

Tentative Rulings for May 19, 2022
Department 502

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).)

21CECG02403 *Viriyavong v. Chatman* (Dept. 502)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

20CECG02338 *Edwards v. HealthComp, LLC* is continued to Thursday, June 30, 2022, at 3:30 p.m. in Department 502

20CECG02524 *Howard v. Jim Crawford Construction Company, Inc.* is continued to Wednesday, May 25, 2022, at 3:30 p.m. in Department 502

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Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Panzak v. City of Fowler et al.***
Superior Court Case No. 17CECG02635

Hearing Date: May 19, 2021 (Dept. 502)

Motion: Defendants' Motion for Summary Judgment and/or Summary Adjudication of Issues

Tentative Ruling:

To deny without prejudice.

Explanation:

A motion for summary judgment shall be granted “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 473c, subd. (c).) Where defendant is the moving party, summary judgment is proper where defendant demonstrates the absence of an essential element of the plaintiff's case. (*Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 266.) “Because of the very drastic nature of the summary judgment statute, power given thereby should be used with caution, and hence when there is doubt as to the propriety of the motion, courts should, without hesitancy, deny the motion [Citation].” (*Travelers Indem. Co. v. McIntosh* (1952) 112 Cal.App.2d 177, 182.)

There are many issues with both the moving and opposition papers. The motion is denied at this time for the simple fact that none of the seven declarations filed in support of the motion comply with Code of Civil Procedure section 2015.5, which requires that a declaration state the date of execution and indicate it was executed in the State of California or be made under penalty of perjury under the laws of the State of California. A declaration that does not comply with section 2015.5 is of no evidentiary value. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 605–606, 618; *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217.) Many of the declarations are not dated, and none state the place of execution or that they are executed under the laws of the State of California. The recitation of the declarants' place of residence at the start of the declarations does not satisfy this requirement. Plaintiff objects to each declaration, and the objections must be sustained. Without the declarations there is no admissible evidence supporting the motion.

The court notes that, in addition to summary judgment, defendants move for summary adjudication of issues. In no respect do the moving papers comply with the relevant statutes or court rules. The notice of motion does not specify the “specific cause of action, affirmative defense, claims for damages, or issues of duty” sought to be adjudicated, as required by Rules of Court, Rule 3.1350(b). Even if the motion were construed to separately seek summary adjudication of each cause of action individually, the separate statement does not separate out the facts relevant to each cause of action. (See Cal. Rules of Court, Rule 3.1350(b), (d)(1)(A).) Instead, defendants present a single list of 113 facts.

The court notes that plaintiff's response to the separate statement does not comply with Rules of Court, Rule 3.1350(f)(2). The opposition papers, including points and authorities, must be submitted 14 court days before the hearing, not after the reply papers are filed. (Code Civ. Proc., § 437c, subd. (b)(2).)

The above is not intended to be an exhaustive discussion of all of the issues with the moving and opposition papers. The opposition and reply papers point out numerous deficiencies with the other parties' filings. Both parties should consider those assertions and address any deficiencies in future filings. Plaintiff and defense counsel are all licensed attorneys. The court expects everyone to be familiar with the Code of Civil Procedure and Rules of Court as they pertain to the filing of motions in general, and summary judgment/adjudication motions in particular.

Pursuant to Cal. 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: RTM **on** 5/18/2022
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: **Woody v. Clear**
Superior Court Case No. 20CECG03640

Hearing Date: May 19, 2022 (Dept. 502)

Motion: Defendant Clear's Motion to Set Expert's Compensation

Tentative Ruling:

To deny defendant Clear's motion to set Dr. Najafi's compensation. (Code Civ. Proc., § 2034.470.) To order defendant and his attorney to pay monetary sanctions of \$2,135 to plaintiff. Also, if a hearing is required and defendant does not prevail, the court may impose additional sanctions. Defendant shall pay sanctions to plaintiff's counsel within 30 days of the date of service of this order.

Explanation:

"If a party desiring to take the deposition of an expert witness under this article deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. Notice of this motion shall also be given to the expert." (Code Civ. Proc., § 2034.470, subd. (a).) "In addition to any other facts or evidence, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall be based on, proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation." (Code Civ. Proc., § 2034.470, subd. (c).)

"[T]he expert or the party designating the expert shall also provide, and the court's determination as to the reasonableness of the fee shall also be based on, both of the following: (1) The total number of times the presently demanded fee has ever been charged and received by that expert. (2) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion." (Code Civ. Proc., § 2034.470, subd. (d), paragraph breaks omitted.) "The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination." (Code Civ. Proc., § 2034.470, subd. (e).) "Upon a determination that the fee demanded by that expert is unreasonable, and based upon the evidence and factors considered, the court shall set the fee of the expert providing testimony." (Code Civ. Proc., § 2034.470, subd. (f).)

"The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2034.470, subd. (g).)

The party bringing the motion has the burden of proving the fee being sought is unreasonable. (*Rancho Bernardo Development Co. v. Superior Court* (1992) 2 Cal. App. 4th 358, 361.) There is no time limit for bringing such a motion - it may even be brought after the expert's deposition. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group, 2021), § 8:1704a.) The amount deemed a reasonable fee for the expert as based upon the above factors is ultimately within the court's discretion. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal. App. 4th 289, 303.)

First, to the extent that defendant argues that the court should disregard Dr. Najafi's opposition brief because it was allegedly not served on him until several days after it was due, the defendant's contention is moot. The hearing date for the motion was originally set for April 28, 2022, but was later continued to May 19, 2022. Therefore, even if the opposition brief was not timely served, defendant has now had about three additional weeks to analyze and respond to the opposition, so he has not been prejudiced by any delay in serving the opposition. In addition, defendant has forfeited his objection to the late opposition by responding to the opposition brief's merits in his reply declaration. Defendant has even submitted new evidence in his reply, which is not usually permitted. Therefore, the court will not disregard Dr. Najafi's opposition brief.

Next, with regard to the merits of defendant's motion, defendant moves for an order setting plaintiff's treating doctor Dr. Najafi's deposition fee at a reasonable rate, which defendant contends should be approximately \$800 per hour. Defendant claims that Dr. Najafi's claimed hourly rate of \$2,000 is excessive and unreasonable, and that other similar experts charge about \$800 to \$1,000 per hour for deposition testimony. However, defense counsel offers no specific examples of other neurosurgeons in the Fresno area who charge only \$800 to \$1,000 per hour for deposition testimony. He simply makes the unsupported claim that he believes the standard range for payment of such deposition testimony is approximately \$800 to \$1,000 without explaining the basis for his assertion. (Aharonian decl., ¶ 6.) Also, in his reply brief, defense counsel admits that another local neurosurgeon, Dr. Hoyt, charges \$1,200 per hour for deposition testimony. (Aharonian reply decl., ¶ 6.) In his reply brief, defendant also points to the fee schedule for Dr. Najafi published by Examworks, which indicates that he charges only \$1,250 per hour for deposition testimony. (Exhibit B to Aharonian reply decl.)¹

Therefore, defendant has failed to submit evidence showing that Dr. Najafi's compensation should be set at no more than \$800 per hour. In fact, defendant's evidence indicates that Dr. Najafi should receive at least \$1,200 per hour based on the rates charged by Dr. Hoyt, or \$1,250 per hour based on Dr. Najafi's rates under his Examworks fee schedule.

On the other hand, Dr. Najafi's attorney has submitted evidence indicating that \$2,000 per hour is in fact his ordinary and customary rate. According to his counsel, Dr.

¹ Again, it is improper for defendant to submit new evidence on reply, as Dr. Najafi has not had a chance to respond to it. Therefore, it is not clear that the court should even consider the new evidence regarding the fees charged by Dr. Hoyt or Dr. Najafi. However, even if the court were to consider this new evidence, it does not support an hourly rate of \$800, and would instead support the higher rate of \$1,200 to \$1,250 per hour.

Najafi has charged and been paid \$2,000 per hour for his deposition testimony in 46 cases since 2019. (Bobroff decl., ¶ 5.) He attaches copies of checks and invoices in the other cases that support his claim that Dr. Najafi regularly charges and is paid \$2,000 per hour for deposition testimony. (Exhibits B and C to Bobroff decl.) Therefore, Dr. Najafi has provided sufficient evidence to support his claim that his ordinary and customary rate for deposition testimony is \$2,000 per hour.

In his motion, defendant contends that about half of the payments made to Dr. Najafi were from plaintiff's firms, which have no real incentive to haggle with their own expert over his fees. However, if half the payments were made by plaintiff's counsel, then the other half must have been paid by defense counsel or insurers for defendants, which presumably are more likely to object to excessive fees that might be charged by a plaintiff's expert. Defendant speculates that these defendants or insurers did not have enough time to bring a motion to reduce the expert's fees because their trial date was only a few months away, but offers no evidence of any specific cases where the trial date was too close to raise an objection to the expert's fees. Defense counsel also speculates that there may have been other cases where Dr. Najafi was paid less for his deposition testimony, but again offers no evidence to support his theory. Such speculative claims, which are unsupported by any evidence, are not sufficient to meet defendant's burden of showing that Dr. Najafi's fees are not reasonable.

Also, to the extent that defendant relies on the Examworks fee schedule that shows that Dr. Najafi only charges \$1,250 for deposition testimony, defendant has not presented any evidence that the Examworks schedule accurately represents Dr. Najafi's current rates. It is not clear when the Examworks schedule was created, or whether it has been updated recently. Nor is there any evidence that Dr. Najafi has actually charged \$1,250 per hour for deposition testimony in the recent past. On the other hand, Dr. Najafi's attorney has presented evidence showing that he has charged \$2,000 per hour in 46 cases in the last two years. Defendant has not presented any evidence that would tend to rebut Dr. Najafi's showing that \$2,000 is his ordinary and customary rate. As a result, the court intends to find that Dr. Najafi's ordinary and customary rate for deposition testimony is \$2,000 per hour.

The court may also consider the rates of other similar experts for similar services in the community, as well as any other factors it deems appropriate. (Code Civ. Proc., § 2034.470, subd. (e).) Dr. Najafi's attorney claims that other doctors charge similar amounts for their services. For example, he cites to Dr. Robert Salazar, who is a board certified physician specializing in pain management. Dr. Salazar allegedly also charges \$2,000 per hour for deposition testimony. (Bobroff decl., ¶ 7.) On the other hand, defense counsel claims that a local neurosurgeon, Dr. Hoyt, charges only \$1,200 an hour for deposition testimony. (Aharonian reply decl., ¶ 6.)

Thus, there is some conflicting evidence as to what local experts with similar qualifications charge. However, given that at least one other local doctor apparently charges \$2,000 per hour, Dr. Najafi's ordinary and customary rate of \$2,000 per hour does not appear to be unreasonable or excessive.

In addition, it is notable that defendant's own insurer, AAA Insurance, recently paid Dr. Najafi \$2,000 per hour for his deposition testimony. (Bobroff decl., ¶ 11.) While

this payment was not necessarily a waiver of AAA's right to object to Dr. Najafi's rates, it does lend support to Dr. Najafi's position that he usually charges and receives \$2,000 per hour for his deposition testimony. It also tends to show that his rates are not excessive or unreasonable. Therefore, the court intends to deny defendant's motion to set Dr. Najafi's fees at a lower rate than his usual and customary rate of \$2,000 per hour.

Furthermore, the court intends to award sanctions against defendant and his attorney for bringing an unsuccessful motion to reduce Dr. Najafi's compensation. (Code Civ. Proc., § 2034.470, subd. (g).) While it may have been justifiable for defendant to initially bring the motion when Dr. Najafi failed to respond to counsel's meet and confer letter, Dr. Najafi's attorney then contacted defense counsel and presented extensive evidence that Dr. Najafi has charged and received \$2,000 per hour in dozens of other cases in the last two years. At this point, defense counsel should have withdrawn the motion to set Dr. Najafi's compensation. Instead, he insisted on pressing forward with it, despite considerable evidence that Dr. Najafi frequently receives \$2,000 per hour for deposition testimony. As a result, Dr. Najafi was forced to pay filing fees to appear in the case, as well as drafting opposition to the motion and potentially appearing at the hearing. Therefore, Dr. Najafi is entitled to be reimbursed for his legal fees and costs in opposing the motion. The court intends to grant the request for monetary sanctions of \$2,135 against defendant and his counsel. Also, if a hearing is required, Dr. Najafi will be required to incur further fees, which will increase the amount of sanctions if defendant does not prevail.

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: RTM on 5/18/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: **Ashjian v. Terzian**
Superior Court Case No. 21CECG02233

Hearing Date: Plaintiffs' Motion for Judgment on the Pleadings as to
Their Complaint and Defendant's Answer

Motion: May 19, 2022 (Dept. 502)

Tentative Ruling:

To continue plaintiffs' motion for judgment on the pleadings to July 19, 2022, at 3:30 p.m. in Department 502, so that it can be heard simultaneously with defendant's motion for reconsideration of the order deeming him to have admitted the truth of the matters in the requests for admission.

Explanation:

While plaintiffs have moved for judgment on the pleadings as to their complaint and defendant's answer based on the fact that defendant has been deemed to have admitted the truth of the matters in the requests for admissions, defendant has moved for reconsideration of the court's January 6, 2022 order. Defendant's motion is presently set to be heard on July 19, 2022. If defendant is successful in setting aside the order, it would be a waste of time and resources to enter judgment on the pleadings against defendant at this time, as the judgment would have to be set aside as well. Therefore, the court intends to continue the plaintiffs' motion for judgment on the pleadings until July 19, 2022, so that both motions can be heard and resolved together.

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: RTM on 5/18/2022
(Judge's initials) (Date)