Tentative Rulings for November 10, 2021
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).)

19CECG03930 ***Vargas v. Fowler Packing Company, Inc.*** **(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.

11CECG04395 ***Switzer v. Flournoy Management, LLC*** **is continued to Thursday, November 18, 2021 at 3:30 p.m. in Dept. 502**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Hernandez v. BB&T***
Superior Court Case No. 21CECG03053

Hearing Date: November 10, 2021 (Dept. 502)

Motion: Petition for Relief from Financial Obligation During Military Service

Tentative Ruling:

To deny without prejudice.

Explanation:

Under both California Military and Veterans Code section 409.3, and Title 50 of the United States Code, section 4021, the relief sought by petitioner may only occur after notice and a hearing. The petition shall be served at least 10 days before the hearing. (Mil. & Vet. Code, § 409.3, subd. (b).) "Service of the petition for relief and all supporting papers must be made in the manner provided by law for service of summons in civil actions." (Cal. Rules of Court, rule 3.1372(b).)

Pursuant to Code of Civil Procedure section 416.10:

A summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods:

(a) To the person designated as agent for service of process as provided by any provision in Section 202, 1502, 2105, or 2107 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code, as in effect on December 31, 1976, with respect to corporations to which they remain applicable).

(b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process.

(c) If the corporation is a bank, to a cashier or assistant cashier or to a person specified in subdivision (a) or (b).

(d) If authorized by any provision in Section 1701, 1702, 2110, or 2111 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code, as in effect on

> December 31, 1976, with respect to corporations to which they remain applicable), as provided by that provision.

Here, the proof of service of summons filed with the Court on October 28, 2021 shows service on respondent BB&T Bank, aka Truist Bank directly, rather than service on a person listed under Code of Civil Procedure section 416.10. (See *Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1434, as modified on denial of rehg. (May 26, 1994) [service was invalid when two out-of-state corporations were served by mail with a summons sent directly to the corporate defendant, rather than the persons listed in Code of Civil Procedure section 416.10; the plaintiff must comply with Code of Civil Procedure sections 415.40 and 416.10].) Here, the proof of service of summons indicates that service on respondent was effectuated pursuant to Code of Civil Procedure section 415.40.

Code of Civil Procedure section 415.40 states as follows:

> A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

To serve a corporation by mail outside the state pursuant to Code of Civil Procedure section 415.40, the summons must be mailed to a person to be served on behalf of the corporation, i.e., an individual specified in Code of Civil Procedure section 416.10. (*Dill v. Berquist Construction Co*., *supra*, 24 Cal.App.4th 1426, 1427.) "Service on a corporation ... can only be accomplished by serving some individual as its representative." (*Id*. at p. 1435.) Here, item 3b of the proof of service of summons fails to identify any such person to be served on behalf of respondent. Additionally, the petition and supporting papers were mailed directly to respondent, rather than to any of the statutorily described persons to be served. (See Code Civ. Proc., § 416.10.) As the statutory requirements for service have not been met, the petition cannot be granted at this time.

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 11/4/2021.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***People v. Bruno's Iron & Metal, L.P.***
Superior Court Case No. 20CECG03209

Hearing Date: November 10, 2021 (Dept. 502)

Motion: Demurrer and Motion to Strike re First Amended Complaint

Tentative Ruling:

To deny the motion to strike. To sustain the demurrers to the 5th, 6th, 7th, 8th and 9th causes of action, without leave to amend. To overrule the demurrers to the 3rd and 4th causes of action. Defendant shall file its answer to the First Amended Complaint ("FAC") within 10 days of service of the order by the clerk.

Explanation:

Motion to Strike

A defendant may move to strike allegations from a pleading in two situations: (a) the allegation is "irrelevant, false, or improper" or "superfluous" or "abusive" and (b) where the "pleading was not drawn in conformity with the laws of the state or a court rule." (Code Civ. Proc., § 436, subd. (a), (b).)

The motion to strike is denied for two reasons. First, it is moot as to the 5th through 9th causes of action, as the demurrers to those causes of action are being sustained without leave to amend.

Second, the moving papers fail to specify what they move to strike. The notice of motion is defective, and defendant does not clarify the matter in the points and authorities. The Notice of Motion states that defendant "moves to strike the injunctive relief demands in all causes of action and in the prayer for relief, and the penalty claims in the Third thru Ninth Causes of Action in the FAC."

If only some sentences or phrases are sought to be stricken, these must be quoted verbatim in the notice of motion. But this does not apply where the motion to strike is directed to the entire pleading, or to some paragraph, count or cause of action therein. (Cal. Rules of Court, Rule 3.1322.) The notice of motion does not specifically identify any allegation, paragraph or prayer to be stricken. The notice needs to be precise; the court is not required to interpret the notice of motion to determine what paragraphs or allegations defendant intends to attack.

Demurrer

Defendant attacks the 3rd through 9th causes of action on the ground that the statutes of limitations have run on all remedies sought (injunction and civil penalties) – without a remedy there is no cause of action.

Plaintiff only opposes the demurrer with regards to the 3rd through 6th causes of action, apparently conceding the demurrers to the 7th through 9th. (See Oppo. 2:12-16.) Accordingly, for the reasons stated in the moving papers, the demurrers to the 7th through 9th causes of action are sustained without leave to amend.

The court notes that to the extent there is *any* remedy available for *any* violation alleged in a cause of action, the demurrer must be overruled. A general demurrer does not lie to only part of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer. (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1167.) Substantive defects in a *portion* of the pleading can be challenged by a motion to strike. (*Id.* at p. 1167.) Thus, to the extent the First Amended Complaint seeks any remedy that is not barred by the applicable statute of limitations, the demurrer to that cause of action must be overruled.

"A demurrer on the ground of the bar of the statute of limitations lies where it "appear[s] clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred." (*Valvo v. Univ. of Southern California* (1977) 67 Cal.App.3d 887, 895; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1155.) Where a complaint discloses on its face that the statute of limitations has run on the cause of action stated in the complaint, it fails to state facts sufficient to constitute a cause of action. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833, rehg. denied, review denied.)

Defendants contend that the four year limitations period of Code of Civil Procedure section 343 applies to plaintiff's requests for injunctive relief, and the five year statute of section 338.1 applies to the requests for civil penalties. Plaintiff contends that the five year statute applies to both remedies.

In this case the court need not make a determination as to which statute of limitation applies to the claims for injunctive relief for three reasons: (a) as noted above, the motion to strike fails to clearly specify which portions of the FAC are being challenged; (b) to the extent claim for civil penalties are available for any alleged violation, the cause of action survives even if injunctive relief is barred by the statute of limitations; and (c) if all claims for civil penalties in a cause of action are barred by the five-year limitations period of section 338.1, then injunctive relief would also be untimely, whether the limitations period is four or five years.

When the Clock Started

Defendants contend that the limitations period started running on the date of the inspections—March 26/27, 2013. Plaintiff contends that, as to the 3rd through 6th causes of action, it is the date the lab test results came back showing that samples contained hazardous waste—May 6, 2013.

This argument of plaintiff's is in essence a delayed discovery argument.

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have **accrued.**" (Code Civ. Proc., § 312, emphasis added.) "Under the delayed discovery rule, a cause of action accrues

and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action." (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 803.)

Plaintiff points out that the FAC alleges that 14 sets of samples were taken from Bruno's facility during the March 26 and 27, 2013 inspections. These samples were sent to an outside laboratory for multiple tests to determine whether they constituted hazardous waste. (FAC ¶ 36.) The lab reports for Toxicity Characteristic Leaching Procedure (TCLP) were received by DTSC on or about May 6, 2013. (Ibid.) All fourteen samples exceeded hazardous waste regulatory thresholds for soluble lead. (FAC ¶ 37.) Eleven of the samples also exhibited hazardous waste characteristics of toxicity due to copper, zinc, lead, mercury, cadmium, chromium, and/or PCB. (Ibid.) Plaintiff contends that had the laboratory reports showed that the samples taken from Bruno's facility were not hazardous under California law, DTSC would have no basis for the 3rd through 6th Causes of Action. (See Health & Saf. Code, § 25117.)

In response, defendants contend that the original Summary of Violations ("SOV") shows that the DTSC had direct knowledge of the alleged violations on March 27, 2013, when it issued its SOV to defendant.

The FAC alleges that DTSC issued the original SOV on March 13, 2017. (FAC ¶ 39.) Despite the fact that the original SOV is not attached to the FAC, defendants submit it with the reply and a Request for Judicial Notice as an "[o]fficial act[] of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (b), (c).) The Code specifically authorizes the court to consider, as ground for demurrer, any matter which the court must or may judicially notice under Ev.C. §§ 451 or 452. (Code Civ. Proc., § 430.30, subd. (a).) The request for judicial notice is granted.

The question is whether plaintiff already had notice, as of issuance of the SOV, of the violations alleged in the 3rd through 6th causes of action. The court has reviewed the SOV and compared it to the violations alleged in the FAC.

The 3rd cause of action alleges that defendant "violated Health and Safety Code section 25201, subdivision (a), by unlawfully engaging in the physical treatment of hazardous waste at the Facility without a hazardous waste facilities permit or other grant of authorization from DTSC by using a trommel to separate metals from trommel fines, ***and*** by processing major appliances that **still contained** MRSH [Materials Requiring Special Handling] through the baler or logging machine. As noted in Paragraphs 35 through 37, supra, analytical results of samples taken by DTSC of dust, debris, and contaminated soil from various areas of the Facility revealed that the samples exceeded hazardous waste thresholds." (FAC ¶ 58, emphasis added.)

The first alleged violation (operating without a permit) does not depend on the test results. Thus, the clock started ticking as to that violation on March 26, 2013. As for the second violation, there is nothing in the SOV pertaining to processing appliances containing MRSH through the bailer or logging machine. The clock started ticking on the second violation alleged in the 3rd cause of action on May 6, 2013.

The 4th cause of action alleges that "DTSC inspectors observed on bare ground, or in bins that were not leak-proof, covered, and/or properly labeled: (1) soil and debris from the small and big shear operations; (2) various items of e-waste, capacitors, printed circuit boards, alkaline, nickel-cadmium, and lead acid batteries, and electrical lighting ballasts; and (3) a large pile of refrigeration compressors containing MRSH (compressor oil). Additionally, DTSC inspectors observed large amounts of dust and dirt drifting off the end of the big shear onto the adjacent property and large areas of bare ground around the Facility covered with a very fine layer of dirt or dust that had the consistency of powder. Walking across this powdered dirt created small clouds of dust with every step, and the application of water as a dust control measure caused clouds of dust to become airborne. As noted in Paragraphs 35 through 37, supra, analytical results of samples taken by DTSC of dust, debris, and contaminated soil from various areas of the Facility revealed that the samples exceeded hazardous waste thresholds." (FAC ¶ 63.) None of this is referenced in the original SOV so as to compel the conclusion that the clock started ticking on the date of the inspection. Accordingly, as to these allegations the clock started ticking on May 6, 2013.

The 4th cause of action contains additional allegations that track the language item 3 in the SOV. (See FAC ¶ 64.) So the clock as to those violations would have started on the date of the inspection (March 26), since those violations were apparent then.

The 5th cause of action alleges that on March 26, 2013 "Bruno's failed to make hazardous waste determinations as to whether waste generated from its shearing and metal handling and processing operations …" (FAC ¶ 69.) Similarly, the 6th cause of action alleges that on March 26, 2013 "Bruno's failed to properly prepare at least sixteen (16) Uniform Hazardous Waste Manifests when it failed to enter its own correct EPA identification number on the manifests." (FAC ¶ 74.)

The violations alleged in the 5th and 6th causes of action – failure to make determinations and failure to properly prepare manifests – are not dependent on whether any hazardous waste actually existed at that time. Accordingly, the clock started ticking on the 5th and 6th causes of action on March 26, 2013.

Emergency Rule 9

Contrary to defendant's argument that Emergency Rule 9 should be construed narrowly, the first line of the Advisory Committee Comment to Emergency Rule 9 reads "Emergency Rule 9 is intended to be construed broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil cause of action."

Emergency Rule 9 states, in relevant part, "Notwithstanding any other law, the statutes of limitations and repose for civil actions that exceed 180 days are tolled from April 6, 2020, until October 1, 2020."

Defendant does not cite to any authority providing that Rule 9 would not further extend the end date of the limitations period just because it has already been extended by a tolling agreement. The court finds that the clock was going to start ticking again on May 11, 2020 (end of the tolling agreement period), but Rule 9 provides further tolling,

such that the clock does not start ticking again until October 1, 2020. Add however many days are left to October 1, 2020, and that is the new last day to file.

The Math – Civil Penalties

Plaintiff alleges that as a result of the tolling agreements, DTSC and defendant agreed that "the period from March 14, 2018 through May 11, 2020 (the 'Tolling Period') would not be included in computing the time limit by any statutes of limitations that are applicable to the causes of action brought against Bruno's based on any claims covered by the tolling agreement. In those tolling agreements, Bruno's further agreed not to assert, plead or raise against DTSC in any fashion, whether by answer, motion or otherwise, any defense or avoidance based on the running of any statute of limitation during the Tolling Period. Those claims include the Causes of Action alleged in this Complaint." (FAC ¶ 9.) The tolling agreements are not provided, so we can only go with plaintiff's description.

As Rule 9 further tolled the statute of limitations to October 1, 2020, that is when the clock should start ticking again.

Scenario A: Clock started March 26, 2013.
March 26, 2013 to March 26, 2018 (5 years) = 1,826 days.
Days run as of March 14, 2018 (start of tolling agreement) = 1,814 days.
Days left on the clock on March 14, 2018, and therefore remaining on October 1, 2020 when the clock started ticking again = 12 days.
Last day to file: 10/13/20.
Complaint filed: 10/30/20.

Scenario B: Clock started May 6, 2013.
May 6, 2013 to March 26, 2018 (5 years) = 1,826 days.
Days run as of March 14, 2018 (start of tolling agreement) = 1,773 days.
Days left on the clock on March 14, 2018 (start of tolling), and therefore remaining on May 11, 2020 when the clock started ticking again = 53 days.
Last day to file: November 23, 2020.
Complaint filed: October 30, 2020.

Accordingly, the court concludes that the 5-year statute did not run as to as least portions of the 3rd and 4th causes of action, and the demurrers to those causes of action should be overruled as some remedy remains available. The limitations period did expire as to all claims for civil penalties under the 5th and 6th causes of action. Accordingly, there is no remedy available for the violations alleged in the 5th and 6th causes of action – if claims subject to a five-year statute are untimely, violations subject to a four-year statute would be untimely as well.

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 11/8/2021 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Provenzano v. City of Fresno, et al.***
Superior Court Case No. 21CECG01263

Hearing Date: November 10, 2021 (Dept. 502)

Motion: By Defendant City of Fresno for leave to file a cross-complaint

Tentative Ruling:

To grant. Defendant City of Fresno is granted 10 days leave from the date of this order to file their cross complaint.

Explanation:

Leave to file a cross-complaint "shall" be granted so long as defendant is acting in good faith. (Code Civ. Proc. § 426.50; see *Silver Organizations Ltd v. Frank* (1990) 217 Cal.App.3d 94, 98-99 [factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith]; *Carroll v. Import Motors, Inc.* (1995) 33 Cal.App.4th 1429, 1436; *Foot's Transfer & Storage Co. v. Superior Court* (1980) 114 Cal.App.3d 897, 90 ["It is preferable that the parties have their day in court."].)

Defendant City of Fresno moves for leave to file a cross complaint under the statutory basis provided in Code of Civil Procedure, section 426.50. (See Notice of Motion, pg. 2:11-15.) The moving attorney has submitted a declaration which attaches the proposed pleading and claims that information learned during discovery prompted its necessity. There is no opposition to the motion, there is no assertion that moving defendant is acting in bad faith, and trial is not scheduled until March, 2023. Therefore, it appears in the interests of justice to allow Defendant City of Fresno leave to file the proposed cross complaint. The motion is granted.

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 11/8/2021.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Roundpoint Mortgage Servicing Corporation v. Smith***
Superior Court Case No. 20CECG01214

Hearing Date: November 10, 2021 (Dept. 502)

Motion: Plaintiff's Motion for Order Substituting Freedom Mortgage Corporation as Plaintiff

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiff Roundpoint Mortgage Servicing Corporation ("Roundpoint") has transferred its interest in the subject Note through an Assignment of Deed of Trust to Freedom Mortgage Corporation ("Freedom"), and it seeks by this motion to have Freedom substituted in its place as plaintiff. However, no proof of service was filed showing that Freedom has any knowledge of this motion.

"An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding *may* be continued in the name of the original party, or the court *may* allow the person to whom the transfer is made to be substituted in the action or proceeding." (Code Civ. Proc., § 368.5.) "Under the case law construing that statute, trial courts have discretion to allow litigation to continue in the name of the original plaintiff rather than substitute the transferee." (*Hearn Pacific Corp. v. Second Generation Roofing, Inc.* ("*Hearn*") (2016) 247 Cal.App.4th 117, 133; see also *Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1345; *Parker v. Superior Court* (1970) 9 Cal.App.3d 397, 400.)

The court continued the initial hearing in order to allow Roundpoint to serve Freedom with the notice of motion and a copy of the minute order from the hearing on October 14, 2021. No proof of service has been filed, so 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: RTM on 11/9/21.
(Judge's initials) (Date)