Tentative Rulings for May 25, 2022
Department 503

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.

20CECG00772 **Shaw Creek Homeowners Association v. Admiral Insurance Comp. Is continued to Thursday, June 16, 2022, at 3:30 p.m. in Department 503**

21CECG02391 ***Seema Kwatra v. River Park Properties II*** **is continued to Thursday, June 16, 2022, at 3:30 in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Green v. CDCR et al.***
Superior Court Case No. 15CECG03951

Hearing Date: May 25, 2022 (Dept. 503)

Motion: Defendant County of Fresno's Demurrer to Complaint;
State Defendants' Demurrer and Motion to Strike

Tentative Ruling:

The demurrer of defendant County of Fresno ("defendant County") is sustained, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

The demurrer of defendants California Environmental Protection Agency, California Health and Human Services Agency, California Department of Corrections and Rehabilitation, Brown, Schwarzenegger, Kernan, Beard, Cate, Hubbard, Hysen, Rothschild, Frauenheim, Trimble, Yates, Allen, Bonilla, Briggs, Lewis, Lozano, Martinez, Van Leer, and Uranday ("State defendants") is sustained, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

The motion to strike is taken off calendar as moot in light of the ruling on the demurrer, and because the motion to strike was not refiled pursuant to the court's May 27, 2021 order.

Oral argument on this matter is set for Wednesday, June 15, 2022, at 3:30 p.m., in Department 503, so that plaintiff may be present. Plaintiff may appear through CourtCall, or other telephonic appearance service.

Explanation:

The court notes initially that, at plaintiff's request, the court has considered the opposition plaintiff filed on May 31, 2017. That opposition only addressed State defendants' demurrer.

Defendant County of Fresno's Demurrer

Failure to comply with claim presentation requirements

Under Government Code section 915, subdivision (a), a claim against a local public entity must be delivered to its clerk, secretary, or auditor. Additionally, under section 911.2, "[a] claim relating to a cause of action . . . for injury to a person . . . shall be presented. . . not later than six months after the accrual of the cause of action." No suit may be brought against a public entity until a written claim has been presented to the public entity and has been acted upon by the Board, or has been deemed to be have been denied by the Board. (Gov. Code, § 945.4.)

The complaint alleges that plaintiff complied with the pre-filing requirements, at paragraph 9, which states that he "is required to comply with a claims statute and has complied with the applicable claims statute[.]" Besides this box, plaintiff hand-wrote a notation, "See attached 602 and Government Claim Forms and Notices." Thus, plaintiff attached the claims that he presented in compliance with this requirement.

General allegations are sufficient to plead compliance with the claim presentation requirement of the Government Claims Act. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1237.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Face of the complaint" includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The complaint attaches the claims that plaintiff submitted, but those claims were submitted to the California Victim Compensation and Government Claims Board and to the Correctional Health Care Services. There is no claim to defendant County. Since plaintiff added explanatory allegations to his allegation of compliance with claim presentation requirements, and the referenced exhibits do not include a claim to defendant County, plaintiff has not satisfied the Government Code claim presentation requirements. The demurrer is sustained without leave to amend for this reason alone.

Statutory basis for liability

There are no allegations of fact in the complaint showing any affirmative conduct by defendant County which would support a claim of statutory liability against it. To state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity, including existence of statutory duty; duty cannot be alleged simply by stating that the defendant had duty under law. In other words, the statute or enactment claimed to establish duty must be identified in pleadings. (*Zuniga* v. *Housing Authority of City of Los Angeles* (1995) 41 Cal.App.4th 82.)

The complaint further fails to state facts sufficient to constitute a cause of action against this public entity as no statutory basis for liability is stated. A governmental entity can only be liable in tort based on an authorizing statute; it cannot be held liable for an injury under common law negligence. (Gov. Code, § 815, subd. (a); *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 279; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.) Civil Code section 1714, which imposes a general duty of care on all persons, is an insufficient basis to impose direct liability on public agencies. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1180.)

State Defendants' Demurrer

Failure to comply with claim presentation requirements

As noted above, since plaintiff attached his government claims to the complaint, the Court cannot simply consider as true his general allegation of compliance with the pre-filing claim requirement (at page 3, item 9), since contradictory facts contained in exhibits take precedence over allegations in the complaint. (*Holland v. Morse Diesel*

Intern., Inc. (2001) 86 Cal.App.4th 1443, 1446.) State defendants are correct that this failure to name seven of the individual defendants bars plaintiff's *state* tort claims as to them. However, there is no pre-lawsuit claim-filing requirement for the federal claim. (*Felder v. Casey* (1988) 487 U.S. 131, 132; *Williams v. Horvath* (1976) 16 Cal.3d 834, 843.)

State defendants argue that nothing in either of plaintiff's claims put the California Environmental Protection Agency or the California Health and Human Services Agency on notice that they were the agencies plaintiff intended to sue. State defendants argue, "While plaintiff's claims identify 'EPA' and 'the Health and Human Services Agency,' they also appear to identify numerous federal, state, and local agencies. (Defs.' Req. for Jud. Not. Ex. A at pp. 2–3 & Ex. B at pp. 2–3.) Thus, the apparent defendants 'EPA' and 'the Health and Human Services Agency,' could refer to any number of federal, state, or local environmental authorities." (Defs.' Memo., p. 19:14-18.)

The Court disagrees. These are claims submitted to state entities. State defendants do not contend that the claims were not submitted to the correct state entity, so as to give notice to the California Environmental Protection Agency and the California Health and Human Services Agency. Apparently, the contention is failure to specifically identify the *California* Environmental Protection Agency or the *California* Health and Human Services Agency. Given that these claims were submitted to state agencies, it is reasonable to conclude that plaintiff was identifying the *California* Environmental Protection Agency or the *California* Health and Human Services Agency.

However, the claims fail to fail to identify a number of state officials: former Governor Schwarzenegger; former Secretaries Kernan and Cate; former Directors Hubbard, Heisen, and Rothschield; and former Warden Yates. (Defs.' Req. for Jud. Not. Ex. A at pp. 2–3 & Ex. B at pp. 2–3.) Since the claims do not identify these individuals, the demurrer is sustained without leave to amend as to them.

Statutory basis for liability

As noted above, a governmental entity can only be liable in tort based on an authorizing statute; it cannot be held liable for an injury under common law negligence. (Gov. Code, § 815, subd. (a); *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 279; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.) Civil Code section 1714, which imposes a general duty of care on all persons, is an insufficient basis to impose direct liability on public agencies. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1180.)

To state a cause of action against a public entity, a plaintiff must plead the specific statute claimed to establish a governmental duty and every fact essential to the existence of statutory liability. (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.) Here, plaintiff alleges no basis for statutory duty.

There are statutes providing a basis for liability based on condition of public property. Government Code sections 835 through 835.4 are the "sole statutory basis for a claim imposing liability on a public entity based on the condition of public property." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438.) These are not pled. Even if they were, the claims would lack merit.

Government Code sections 835 and 835.4 require the existence of a dangerous condition of public property that caused the injury. The condition at issue here is the presence of natural, fungal cocci spores endemic to the entire Central Valley region where Pleasant Valley is located. (See Complaint at pp. 2, 13, 19; see also *Hines v. Youseff*, *supra*, 914 F.3d at 1223-1224 ["Valley Fever is a disease caused by inhaling certain fungal spores. The spores, which live in dry soil, are common in much of the southwestern United States."].) But "[a]n ordinary, natural topographical condition is not a dangerous condition of property within the meaning of the Governmental Tort Liability Law." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 7.) The condition alleged is not one of the public property, but of the land or region in which the public property is located.

Even if there was a basis for holding State defendants liable pursuant to sections 835 and 835.4, certain statutory immunities would preclude liability. As the moving papers note, public entity liability under Government Code sections 835 through 835.4 dangerous condition statutes is "subject to any immunity of the public entity provided by statute . . . ." (Gov. Code, § 815, subd. (b); see also *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 504 [generally recognized that a statutory governmental immunity overrides statute imposing liability.) And public employee liability under Government Code sections 840 through 840.6 dangerous condition statutes is "subject to any immunity of the public employee." (Gov. Code, § 840.)

State defendants argue for the application of various statutory immunities. The court discusses them, in turn.

Government Code section 855.4, subdivision (a): injury resulting from decision to perform or to not perform an act to promote public health by preventing disease or controlling spread of disease within the community. State defendants rely on *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, where the immunity applied to a claim for injury from contraction of hantavirus pulmonary syndrome, contracted by a child while she played in an abandoned city-owned building.

Wright, however, is distinguishable, in that plaintiff here was placed at the property against his will. Pleasant Valley State Prison is not a closed off abandoned building that plaintiff voluntarily and affirmatively accessed. And the court cannot conclusively determine at this stage that defendants acted with "due care" in connection with plaintiff's exposure to Valley Fever. That is a factual issue, given the allegations of affirmative action forcing plaintiff into a situation in which he was exposed to Valley Fever.

Government Code section 831.2: immunity for injury caused by a natural condition of any unimproved public property. State defendants contend that this immunity applies even where the public property is improved, citing *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170 [diseased tree fell on plaintiff]. However, immunity under section 831.2 is not conclusively established where there is evidence from which a trier of fact could conclude that the injury-causing condition was not in a different location from the site of the accident, and came from an improved area. (See *County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 734 [another falling tree case].)

In this case, the court cannot conclusively determine that the natural condition was from an unimproved public property. The factual record is not sufficiently developed at this stage to make this determination.

Government Code section 845.2: no liability for failure to provide prison facilities or sufficient equipment and personnel therein.

Again, it is not apparent that this immunity would apply to this case. Defendants rely on *Taylor v. Buff* (1985) 172 Cal.App.3d 384, an appeal of a grant of summary judgment in a case where the plaintiff prisoners alleged they were sodomized by other inmates who gained access to plaintiffs because of the lack of properly functioning electronic locks on the cell doors, which resulted in inmates roaming freely throughout the cell block. Thus, it was a case involving allegations of failure to provide adequate facilities or personnel to protect the plaintiffs within the facility. In finding that section 845.2 applied, the court of appeal reasoned,

> Section 845 was designed to "prevent political decisions of policy-making officials of government from being second-guessed by judges and juries in personal injury litigation [citation]. In other words, essentially budgetary decisions of these officials were not to be subject to judicial review in tort litigation. [Citation.]" (*Mann v. State of California* (1977) 70 Cal.App.3d 773, 778-779 . . . .) The decision whether or not to allocate funds for an improved security system in the jail was a purely discretionary one and cannot serve as a basis for tort liability.

(*Taylor, supra*, 172 Cal.App.3d at pp. 390-391.) The instant case involves the placement of plaintiff in a facility in a location where Valley Fever is endemic. The immunity does not fit the facts of this case.

Government Code section 844.6, subdivision (a)(2): public entity not liable for an injury to a prisoner (with certain statutory exceptions not applicable here). Subdivision (c) provides that "[e]xcept for an injury to a prisoner, nothing in this section prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 . . . of this part." In *Badiggo v. County of Ventura* (1989) 207 Cal.App.3d 357, 361-62, the court held that this immunity applies to claims by prisoners based on a dangerous condition of public property.

This immunity does apply in this case, as plaintiff sues public entities for injuries he sustained during and due to his imprisonment. But section 844.6 only immunizes public entities, not public entity employees. Accordingly, the demurrers are sustained, without leave to amend, as to defendants California Environmental Protection Agency, California Health and Human Services Agency, and California Department of Corrections and Rehabilitation.

Government Code sections 820.2 and 821: immunity from injury resulting from exercise of discretion by public employee (section 820.2); immunity from injury from adoption or failure to adopt enactment (section 821).

Plaintiff alleges that defendants put him in harm's way by placing him in a prison where he was exposed to Valley Fever. (Complaint at p. 2.) While plaintiff has not alleged any facts showing what role any particular defendant had in placing him at Pleasant Valley State Prison, to the extent he alleges defendants had any role in implementing related policy, plaintiff fails to state a claim because policy decisions such as this fall within the definition of a discretionary act under Government Code section 820.2. "[T]he assignment of inmates within the California prisons is essentially a matter of administrative discretion." (*Munoz v. Rowland* (9th Cir. 1997) 104 F.3d 1096, 1098.) The decision to place plaintiff at Pleasant Valley State Prison was a discretionary act. (See *People v. Flower* (1976) 62 Cal.App.3d 904, 914 ["The responsibility of assigning prisoners to specific institutions falls upon the Director of Corrections, who is to exercise his discretion so as to maximize achievement of the goals of his department."].) Section 820.2 immunity applies to the individual State defendants, as the decision to incarcerate plaintiff at Pleasant Valley State Prison would be a decision resulting in the exercise of discretion, as well as any actions implementing policies that resulted in plaintiff being housed there.

To the extent liability of higher State officials is based on their adoption of enactments (including regulations (see Gov. Code, § 810.8)), section 821 immunity would apply, as well. The demurrers by the individual State defendants are sustained, without leave to amend, for these additional reasons.

Government Code sections 820.2 and 820.8: public employee immunity from liability for acts of subordinates. Plaintiff sues a number of high-level officials, including former governors and wardens, and agency secretaries, directors, heads and chiefs. (Complaint at pp. 5-6.) Under section 820.8, these officials cannot be held vicariously liable for acts of their subordinates. (See *Martinez v. Cahill* (1963) 215 Cal.App.2d 823, 824.) The demurrers by the individual State defendants are sustained on this ground, as well.

In conclusion, even if plaintiff had pled a statutory basis for liability, and has an otherwise viable claim based on a dangerous condition of public property, the individual and entity State defendants are immune from liability in this case pursuant to Government Code sections 820.2, 820.8, 821 and 844.6, subdivision (a)(2).

Eighth Amendment claim

To the extent that the complaint can be read to encompass a federal Eighth Amendment claim, the recent Ninth Circuit decision of *Hines v. Youseff* (9th Cir. 2019) 914 F.3d 1218, solidly forecloses such claim. *Hines* makes clear that the individual defendants have qualified immunity on plaintiff's claim based on exposing prisoners to Valley Fever. Despite having been given an opportunity to address the impact *Hines*, plaintiff failed to do so.

Moreover, the entity defendants cannot be held liable in a 42 U.S.C. section 1983 claim alleging an Eighth Amendment violation. (See *Venegas v. Cty. of Los Angeles* (2004) 32 Cal.4th 820, 829 ["states . . . are not considered persons under section 1983 and are immune from liability under the statute by virtue of the Eleventh Amendment and the

doctrine of sovereign immunity"]; see also *Pitts v. Cty. of Kern* (1998) 17 Cal.4th 340, 348.) The demurrer is sustained to the Eighth Amendment claim, without 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: KAG on 5/23/2022 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Fernandez v. Press Box, Inc.***
Superior Court Case No. 20CECG00666

Hearing Date: May 25, 2022 (Dept. 503)

Motion: Plaintiff's Motion to Compel Defendant Press Box Inc.'s Supplemental Responses to Demand for Production of Documents, Set One

Tentative Ruling:

To deny the motion and the parties' requests for sanctions. (Code Civ. Proc., § 2031.310, subd. (c).)

Explanation:

Compliance with Fresno County Superior Court Local Rule, Rule 2.1.17

Defendant Press Box Inc. ("defendant") argues that plaintiff failed to comply with Fresno County Superior Court Local Rule, rule 2.1.17, by failing to first obtain the court's permission to file his motion. At issue, is whether the court's June 2, 2021 Order After Pretrial Discovery Conference granted such permission to plaintiff to file the instant motion to compel further responses to defendant's supplemental responses to the request for production of documents, set one. The relevant terms of the June 2, 2021 order are as follows:

The parties, after discussion and negotiation, agree to the following order:

1. Defendant served supplemental responses to plaintiff's Request for Production of Documents, Set One, on June 1, 2021. *If plaintiff is unsatisfied with the supplemental responses. plaintiff's deadline to file a motion to compel further responses is 45 days from the date of this order.*

2. Defendant served responses to plaintiff's Special Interrogatories, Set One. Plaintiff is satisfied with the responses to Special Interrogatory Nos. 4, 9, 10. 11, 12. Defendant shall provide supplemental responses to the remaining special interrogatories within 30 days of the date of the release of class member information by the administrator. If plaintiff is unsatisfied with the supplemental responses, plaintiff is directed to submit a timely written request for a further pretrial discovery conference.

3. The parties shall meet and confer on modifications to defendant's proposed protective order in light of the Court's comments. *If the parties are unable to reach an agreement on modifications to defendant's proposed protective order, they are directed to contact*

the clerk in Department 503 to request a further pretrial discovery conference.

(June 2, 2021, Order After Pretrial Discovery Conference, ¶ 1-3, emphasis added.)

Defendant asserts that the June 2, 2021 order did not grant plaintiff permission to file the instant motion; rather, it merely addressed and ruled on the issues relating to the *Belaire-West* notice and ordered the parties to further meet and confer over defendant's proposed protective order.

Defendant's interpretation of the order is incorrect. It is evident on the face of the order that the issue of modifications to the proposed protective order is a separate issue from defendant's supplemental responses to plaintiff's request for production of documents. By the plain language of the order, plaintiff was given leave to file a motion to compel further responses, if plaintiff was unsatisfied with the supplemental responses served on June 1, 2021.

Timeliness of the Motion

Defendant also contends that plaintiff's motion is untimely.

A notice of motion to compel further response must be served within 45 days after the responses in question, or any supplemental responses, were served, unless the parties agree in writing to extend the time. (Code Civ. Proc., § 2031.310, subd. (c).) Delay in filing the motion beyond the 45-day time limit waives the right to compel a further response to the discovery. This time is mandatory and jurisdictional, and the court has no authority to grant a late motion. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1409.)

The 45-day deadline runs from the date the response is served, not from the date originally set for production. (Code Civ. Proc.. § 2031.310, subd. (c); *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 901.) Here, defendant served its supplemental response on June 1, 2021. Pursuant to the June 2, 2021 order, the parties agreed that te 45-day deadline would commence on the date of the order, June 2, 2021. Thus, plaintiff's deadline for filing his motion, with five calendar days added for service of the order by mail (Code Civ. Proc., § 1013, subd. (a).), was July 22, 2021. Since plaintiff filed his motion on July 23, 2021, the motion is untimely.

Sanctions

Although both sides request sanctions, the court finds the imposition of sanctions under the circumstances to be unjust. Since plaintiff has requested sanctions on the basis of Code of Civil Procedure section 2031.310, subdivision (h), which imposes sanctions against the unsuccessful moving or opposing party, plaintiff's request is denied. Additionally, defendant requests sanctions pursuant to Code of Civil Procedure sections 2023.020 and 2023.010, subdivision (b)(2), for plaintiff's failure to meet and confer regarding its June 1, 2021, supplemental responses. Although there is no evidence showing that plaintiff has engaged in any meet and confer efforts pertaining specifically to defendant's June 1, 2021, supplemental responses, it is evident that plaintiff has made

a substantial attempt to meet and confer with defendant on its discovery responses overall. Moreover, because defendant's June 1, 2021, supplemental response are substantially similar to its original response, the court finds plaintiff's actions to be in good faith. No sanctions are awarded.

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: KAG on 5/23/2022 .
(Judge's initials) (Date)