

Tentative Rulings for December 2, 2021
Department 403

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.

21CECG00725 *Ali v. State Farm Mutual Automobile Insurance Company, et al.* is continued to Thursday, January 27, 2022 at 3:30 p.m. in Dept. 403

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Tentative Rulings for Department 403

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Tentative Ruling

Re: **Wolfe Capital Investments, LLC v. Lambeth, et al.**
Superior Court Case No. 21CECG01666

Hearing Date: December 2, 2021 (Dept. 403)

Motion: Defendants' Motion to Expunge Lis Pendens

Tentative Ruling:

To continue the matter to January 20, 2022 at 3:30 p.m. in Dept. 403.

Explanation:

The instant motion has been brought by defendants Mary Katherine Lambeth, Barbara J. Kelly, James P. Smith, Orangewood Plaza, Ltd., RECO Properties and JD Investments. The Court notes, however, that defendant Barbara J. Kelly ("Decedent") has passed away. (See Lambeth Decl. ¶ 3.)

"Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (Code Civ. Proc., § 377.20, subd. (a).)

"[A] cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest." (Code Civ. Proc., § 377.40.)

"On motion, the court shall allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, except that the court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims is first made." (Code Civ. Proc., § 377.41.)

Whether the decedent is plaintiff or defendant, a personal representative [or successor in interest if there is no personal representative] must be substituted for the decedent in any actions pending at the time of death. (Carr et al., Cal. Affirmative Def: Death of Real Party in Interest § 17:4 (2nd ed. 2021.) Continued presence of the deceased's attorney is insufficient, as that attorney's authority to act died with the client. (See *Herring v. Peterson* (1981) 116 Cal.App.3d 608, 612.) "Power and authority of an attorney dies with the client." (*Ibid.*)

Therefore, the matter is continued to January 20, 2022 to allow the parties an opportunity to substitute Decedent's personal representative or successor in interest, as the case may be, to continue the pending action in place of Decedent.

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Tentative Ruling

Re: ***Andrade, et al. v. Saint Agnes Medical Center, et al.***
Superior Court Case No. 21CECG00235

Hearing Date: December 02, 2021 (Dept. 403)

Motion: Application of Allison Ng to Appear *Pro Hac Vice* on Behalf of Defendants CareFusion 303, Inc., CareFusion Corporation, and Becton Dickinson and Company

Tentative Ruling:

To continue the matter to Thursday, January 20, 2022, to allow moving party to serve the State Bar of California, as well all parties to the action, with Notice of Hearing of Application and the moving papers. If moving party has already served the State Bar the Amended Notice of Hearing of Application, she merely needs to provide proof of this, rather than serve the Bar again.

Explanation:

The application cannot be granted at this time for the following reasons:

The moving party has untimely served notice of the motion to all parties. The proof of service states that the moving party mailed copies of the motion papers to all parties to this action on November 8, 2021. "The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005" (Cal. Rules of Court, Rule 9.40(c)(1).) Pursuant to Code of Civil Procedure section 1005, the last day for service of this motion, by mail, was on November 03, 2021. (Code Civ. Proc., § 1005(b).)[all moving and supporting papers shall be served and filed at least 16 court days before the hearing. However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days.]

Additionally, the proof of service, filed with the "Amended Notice of Hearing of Application", filed on November 10, 2021 ("Amended Application"), did not indicate that notice was sent to the State Bar of California. Rules of Court, Rule 9.40(c)(1) requires the moving party to serve all parties who have appeared in the action and the State Bar of California. The proof of service filed with the moving party's "Notice of Hearing of Application", filed on November 8, 2021 ("Notice of Application"), states that the Application has been served on the State Bar, but this is insufficient notice, because the hearing date on the Notice of Application was incorrect.

The court further notes that the proof of service filed with the moving party's Amended Application, filed on November 10, 2021, corrects neither of these issues.

Therefore, rather than deny the application for faulty service, it appears appropriate to continue the matter to allow for additional notice.

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Tentative Ruling

Re: ***Garcia, et al. v. Hartog, et al.***
Superior Court Case No. 18CECG04305

Hearing Date: December 02, 2021 (Dept. 403)

Motion: Petition to Compromise Claim of Minor

Tentative Ruling:

To deny, without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition cannot be granted at this time for the following reasons:

Petitions for All Minor Claimants Required:

While a petition for approval of Justin Garcia's claim was filed, the court finds no such petitions for Isaiah Garcia and David Garcia. Petitioner must file a petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the petitions for Isaiah Garcia and David Garcia, along with the amended petition for Justin Garcia.

Medical and/or Insurance Reimbursement Liens:

The petition does not provide any proof that the insurance plan, Blue Cross Blue Shield, has agreed to the reduced amounts in payments of the liens as stated in the petition. If any medical expenses were paid under a health insurance plan, and the plan agreed to a negotiated reduction to the reimbursement of such payments, petitioner must submit substantiation of the reduction.

Petitioner must also clarify whether any remaining medical expenses and/or liens are involved in this matter. If not, petitioner must supply documentation that will sufficiently show that the medical expenses are fully paid.

Attorney's Fees:

Beginning in 2010, the court rules governing the compromise of minor's claims were substantially revised. (See Cal. Rules of Court, rule 7.950 et seq.) If attorney fees are requested, a declaration from the attorney explaining the basis for the request, including a discussion of applicable factors listed in California Rules of Court, rule 7.955(b), must be attached to the petition. Here, the unsigned Attachment 13a does not comply with rule 7.950, which requires a declaration, signed under penalty of perjury, from the attorney that addresses the factors in rule 7.955(b). Certainly the declaration should have discussed at least factors #2, 6, 7, 8, 12 and 13 as to both handling attorneys, to the best

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Tentative Ruling

Re: **Vang v. California State University Board of Trustees et al.**
Superior Court Case No. 17CECG04085

Hearing Date: December 2, 2021 (Dept. 403)

Motion: by Plaintiff to strike/tax costs on appeal

Tentative Ruling:

To deny the motion to strike costs on appeal. To deny the motion to tax filing costs on appeal.

Explanation:

On March 25, 2021, the Fifth District Court of Appeals issued remittitur following appeal from the granting of a demurrer, and awarded appellate costs to defendants. Defendants filed a memorandum of costs on March 30, 2021, seeking \$432 in costs. Plaintiff now seeks to strike and tax those costs on two grounds: that a government defendant may only be awarded costs if the court finds that the action was clearly frivolous and lacking merit; and that the costs claimed were not actually incurred.

Strike Costs

Plaintiff argues that a government defendant may only be awarded costs if the court finds that the action is frivolous and lacking merit under Code of Civil Procedure section 1038. Code of Civil Procedure section 1038 is inapplicable here. Section 1038 essentially enhances normal recoverable costs to include attorney and expert fees, neither of which Defendant is seeking. Additionally, section 1038 applies only to specific dispositive motions, not demurrers.

The Fifth District Court of Appeals has awarded costs on appeal to defendants. The costs on appeal sought by defendants, filing fees and copy fees, are specifically allowed. (Cal. Rules of Ct., Rule 8.278(d)(1)(A), (d)(1)(E).) Thus, defendants are entitled to these costs on appeal.

Tax Costs

The right to recover costs depends on four conditions: (1) there must be a valid judgment awarding costs to the party claiming them; (2) the item must be one allowed by rule or statute; (3) the amount claimed must have been actually incurred; and (4) the amount claimed must be reasonable. (*Wilson v. Board of Retirement* (1959) 176 Cal.App.2d 320, 323.) There is inarguably a valid judgment and thus the first condition is met.

Plaintiff seeks costs in three categories: filing fees of \$390 and printing and copying briefs for \$42. All of the categories of which defendants seek costs are specifically allowed

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Tentative Ruling

Re: **A&A Tarzana Plaza LP v. Pan**
Superior Court Case No. 20CECG03650

Hearing Date: December 2, 2021 (Dept. 403)

Motion: Plaintiff/cross defendant A&A Tarzana Plaza LP's motion to strike portions of the cross-complaint by Jing Yang

Tentative Ruling:

To deny A&A Tarzana Plaza LP's motion to strike. (Code Civ. Proc., §§ 435, 432.10.)

To strike, on the court's motion, the portions of the cross-complaint identified in A&A Tarzana Plaza LP's motion to strike. (Code Civ. Proc., §§ 436, 431.10, subd. (b).) To grant leave to amend. Should cross-complainant Jing Yang desire to amend, the First Amended Cross Complaint shall be filed within ten (10) days from the date of this order. The new amendments shall be in **bold print**. Should cross-complainant elect not to amend, cross defendants shall file responsive pleadings within thirty (30) days from the date of this order.

Explanation:

"Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof" (Code Civ. Proc., § 435, subd. (b)(1).) "A party served with a cross-complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint." (Code Civ. Proc., § 432.10.)

Service of summons by mail is authorized by the Code of Civil Procedure and is "deemed complete on the date a written acknowledgment of receipt of summons is executed" (Code Civ. Proc., § 415.30, subd. (c).) Furthermore, "[i]f a summons is served by mail pursuant to this chapter, the provisions of [Code of Civil Procedure] Section 1013 that extend the time for exercising a right or doing an act shall not extend any time specified in this title." (Code Civ. Proc., § 413.20.)

A&A Tarzana Plaza LP's ("A&A") reply relies on the five day allowance set forth in Code of Civil Procedure section 1013. However, that provision does not apply to service of summons by acknowledgment and receipt. (See Code Civ. Proc., §§ 415.30; 413.50 ["If a summons is served by mail pursuant to this chapter, the provisions of Section 1013 that extend the time for exercising a right or doing an act shall not extend any time specified in this title."].)

A&A also contends that the parties' inability to sufficiently meet and confer led to delay, and references the accompanying declaration for support. That declaration, however, only attests to a request made through an unattached email on April 23 which

