

Tentative Rulings for December 2, 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).)

19CECG00180 *Adnan Zahir v. Ajaz Jilani* (Dept. 501)

21CECG01558 *Helen Lee, et al. v. Brian Bernard, 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.

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Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Pena v. Conrad***
Superior Court Case No. 20CECG01679

Hearing Date: December 2, 2021 (Dept. 501)

Motion: Defendant North Cal Cleaning Company's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain, with leave to amend. (Code Civ. Proc., § 430.10, subds. (a), (e).) Plaintiff is granted 10 days, running from service of the minute order by the clerk, to file and serve an amended complaint. All new allegations in the amended complaint are to be set in **boldface** type.

Explanation:

Exclusivity of the Workers' Compensation Remedy

Defendant North Cal Cleaning Company (NCCC) demurs to the First Amended Complaint on the grounds that the breach of contract cause of action alleged against it in the First Amended Complaint is barred by the exclusive remedy of workers' compensation. (Code Civ. Proc., § 430.10, subd. (e).)

Labor Code section 3600, subdivision (a), provides that liability for the compensation provided by the subdivision, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706 and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

- (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
- (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.
- (3) Where the injury is proximately caused by the employment, either with or without negligence.
- (4) Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code.
- (5) Where the injury is not intentionally self-inflicted.

- (6) Where the employee has not willfully and deliberately caused his or her own death.
- (7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.
- (8) Where the injury is not caused by the commission of a felony, or a crime which is punishable as specified in subdivision (b) of Section 17 of the Penal Code, by the injured employee, for which he or she has been convicted.
- (9) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

Labor Code section 3602, subdivision (a), provides that "where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer."

The exclusive remedy provisions of the Workers' Compensation laws preempt not only causes of action that are based on a compensable workplace injury, but also those causes of action based on injuries that are collateral to or derivative of a compensable workplace injury. (*King v CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1051; *California Ins. Guarantee Assn. v. San Diego County Schools Risk Management etc.* (2019) 41 Cal.App.5th 640, 652.) However, claims for economic or contract damages incurred independent of any workplace injury are exempt from workers' compensation exclusivity. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 814; *Pichon v. Pacific Gas & Elec. Co.* (1989) 212 Cal.App.3d 488, 501.)

Plaintiff's First Amended Complaint contains a cause of action for breach of contract against NCCC. Plaintiff contends that on or about July 24, 2019, an agreement was made between him and NCCC. (FAC ¶ BC-1.) However, the First Amended Complaint fails to specify whether the alleged agreement was written or oral and also fails to recite the essential terms of the agreement. Although plaintiff states in his Opposition to the Demurrer that his employment contract is partially written, implied and oral (Opp. 2:5-6), this allegation does not appear in the First Amended Complaint. "A cause of action for breach of contract requires pleading of a contract" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1031.) Plaintiff claims that NCCC breached the purported agreement by failing to provide insurance coverage for the vehicle plaintiff was driving while employed by NCCC. (FAC ¶ BC-2.) Plaintiff states that as a result of NCCC's breach of the agreement, he suffered damages, including pain and suffering, medical and hospital expenses – not covered by workers' compensation, lost income (including past and possibly future wages), and damage to personal property. (FAC ¶ BC-4.)

Plaintiff contends that contract law is not preempted by workers' compensation laws. Specifically, plaintiff contends that he has alleged an implied contract whereby NCCC was obligated to provide insurance as part of plaintiff's employment contract with NCCC, and that NCCC breached the terms of the agreement by failing to insure the vehicle. Plaintiff also alleges that he has sustained damages not compensable under the workers' compensation scheme, i.e., medical and hospital expenses – not covered by workers' compensation and damages to personal property. Nevertheless, the First Amended Complaint fails to adequately plead the existence of an implied agreement between plaintiff and NCCC and fails to adequately allege any economic or contract damages incurred by plaintiff as a result of the purported breach.

In order to defeat the application of the exclusivity rule, plaintiff attempts to allege, albeit insufficiently, an injury that does not involve physical or emotional injury to the person and that is not collateral to or derivative of an injury compensable under the Workers' Compensation scheme. Plaintiff claims that if given another opportunity, he will be able to provide further details regarding the implied contract and damages to personal property, an item that is not compensable under the Workers' Compensation scheme. (Opp. 3:21-26.) Hence, the court will grant plaintiff another opportunity to amend his pleading in order to state a claim that is not barred by the workers' compensation exclusivity rule.

Exclusive Jurisdiction of the Workers' Compensation Appeals Board (WCAB)

NCCC contends that pursuant to Labor Code section 5300, the WCAB has exclusive jurisdiction over this matter. Plaintiff argues, on the other hand, that the WCAB has no jurisdiction over contract claims between an employee and his employer. (Opp. 3:14-15.)

Code of Civil Procedure section 430.10, subdivision (a), provides that the party against whom a complaint has been filed may object, by demurrer to the pleading on the ground that the court has no jurisdiction of the subject of the cause of action alleged in the pleading.

Pursuant to Labor Code section 5300, "[a]ll the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4: (a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." The workers' compensation law provides that subject only to the review by the courts, the WCAB has exclusive jurisdiction of all proceedings for "the enforcement against the employer ... of any liability for compensation ... in favor of the injured employee ..." (Lab. Code, § 5300.) In light of the court's ruling above regarding the applicability of the exclusivity doctrine to the breach of contract cause of action, the court will grant plaintiff another opportunity to amend

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Tentative Ruling

Re: ***Kilgore v. Ciresi, M.D. et al.***
Superior Court Case No. 20CECG02700

Hearing Date: December 2, 2021 (Dept. 501)

Motion: by defendant Kevin Ciresi, M.D., to compel joinder of additional parties, Alyza Boriphanvichitr and Isaiah Boriphanvichitr (Code Civ. Proc. § 382)

Tentative Ruling:

To grant the motion to join Alyza Boriphanvichitr and Isaiah Boriphanvichitr as defendants to the action.

Explanation:

On September 16, 2020, plaintiff Shannon Kilgore, individually and as the Successor-in-Interest to Jessica Cortez, brought suit against, among others, defendant and moving party, Kevin Ciresi, M.D. The complaint alleges one cause of action for medical malpractice resulting in wrongful death. Plaintiff is alleged to be the husband of Cortez, who passed away on September 25, 2019, and as such is the “wrongful death heir.”

Ciresi brings this motion to compel joinder of Alyza and Isaiah Boriphanvichitr, as omitted adult children of Cortez, and necessary parties to the present wrongful death claim.

Wrongful death is a statutory cause of action authorized under Code of Civil Procedure section 377.60, which provides, in pertinent part, that “[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent’s personal representative on their behalf: [¶] (a) The decedent’s surviving spouse, children, and issue of deceased children....” (Code Civ. Proc. § 377.60, subd. (a).) Section 377.60 does not expressly prevent more than one cause of action by a decedent’s heirs. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 807.) Nevertheless wrongful death actions are considered to be “joint, single and indivisible.” (*Ibid.*) In stating that an action for wrongful death is joint, it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is single, it is meant that only one action for wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that the action is indivisible, it is meant that there cannot be a series of suits by heirs against the tortfeasor for their individual damages. (*Cross v. Pac. Gas & Elec. Co.* (1964) 60 Cal.2d 690, 694.)

Omitted heirs are necessary parties. (*Ruttenberg, supra*, 53 Cal.App.4th at p. 808.) Plaintiff heirs have a mandatory duty to join all known omitted heirs in the single action

for wrongful death. (*Ibid.*) If an heir refuses to participate in the suit as a plaintiff, he or she may be named as a defendant so that all heirs are before the court in the same action, though the heirs are, in reality, all plaintiffs. (*Ibid.*) Just as a judgment on behalf of some heirs will not preclude a future action by a known but omitted heir, a wrongful death settlement will not terminate the action if the settlement includes less than all of the named heirs. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 698.)

Code of Civil Procedure section 382 provides, in pertinent part, that “[i]f the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.”

Here, Ciresi submits an interrogatory seeking the identity of Cortez's children. (Declaration of Cynthia A. Palin, ¶ 2 and Ex. 2 thereto.) Plaintiff's verified response identifies two children, Alyza and Isaiah Boriphanvichitr. (*Id.*, ¶ 3, and Ex. 3 thereto.) Counsel for Ciresi further submits a letter inviting plaintiff to join the two children to the action. (*Id.*, ¶ 1, and Ex. 1 thereto.) It is unclear whether plaintiff ever responded to the letter. However, the letter is dated January 20, 2021. To date, there has been no attempt to add the two children to the present action, aside from the present motion.

No opposition was filed to refute the verified responses identifying Alyza and Isaiah Boriphanvichitr as surviving children, and therefore heirs, of Cortez. As the two children have an interest in the outcome of the wrongful death action, they are considered necessary parties to the action. (*Ruttenberg, supra*, 53 Cal.App.4th at p. 808.) Therefore, the court will grant the motion to compel joinder of Alyza Boriphanvichitr and Isaiah Boriphanvichitr as defendants to the present action.

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** 11/30/2021 .

(Judge's initials)

(Date)

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Tentative Ruling

Re: ***Tovar v. Olive/Broadway Enterprises, Inc.***
Superior Court Case No. 20CECG00579

Hearing Date: December 2, 2021 (Dept. 501)

Motion: by Defendants for Order Compelling Plaintiff's Further Deposition; for Protective Order; and for Monetary Sanctions

Tentative Ruling:

To deny the motions to compel and for protective order and reciprocal requests for monetary sanctions.

Explanation:

These motions follow the suspension of plaintiff's deposition on October 1, 2021, after counsel were unable resolve disputes regarding plaintiff's counsel's stated objections and instructions to his client.

Motion to Compel Plaintiff's Further Deposition

To the extent the motion requests a further response to a particular deposition question or document request a Separate Statement is necessary under California Rules of Court, rule 3.1345. While that rule does provide an exception where "no response has been provided to the request for discovery," here there were responses to many deposition questions, consisting at times of assorted objections by plaintiff's counsel and instructions not to answer. On a motion such as this, what is at issue is whether or not the asserted objection was a valid reason for instructing the client not to answer. Additionally, it does appear that some documents were provided in response to the request for production served with the notice of the deposition. Without a separate statement it is not possible to determine what responses were determined to be inadequate by defendants. Therefore, the court denies the motion to compel further responses on procedural grounds. **This denial in no way reflects that the continued deposition of Rodrigo Tovar should not go forward in a professional and courteous manner on December 9, 2021, as noticed.** Should the deposition not go forward as noticed, or go forward in an environment that the court believes frustrated defendants' ability to meaningfully conduct discovery, the court will almost certainly continue the trial at a scheduled hearing later this month.

As for sanctions, these are mandatory against the losing party unless the court finds that the losing party acted with substantial justification or other circumstances make the imposition of sanctions "unjust." (Code Civ. Proc., §§ 2025.450, subd. (g)(1), 2025.480, subd. (j).) To analyze this issue, some points as to the merits of the motion must be observed, even though the motion is denied.

This motion attempted to compel answers to deposition questions plaintiff refused to answer because his counsel made an objection and then, based on that objection, instructed his client not to answer. Questions at a deposition may relate to “any matter, not privileged, that is relevant to the subject matter ... 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.) Thus, the scope of examination is very broad.

Instructing a witness not to answer questions is only proper where the deposition question seeks discovery of privileged information and a specific privilege objection is interposed. (Code Civ. Proc., § 2025.460, subd. (a).) “Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition.” (*Id.*, subd. (c).) Therefore, it is improper for counsel to instruct the witness not to answer on any other ground but privilege. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1014 [“In other words, deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at the deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial.”].)

The court finds that sanctions against defendants are not appropriate, since even a cursory glance at the deposition transcript pages reveals several instances where the instruction not to answer was utterly unfounded. Thus, it appears that defendants had substantial justification for bringing the motion, even if it must be denied on procedural grounds.

Motion for Protective Order

Code of Civil Procedure section 2025.420, subdivision (b)(5), allows the court to make an order that a deposition be only taken on certain specified terms and conditions to protect a party or other natural person from unwarranted annoyance, embarrassment, or oppression or undue burden and expense. Those specified terms were laid out in the previous motion to compel but not this motion for protective order. The motion now before the court seeks an order to prevent further harassment and inappropriate conduct from Mr. Whelan toward defendants and their counsel.

Although the court observes unbecoming conduct at the subject deposition and elsewhere, the court will not at this time enter the broad protective order described in defendants' motion. However, based on a review of the deposition transcripts and emails attached to Ms. Smith's declaration and the history of the many requests for pretrial discovery conferences in this action, the court remains open to appointing a discovery referee pursuant to Code of Civil Procedure section 639. Although no formal evidence has been presented, plaintiff previously represented to the court loosely through counsel that he was not financially able to pay his pro rata share of the fees for a discovery referee and that point is repeated in his opposition to the motion. The Code of Civil Procedure does not allow the court to consider counsel's ability to pay the fee when appointing a referee. (Code Civ. Proc. § 639, subd. (d)(5)(B).) Should defendants voluntarily agree to pay plaintiff's share of the fee, plaintiff's financial condition is no longer a concern when making the order.

As with the motion to compel, sanctions do not appear warranted in this instance, and the court declines to award sanctions to either side.

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 12/1/2021.
(Judge's initials) (Date)