Tentative Rulings for May 26, 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).)

17CECG01801	***Bartlett v. Pleasanton Fitness, LLC*** **(Dept. 503)**
21CECG03242	***Garcia v. Clawson Honda of Fresno*** **(Dept. 503)**
20CECG01141	***Savala v. Pacheco*** **(Dept. 503)**
21CECG01422	***The State of California v. All Persons Unknown Claiming Interest in the Property*** **(Dept. 503)**

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

20CECG03461	***Tyler v. CSG Holdings CA, LLC*** **is continued to Tuesday, June 28, 2022, at 3:30 p.m. in Department 503. The court also intends to continue the upcoming Motions to Compel now scheduled for hearing on June 2, 2022, and will post the continuance for those motions on the Tentative Ruling for that date.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(27)

Tentative Ruling

Re: ***Praetorian Insurance Company v. Haight Brown & Bonesteel/LEAD CASE***
Superior Court Case No. 20CEC01978

Hearing Date: May 26, 2022 (Dept. 503)

Motion: Defendant Haight Brown & Bonesteel LLP's Demurrer to Plaintiff Hallmark Specialty Insurance Company's Second Amended Complaint

Tentative Ruling:

To overrule the demurrer as to the third cause of action. To sustain the demurrer as to the first and second causes of action, without leave to amend.

Defendant shall file its answer to the second amended complaint within 20 days of service of the order by the clerk.

Explanation:

"If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory.'" (*Quelilmane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38, emphasis in original.) In addition, the plaintiff's "ability to prove [the] allegations, or the possible difficulty in making such proof does not concern the reviewing court …." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496; see also *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190.) Similarly, "liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1238.)

Equitable Subrogation: First and Second Causes of Action

Subrogation requires that "the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer …." (*Fireman's Fund Ins. Co v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1292.) California courts, however, "have consistently held legal malpractice claims are nonassignable to protect the integrity of the uniquely personal and confidential attorney-client relationship." (*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1383; see also *Goodley v. Wank & Wank* (1976) 62 Cal.App.3d 389, 395; *Fifield Manor v. Finston* (196) 54 Cal.2d 632, 639-640; but see *White Mountains Reinsurance Co. of America v. Borton Petrini, LLP* (2013) 221 Cal.App.4th 890, 908-910 [subrogation of legal malpractice claim permitted because

it was not treated as a "distinct commodity," there was no former adversarial interest, and the claim had been subsumed by a larger transaction].)

The second amended complaint alleges that the insured (Interstate Home Services ("Interstate") had "an existing, assignable cause of action against [Haight Brown & Bonesteel ("Haight")]". (SAC, ¶ 22.) Hallmark Specialty Insurance Company ("Hallmark") alleges that it became equitably subrogated to Interstate's legal malpractice claim through its policy limits contribution to settle the underlying action. (SAC, ¶¶ 9, 21, 23, 35, 36.) Accordingly, Hallmark's basis for recovery under the first and second causes of action is that of equitable subrogation.

Hallmark's new allegations, although indicative of deliberate participation, conversely demonstrate that Hallmark's interest in Interstate's legal malpractice claim was something distinctly more focused and broad than the "incidental" nature of the malpractice claim in *White Mountains Reinsurance Co. of America v. Borton Petrini, LLP*, *supra*, 221 Cal.App.4th 890. (*Id.* at p. 909 ["In this case, the assignment of the legal malpractice claim was only a small, incidental part of a larger commercial transfer between insurance companies involving the transfer of assets, rights, obligations, and liabilities."].) Accordingly, the facts alleged in the second amended complaint are insufficient to fall within the "narrow" exception articulated in *White Mountains*. (*Ibid*.)

Consequently, Haight's demurrer to the first and second causes of is sustained. Since Hallmark does not request leave to amend, and it does not otherwise appear that amendment would be curative, leave to amend is not granted. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; see also *McClintock v. West (2013)* 219 Cal.App.4th 540, 556 [demurrer properly sustained without leave to amend where plaintiff did not argue that leave to amend was warranted].)

Therefore, the demurrer to the first and second causes of action is sustained, without leave to amend.

Intended Benefit: Third Cause of Action

"'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*.'" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811, emphasis in original, citation omitted; see also *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148.) The timing is an important factor, and "[e]ven the briefest conversation between a lawyer and a client can result in the disclosure of confidences." (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39.) In addition, third party beneficiaries may recover against an attorney for failing to property perform duties owed to the client. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [intended beneficiaries of a will, who lost their testamentary rights, entitled to maintain suit against the attorney who drafted the will]; *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1095-1096 ["courts have extended an attorney's duty of care to nonclients … in limited circumstances"].)

Nevertheless, "[a]n essential predicate for establishing an attorney's duty of care under an 'intended beneficiary' theory is that *both* the attorney … and the client … must have intended [the insurer] to be *the* beneficiary of legal services [the attorney] was to

render." (*Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1008, emphasis in original.) In *Zenith*, the plaintiff, despite several attempts, failed to amend its complaint to show that the attorney intended to confer a benefit to the plaintiff, a reinsurer. (*Id*. at p. 1009.) Also dispositive was that the nature of the reinsurer's interests was distinct from those of the actual client because only the client was subject to increased liability (e.g., bad faith denial). (*Ibid*.) The increased liability created adversity, which further diminished the likelihood of an intended benefit to the plaintiff. (*Ibid*.)

Haight contends that Hallmark's interests were adverse to those of Praetorian Insurance Company ("Praetorian"), and asserts Hallmark's federal lawsuit to demonstrate the adversity. However, Hallmark's claim against Praetorian only arose after Hallmark's policy became affected, and, until that point, Praetorian and Hallmark's interests were unified, at least in respect to minimizing their insured's liability. (Cf. *Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 82 [parties conceded that a conflict of interest arose at inception of relationship].) In other words, whatever adverse interest now exists between Hallmark and Praetorian was not present during Haight's defense in the underlying litigation.

In addition, unlike the defective pleading in *Zenith Ins. Co. v. O'Connor, supra,* 148 Cal.App.4th 998, the second amended complaint has added detailed facts alleging that Hallmark received status reports, discovery reports, engaged in ongoing discussions with Haight, and was provided strategic litigation recommendations. In essence, it is reasonably inferred from the second amended complaint that Haight deliberately included Hallmark in strategic decisions and provided status and discovery reports to guide that participation. (SAC, ¶ 13.) In particular, the status reports included material recommendations which impliedly gave Hallmark at least some degree of veto authority, and revealed projected, and likely, confidential, strategies. By contrast, in *Zenith Ins. Co*, the reinsurer's admitted lack of control and participation was demonstrated by the law firm's refusal to follow the reinsurer's litigation demands. (*Id*. at p. 1011.)

Consequently, it is reasonably inferable from the new allegations that Haight's treatment of Hallmark was similar to the actual hirer, Praetorian, in its performance of legal services in the underlying litigation. Furthermore, at least for purposes of the underlying litigation, the degree of information (e.g. strategies, recommendations, etc.) provided by Haight implies a unity of interests between both the insurers and the insured. (See *Unigard Ins. Group v. O'Flahery & Belgum* (1995) 38 Cal.App.4th 1229, 1236-1237 [dual attorney-client relationship established where no actual or apparent conflict of interest between insured and insurer exists].) In essence, an insurer can maintain a legal malpractice suit against the law firm hired to defend its insured under an independent duty theory separate from assignment. (*Id*. at pp. 1235-1237.)

Haight contends that its communications with Hallmark were nothing more than "updates," and were only intended to discharge its duty of good faith. Such duty, however, is limited, even when the parties' agreement contains precise procedures and processes. (*Sequoia Ins. Co. v. Royal Ins. Co*. (9th Cir. 1992) 971 F.2d 1385, 1393.) Furthermore, the Ninth Circuit has also held that the duty is discharged simply by notifying the excess insurer that the underlying claim might affect the excess policy. (See *Bohemia, Inc. v. Home Ins. Co.* (1984) 725 F.2d 506, 513-514.) In short, the degree of Hallmark's

involvement in the underlying litigation was elevated beyond simple notification that the excess policy might be affected.

Therefore, the demurrer to the third cause of action is overruled.

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 5/24/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Torres-Amador v. County of Fresno***
Superior Court Case No. 20CECG00420

Hearing Date: May 26, 2022 (Dept. 503)

Motion: Defendant Wellpath's Motion Seeking Terminating Sanctions

Tentative Ruling:

To grant terminating sanctions in favor of defendant Wellpath and against plaintiff Edgar Torres-Amador. Defendant Wellpath is directed to submit to this court, within seven (7) days of service of the minute order, a proposed judgment dismissing itself from this action. Plaintiff is further ordered to pay additional monetary sanctions to defendant Wellpath in the amount of $310.00, payable within 20 calendar days of the date of this order, with the time to run from the service of the minute order by the clerk.

Explanation:

If a party fails to obey an order compelling answers, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction[.]" (Code Civ. Proc., § 2030.290, subd. (c).) This means the court may strike out that party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss a plaintiff's action, or enter a defendant's default and render a default judgment against the defendant. (Code. Civ. Proc., § 2023.030, subd. (d).)

Appellate courts have generally held that before imposing a terminating ("doomsday") sanction, trial courts should usually grant lesser sanctions first, such as orders staying the action until the plaintiff complies, or declaring the matters admitted if answers are not received by a specific date. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) It is only when a party persists in disobeying the court's orders that sanctions such as dismissing an action are justified. The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.) However, where lesser sanctions have been ordered, such as an order compelling compliance with discovery requests, and the party persists in disobeying, the party does so "at his own risk, knowing that such a refusal provided the court with statutory authority to impose other sanctions" such as dismissing the action. (*Id.* at p. 1583; see also *Todd v. Thrifty Corp.* (1995) 34 Cal. App. 4th 986.)

Here, the court continued defendant's motion to give plaintiff one last opportunity to comply with this court's prior orders regarding discovery, namely to serve verifications to the responses already served. Plaintiff did not comply. Therefore, the court finds it appropriate at this juncture to grant terminating sanctions as to this moving defendant.

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 5/24/2022 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Herrera, et al. v. Falcon Private Security, Inc., et al.***
Superior Court Case No. 20CECG03491

Hearing Date: May 26, 2022 (Dept. 503)

Motions: By Defendant Falcon Private Security, Inc. for Terminating Sanctions against Plaintiffs David Herrera and Tiernan Deedon

Tentative Ruling:

To grant the two motions for terminating sanctions against plaintiffs, as plaintiffs have willfully refused to comply with this court's orders compelling them to respond to discovery. (Code Civ. Proc., § 2023.010, subd. (g); 2030.290, subd. (c); 2031.300, subd. (c).) To dismiss the action against defendant Falcon Private Security, Inc. ("Falcon Security") only. Falcon Security shall submit a proposed judgment consistent with this court's order within 10 days of the date of service of this order by the clerk.

To award monetary sanctions in the amount of $765 against plaintiffs and their attorney of record, Justin B. Toobi, jointly and severally, payable within 30 days of the date of service of this order by the clerk.

Explanation:

Service of Underlying Motions

Code of Civil Procedure section 1013, subdivision (a) provides that service by mail is effective if the documents are "addressed to the person on whom it is to be served, *at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence*." (Code Civ. Proc., § 1013, subd. (a), emphasis added.)

Plaintiffs' counsel, Justin B. Toobi's last address of record with the court is: 724 S. Spring Street, Suite 201, Los Angeles, CA 90014 ("Spring Street Address"). However, the proofs of service for Falcon Security's motions to compel discovery (the underlying motions giving rise to the motion for terminating sanctions), filed on July 8, 2021, indicate that each plaintiff was served by mail to Mr. Toobi, at 5101 Santa Monica Blvd., Suite 291, Los Angeles, CA 90029 ("Santa Monica Address").

While defense counsel acknowledges that he served the underlying discovery motions on Mr. Toobi at the Santa Monica Address, he contends that he served Mr. Toobi at his Santa Monica Address in good faith and to ensure that Mr. Toobi would actually receive notice of the motions. Defense counsel advises that Mr. Toobi provided written notice of his change of address to him, prior to the filing of the discovery motions on July 8, 2021. (Supp. Brief, 4:2-3; Larsen Decl.) Defense counsel further states that Mr. Toobi previously complained when discovery requests were mailed to his prior address, the Spring Street Address, instead of his new address, the Santa Monica Address. (Larsen

Decl., ¶ 3.) Additionally, all correspondence defense counsel has received from Mr. Toobi since June 23, 2021 reflects the Santa Monica Address. (Larsen Decl., ¶ 4, Exs. 1, 2.)

Defense counsel also notes that Mr. Toobi's attorney information on the California State Bar website identifies the Santa Monica Address (Larsen Decl., ¶ 6, Ex. 4), and that a minute order served by the Los Angeles Superior Court on June 15, 2021, to the Spring Street Address in *Gabriel Flores, et al. v. Medicali Holdings, Inc.*, Case No. 19STCV31058, was returned to the court as undeliverable, with a handwritten message showing: "FWD Justin B. Toobi 5101 Santa Monica Blvd #291, Los Angeles, CA 90029 (Supp. Brief, 3:27-28; 4:1-3; Request for Judicial Notice, Ex. C).[1] The court also notes that a minute order served on Mr. Toobi on December 28, 2021 in the instant case was also returned undeliverable with a handwritten message showing: "No longer @ this address [*sic*] FWD: 5101 Santa Monica Blvd, #291 Los Angeles, CA 90029 [*sic*]." (December 28, 2021 Returned Mail—Certificate of Mailing.)

"An attorney or self-represented party whose mailing address, telephone number, fax number, or e-mail address … changes while an action is pending must serve on all parties and file a written notice of the change." (Cal. Rules of Court, rule 2.200.) "[T]he person to be served has the burden of notifying the court of any change of address, and failure so to do does not enable him to claim improper notice." (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 31, quoting *Bethlahmy v. Customcraft Industries, Inc.* (1961) 192 Cal.App.2d 308, 310, internal quotations omitted.) Defense counsel has sufficiently shown proper notice of the underlying motions to Mr. Toobi.

Terminating Sanctions

If a party fails to obey an order compelling answers, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction[.]" (Code Civ. Proc., § 2030.290, subd. (c).) This means the court may strike out that party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss a plaintiff's action, or enter a defendant's default and render a default judgment against the defendant. (Code. Civ. Proc., § 2023.030, subd. (d).)

Appellate courts have generally held that before imposing a terminating ("doomsday") sanction, trial courts should usually grant lesser sanctions first, such as orders staying the action until the plaintiff complies, or declaring the matters admitted if answers are not received by a specific date. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) It is only when a party persists in disobeying the court's orders that sanctions such as dismissing an action are justified. The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.) However, where lesser sanctions have been ordered, such as an order compelling compliance with discovery requests, and the party persists in disobeying, the party does so "at his own risk, knowing that such a refusal provided the court with statutory authority to impose other sanctions" such as dismissing the action. (*Id.* at p. 1583; see also *Todd v. Thrifty Corp.* (1995) 34 Cal. App. 4th 986.)

[1] Defendant's request for judicial notice is granted. (Evid. Code, § 452, subd. (d).)

Here, on December 9, and December 16, 2021, the court ordered plaintiffs to serve verified responses to the discovery requests at issue within 10 days of the court's service of the order, as well as to pay a combined total amount of $1,137.50 in monetary sanctions within 20 days of service of the order. Defense counsel further sent plaintiffs' counsel a reminder email, and offered again to meet and confer regarding the issues. Plaintiffs, however, never served verified responses to any of the discovery requests; nor have they paid the monetary sanctions as ordered. There is no evidence indicating that plaintiffs' counsel has made any attempt to communicate with defense counsel regarding the discovery requests since the orders were made.

Therefore, it appears that plaintiffs are willfully refusing to comply with the court's orders compelling them to respond to the discovery requests, as well as the orders to pay monetary sanctions. Lesser sanctions would not likely be effective in obtaining plaintiffs' compliance, as it appears they have no interest in responding to Falcon Security's discovery or otherwise participating in the action. As a result, the court grants the motions for terminating sanctions and orders the action against Falcon Security dismissed. The court awards monetary sanctions in the amount of $765 against plaintiffs and their attorney, which represents three hours of attorney time and the filing fees for the motions.

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 5/24/2022 .
(Judge's initials) (Date)