Civil Code [§1950.5] and public policy." (MPA 7:19-20.)

Moreover, declaratory relief is not proper under the circumstances. The court does not abuse its discretion in rejecting declaratory relief in a situation in which plaintiff has a speedy and adequate remedy other than by means of declaratory relief. (*People v. Ray* (1960 181 Cal.App.2d 64, certiorari denied 81 S.Ct. 1662, 366 U.S. 937, 6 L.Ed.2d 848, certiorari denied 82 S.Ct. 448, 368 U.S. 971, 7 L.Ed.2d 400.) The FAC pleads numerous other causes of action that fully resolve the issue of defendants' alleged violation of section 1950.5 and availability of statutory damages. Declaratory relief is duplicative and unnecessary.

And as discussed in connection with the first cause of action, the third cause of action raises issues of statutory damages that would not be fully resolved even if the court granted this motion. Paragraph 48 of the FAC alleges that plaintiffs seek to recover "unlawfully collected money" along with statutory damages. It is unclear what money was unlawfully *collected* (versus retained from security deposits, which is the actual issue in this action). The court cannot summarily adjudicate the cause of action because paragraph 48 raises issues (amount of statutory damages) that are not resolved by this motion – declaring that defendants violated section 1950.5 and did so in bad faith would not fully resolve the cause of action.

Thus, as to the first and third causes of action, this motion is in reality a motion for summary adjudication of an issue in the action that does not fully resolve any cause of action – this is improper because plaintiffs made no attempt to comply with Code of Civil Procedure section 437c, subdivision (t).

Plaintiffs also seek summary adjudication of defendants' 14th, 18th and 30th affirmative defenses. As directed at these "affirmative defenses," the motion is the result of the all-too-common practice of defendants adding to their answers a multitude of "affirmative defenses" that are not affirmative defenses at all. An answer is to contain denials that controvert the material allegations of the complaint, and/or affirmative defenses (sometimes referred to as "new matter"). (Code Civ. Proc., § 431.30; *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248.) For example, in a breach of contract action, a general denial (which denies all allegations in one sentence), "denies that there is a contract, that the plaintiff performed or had an excuse for nonperformance, that the defendant did not perform, or that the plaintiff was damaged." (*Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545.)

A "new matter," or affirmative defense, is something not responsive to the essential allegations of the complaint. Rather, it is something new that is relied upon by a defendant that is *not put in issue by the plaintiffs*. (*Walsh, supra,* 66 Cal.App.4th at p. 1546.) Where an answer sets forth facts showing some essential allegation of the complaint is *not true*, such facts are not "new matter" (i.e., affirmative defense), but only a traverse. (*Id.*) An affirmative defense is based on the assumption that all the material allegations made by the complaint are either admitted or proven to be true, but consists of facts that for some other reason defeat recovery. (*Id.*) In other words, *[a]ll facts which directly tend to disprove any one or more of these averments may be offered under the general denial: all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded.*' " (*Ibid.,* quoting *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 383, fn. 4 [internal quotes omitted].)

A defendant who pleads affirmative defenses bears the burden of proof at trial on those new matters. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239.) The Rutter Guide cautions against pleading "defenses" that are really part of a plaintiff's case, because it may give the plaintiff an argument that defendant bears a burden they do not have. (*Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2020) ¶ 6:435.)

Here, plaintiffs seek summary adjudication of the following:

> Issue No. 2: Defendants' 14th Affirmative Defense, which alleges that Defendants' standard practices are not "unfair" or "unlawful" under Business and Professions Code §17200 et seq.
> Issue No. 3: Defendants' 30th Affirmative Defense, which alleges that Defendants acted in good faith, is barred because Defendants violated Civil Code §1950.5 knowingly and in bad faith.
> Issue No. 4: Defendants' 18th Affirmative Defense, which alleges that Plaintiffs cannot be awarded statutory or liquidated damages because Defendants acted in good faith, is barred by Defendants' bad faith conduct.

These are all just denials of matters that plaintiffs put at issue in their FAC, and on which plaintiffs have the burden of proof. Plaintiffs must prove in connection with the first cause of action for Unfair Competition that defendants' practices were unfair or unlawful. (See Bus. & Prof. Code, § 17200.) In alleging that their practices were not unfair or unlawful, defendants merely deny the essential allegations of the complaint at FAC ¶¶ 4, 24(c), 32 and 34. In order to obtain statutory damages of up to twice the amount of the security under section 1950.5, subdivision (*l*), plaintiffs must prove that retention of the security by the landlord was in bad faith. The 30th and 18th "affirmative defenses" merely constitute denials of plaintiffs' allegations of bad faith (see FAC ¶ 53), which plaintiffs must prove to obtain statutory damages.

Under Code of Civil Procedure section 437c, subdivision (f)(1), plaintiffs may seek summary adjudication of one or more "affirmative defenses." There is no new matter or affirmative defense set forth in the 14th, 18th or 30th "affirmative defenses" as pled in defendants' Answer. There is no affirmative defense to summarily adjudicate. These are

merely denials of material allegations of the FAC, and the motion as directed at these "affirmative defenses" is simply a backdoor attempt to summarily adjudicate issues without complying with subdivision (t) of Civil Procedure section 437c.

Thus, the motion is denied.

The court will briefly address a few other problems with the moving and opposition papers.

First, plaintiffs argue that defendants violated section 1950.5 by (a) imposing a "markup" or "administrative fee" on security-deposit charges, and (b) failing to provide tenants with the "bills, invoices, and receipts" required by law and to disclose the markup added to third-party invoices. The court pointed out four years ago in denying defendants' summary judgment motion that plaintiffs could not defeat summary judgment by relying on an issue not raised in the pleading. The FAC says nothing of failure to document the markup. Plaintiffs could have sought to amend their Complaint to add this allegation, but have not. If summary judgment cannot be denied based on issues not raised in the pleadings (see *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258), *a fortiori*, it cannot be granted based on issues not raised in the pleadings.

Second, plaintiffs submitted substantial new evidence with the reply brief, including 62 pages of new evidence in the David Doyle Declaration. The Fifth District still follows the *Garcin* "golden rule" of summary adjudication: if it is not in the separate statement, it does not exist. (*Mills v. Forestex* (2003) 108 Cal.App.4th 625, 640-641 [Appellate court did not consider facts the trial court below did not consider and that were not in the separate statement.]) The new evidence consists of discovery that was previously taken – none of it is new since the filing of the moving papers. Plaintiffs use this evidence to respond to defendants' arguments about what the markup is used for and when it was instituted. These are all issues and arguments that were raised four years ago in the context of defendants' MSJ. There is nothing new here that would justify plaintiffs holding this evidence back for the reply.

Third, in support of the opposition defendants filed a separate statement of additional undisputed material facts with none of the 25 pages of facts numbered, as required by California Rules of Court, rule 3.1350(f)(3), (h).

Defendants' failure to provide numbering for ease of reference continues with their evidentiary objections. Each written objection must be numbered consecutively, among other requirements. (Cal. Rules of Court, rule 3.1354(b).) The numbering of defendants' objections starts out okay, but then it skips from objection number 9 to number 13, repeats the numbers 5 and 13 twice each, and in each objection 13 defendants separately object to numerous different portions of declarations without sub-numbering.

Fourth, a substantial portion of plaintiffs' evidence in support of the motion lacks foundation. While the court is not ruling on the merits of the motion, and rulings on the objections are not strictly necessary (see Code Civ. Proc., § 437c, subd. (q)), the court

rules as follows on the objections: Objection nos. 5[1]-9 (directed at Schallert Decl., ¶¶ 5-9) are sustained. Mr. Schallert's supplemental declaration fails to cure the failure to authenticate the move-out statements issued by defendants to various tenants. Objections nos. 1-3 of the Cardamon Declaration are sustained, while nos. 4 and 5[2] are overruled. Objection nos. 13[3] and 14 to the Schallert Declaration are sustained.

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 11/5/2021 .
(Judge's initials) (Date)

[1] The second objection no. 5.
[2] The first objection no. 5.
[3] Both the first and second objection no. 13.

(32)

Tentative Ruling

Re: ***West v. Locatelli***
Superior Court Case No. 19CECG02777

Hearing Date: November 10, 2021 (Dept. 501)

Motion: by Plaintiff for Leave to File a Second Amended Complaint

Tentative Ruling:

To grant. (Code Civ. Proc., § 473, subd. (a)(1).) Plaintiff shall file the proposed Second Amended Complaint within 5 days of the clerk's service of the minute order.

Explanation:

"It is well established that leave to amend a complaint is entrusted to the sound discretion of the trial court ...." (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... by adding ... any party." (Code Civ. Proc., § 473, subd. (a)(1).) "The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading ... in other particulars ...." (Code Civ. Proc., § 473, subd. (a)(1).) "Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading ...." (Code Civ. Proc., § 576.)

"The trial court has discretion to allow amendments to the pleadings in the furtherance of justice, and this discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905; see Code. Civ. Proc., § 473, subd. (a)(1).) "[T]he policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified." (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422.)

A motion to amend a pleading must include a copy of the proposed amendment or amended pleading, serially numbered; state what allegations, if any, are to be deleted and where they are in the complaint; and state what allegations are proposed to be added, and where moving party seeks to add them. (Cal. Rules of Court, rule 3.1324(a).) The motion must be supported by a declaration specifying the effect of the proposed amendment; why the amendment is necessary and proper; when the facts giving rise to the amended allegations were discovered; and the reasons why the request for amendment was not made sooner. (Cal. Rules of Court, rule 3.1324(b).)

In the case at bench, plaintiff seeks leave to file a Second Amended Complaint in order to add the previously dismissed Doe Defendants, to add Judith Locatelli as a new defendant and to add six new causes of action as follows: conversion, failure to reimburse required expenses in violation of Labor Code section 2802, failure to pay

minimum wage, failure to pay overtime wages, failure to pay wages when due, and failure to provide accurate itemized wage statements.

As noted earlier, "[t]he court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... by adding ... any party." (Code Civ. Proc., § 473, subd. (a)(1).) Therefore, the court is empowered to permit an amendment purporting to add new defendants.

Where plaintiff introduces new legal theories in the amended complaint that relate to the same general set of facts, allowing the amendment is proper. (*Bonded Products Co. v. R. C. Gallyon Const. Co*. (1964) 228 Cal.App.2d 186, 189.) It is irrelevant that new legal theories are introduced as long as the proposed amendments relate to the same general set of facts. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) As long as the "operative facts" are similar in both pleadings, a change in legal theory or cause of action is permissible; this includes a change from a common law to a statutory cause of action. (See *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal.App.3d 1085; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157.)

Here, the proposed Second Amended Complaint appears to be based on the same general set of facts alleged in the original Complaint. The motion appears to be unopposed. There is no indication that defendants will be prejudiced by allowing the amendment, as no trial date has been set, and the proposed causes of action arise from the same operative facts alleged in plaintiff's original Complaint. Moreover, Defendants were presumably aware of plaintiff's intention to reinstate the Doe Defendants, to name Judith Locatelli as a new defendant and to assert six additional causes of action against defendants, having previously filed and thereafter prevailed on a motion to strike plaintiff's Second Amended Complaint filed on October 20, 2020. Therefore, the proposed amendments should come as no surprise to defendants.

Allowing plaintiff to file the proposed Second Amended Complaint will ensure that the pleading accurately reflects the issues to be tried, and will promote the strong judicial policy favoring liberal amendments so that all disputed matters between the parties may be resolved in the same action. The motion meets the requirements of California Rules of Court, rule 3.1324, and there is no indication that plaintiff unreasonably delayed in bringing the motion, or that defendants will be prejudiced if the amendment is allowed as the motion is unopposed and a trial date has not yet been set. "Absent a showing of prejudice to the adverse party, [the] rule of great liberality in allowing amendment of pleadings will prevail." (*Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474.) Accordingly, plaintiff's motion is granted.

In ruling on this motion, the court does not address the merits or legal sufficiency of the Second Amended Complaint. (See *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th

739, 742, 760 [the better course of action is to allow the amendment and then let the parties test its legal sufficiency in other appropriate proceedings].)

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (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: DTT on 11/5/2021.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Vasquez v. Luna et al.***
Superior Court Case No. 21CECG02537

Luna v. Vasquez et al.
Superior Court Case No. 21CECL06971

Hearing Date: November 10, 2021 (Dept. 501)

Motion: by Plaintiff Vasquez for an Order to Consolidate

Tentative Ruling:

To find moot and take off calendar as one of the to-be-consolidated cases (Case No. 21CECL06971) was dismissed on November 5, 2021.

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 (Judge's initials) on 11/8/2021 (Date).

(29)

Tentative Ruling

Re: ***Caballero v. Fresno Community Hospital, etc., et al.***
Superior Court Case No. 20CECG03008

Hearing Date: November 10, 2021 (Dept. 501)

Motions (x4): by Defendant UOA for Order Compelling Discovery and Imposing Monetary Sanctions

Tentative Ruling:

To grant defendant University Orthopaedic Associates' ("UOA") motion for an order compelling plaintiff to provide initial verified responses to UOA's form interrogatories, set one; special interrogatories, set one; request for production of documents, set one; and request for nature and amount of damages. (Code Civ. Proc. §§ 425.11, subd. (b), 2030.210, 2030.290, subd. (b), 2031.300, subd. (b).) Plaintiff is ordered to serve complete verified responses to the discovery set forth above, without objection, within 15 days of the clerk's service of the minute order.

To grant UOA's request for sanctions. Sanctions in the amount of $522.50 are awarded in favor of Defendant UOA, and against Plaintiff. Plaintiff is ordered to pay sanctions in the amount of 522.50 to the Salinas Law Group within 30 days of service of this order. (Code Civ. Proc. §§ 2023.010, subd. (d), 2030.030, subd. (a), 2030.290, subd. (c), 2031.300, subd. (c).)

Explanation:

"The Civil Discovery Act provides litigants with the right to broad discovery. In general, 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." (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402, internal citation and quotation marks omitted; see also Code Civ. Proc. §2023.010(d) [failing to respond to authorized discovery is misuse of discovery process].)

In the case at bench, the subject discovery was served on plaintiff on April 21, 2021. Plaintiff has failed to provide any responses. The requests appear tailored to lead to the discovery of relevant evidence, and plaintiff has not served any objections, nor

filed opposition to the instant motion. Accordingly, UOA's motions are granted. UOA's request for sanctions is also 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 11/9/2021.
(Judge's initials) (Date)