

Tentative Rulings for May 25, 2022
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.

17CECG04095 *Alejandra Blanco v. David J. Wright, D.D.S., Inc* is continued to
Tuesday, June 14, 2022 at 3:30 p.m. in Department 403

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(34)

Tentative Ruling

Re: **Gerald Molinari v. Manco Abbott, Inc.**
Superior Court Case No. 20CECG01745

Hearing Date: May 25, 2022 (Dept. 403)

Motion: Plaintiff's Motion for Trial Preference

Tentative Ruling:

To deny without prejudice.

Explanation:

Under Code of Civil Procedure section 36, subdivision (a),

A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:

(1) The party has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

(Code Civ. Proc., § 36, subd. (a).)

“Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.” (Code Civ. Proc., § 36, subd. (f).)

Assuming the elements of the statute are met and there has not been untoward delay by the plaintiff or other extenuating circumstance, this is a mandatory preference. (*Landry v. Berryessa Union School Dist.*, (1995) 39 Cal.App.4th 691, 696–697.) “Mere inconvenience to the court or to other litigants is irrelevant. Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations.” (*Swaithes, supra*, at pp.1085-1086, internal citations omitted.)

Moreover, “An affidavit submitted in support of a motion for preference under subdivision (a) of Section 36 may be signed by the attorney for the party seeking

preference based upon information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under subdivision (a) of Section 36.” (Code Civ. Proc., § 36.5.)

“The standard under subdivision (a), unlike under subdivision (d), which is more specific and more rigorous, includes no requirement of a doctor's declaration. To the contrary, a motion under subdivision (a) may be supported by nothing more than an attorney's declaration ‘based upon information and belief as to the medical diagnosis and prognosis of any party.’” (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 534, internal citations omitted.)

Also, a plaintiff moving for a trial preference under subdivision (a) does not have to show that she is likely to die or become incapacitated before the case goes to trial if a preference is not granted. “Section 36, subdivision (a), says nothing about ‘death or incapacity.’ Whether there is ‘substantial medical doubt of survival ... beyond six months’ is, to be sure, a matter of specific concern under subdivision (d), but the relevant standard under subdivision (a) is more open-ended. The issue under subdivision (a) is not whether an elderly litigant might die before trial or become so disabled that she might as well be absent when trial is called. Provided there is evidence that the party involved is over 70, all subdivision (a) requires is a showing that that party's ‘health ... is such that a preference is necessary to prevent prejudicing [their] interest in the litigation.’ (Italics added.)” (*Ibid.*)

Here, plaintiff moves for a preferential trial date based on the declaration of his attorney, who states that plaintiff is 79 years old and in declining mental and physical health. (Bell decl., ¶ 6.) He currently suffers from cognitive impairments, dizziness, memory deficiencies, balance issues, shortness of breath and fatigue, murmurs, bouts of tachycardia, arrhythmia, and instability, which continue to worsen. The details of his mental and physical decline are described in the memorandum but not included in counsel's declaration.

The representation of declining mental and physical health, without additional facts *in the declaration*, to demonstrate how this condition is such that plaintiff would be prejudiced, is insufficient to show that plaintiff's health is such that a trial preference is necessary to prevent prejudice to his rights. Further, there is no explanation given as to why counsel delayed bringing this motion: the complaint was filed in 2020 and trial set in September of 2021; arguably, without further evidence or elucidation in the declaration, there was untoward delay. Therefore, the motion is denied without prejudice.

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: **KCK** **on** **05/20/22** .
 (Judge's initials) (Date)

(24)

Tentative Ruling

Re: **City of Fresno v. Spirit of Woman, Inc.**
Superior Court Case No. 20CECG01636

Hearing Date: May 25, 2022 (Dept. 403)

Motion: Final Accounting of Receiver

Tentative Ruling:

To grant and sign the order lodged with the court on March 7, 2022.

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: **KCK** on **05/23/22**
 (Judge's initials) (Date)

(36)

Tentative Ruling

Re: **Lisa Soliz, et al. v. Lithia NC, Inc.**
Superior Court Case No. 21CECG00895

Hearing Date: May 25, 2022 (Dept. 403)

Motion: Motion for Leave to File First Amended Complaint

Tentative Ruling:

To grant. (Code Civ. Proc., § 473, subd. (a)(1).)

Explanation:

Plaintiffs seek leave to amend to add additional causes of action under the Consumer Legal Remedies Act, Magnuson-Moss Warranty Act, and to initiate a claim on defendant's statutory bond pursuant to Vehicle Code, section 11711.

Plaintiffs have met the formalities required of a motion to amend the complaint and have given due notice to all appearing defendants. Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ..." (Code Civ. Proc., § 473, subd. (a)(1); Code Civ. Proc., § 576.) Judicial policy favors resolution of cases on the merits, and thus the court's discretion as to allowing amendments will usually be exercised in favor of permitting amendments. This policy is so strong, that denial of a request to amend is rarely justified, particularly where "the motion to amend is timely made and the granting of the motion will not prejudice the opposing party." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

No opposition was filed, so no facts were presented to warrant denial of plaintiffs' motion for leave to amend.

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: **KCK** on **05/23/22** .
 (Judge's initials) (Date)