Tentative Rulings for January 18, 2023
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.

21CECG00151 ***Ramiz v. Older Americans Housing, Inc*****. is continued to Thursday, February 8, 2023, at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(03)

Tentative Ruling

Re: ***CMG Construction Management Group, Inc. v. City of Fresno***
Superior Court Case No. 22CECG00271

Hearing Date: January 18, 2023 (Dept. 503)

Motion: By Defendant County of Fresno to Expunge Lis Pendens and for Attorney's Fees and Costs

Tentative Ruling:

To grant Defendant County of Fresno's motion to expunge the lis pendens. (Code Civ. Proc. §§ 405.30, 405.32.) To deny defendant's motion for attorney's fees and costs, without prejudice, as defendant has not provided any evidence to support the requested amount of fees and costs. (Code Civ. Proc. § 405.38.)

Explanation:

Under Code of Civil Procedure section 405.30, any party, or any nonparty with an interest in real property affected by a lis pendens, can move to expunge the lis pendens at any time after the notice of pendency of action has been recorded. (Code Civ. Proc. § 405.30.) "Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice. The claimant shall have the burden of proof under Sections 405.31 and 405.32." (*Ibid*.) "[T]he court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc., § 405.32.)

"Unlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim. [Citation.]" (*Kirkeby v. Superior Court of Orange County* (2004) 33 Cal.4th 642, 647.) A motion to expunge under section 405.32 requires an evidentiary hearing on the probability that the plaintiff will be able to establish a valid real property claim. (*BGJ Associates, LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 957.) "'Probable validity,' with respect to a real property claim, means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." (Code Civ. Proc., § 405.3.)

"The 'probable validity' standard was added to the lis pendens statute in 1992 to override the decision in *Malcolm v. Superior Court* (1981) 29 Cal.3d 518, 527 [174 Cal.Rptr. 694, 629 P.2d 495], and other cases holding that the trial court on a motion to expunge may not conduct a 'minitrial' on the merits of the case. The statute changed the law to require a judicial evaluation of the merits of the underlying claim. Unlike other motions, the burden is on the party opposing the motion to expunge - i.e., the claimant-plaintiff - to establish the probable validity of the underlying claim. The claimant-plaintiff must establish the probable validity of the claim by a preponderance of the evidence… That is, the plaintiff must 'at least establish a prima facie case. If the defendant makes an

appearance, the court must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.'" (*Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319, internal citations and footnotes omitted.) "Thus, a showing of good faith and a proper purpose are no longer sufficient to overcome a motion to expunge. The claimant must show a probably valid claim." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1378, internal citation omitted.)

Also, "section 405.38 requires, rather than authorizes, the court to award attorney fees and costs to the prevailing party on a motion to expunge, unless it finds that the other party acted with substantial justification or that other circumstances would make the imposition of fees and costs unjust." (*Id*. at p. 1378.)

Here, defendant County of Fresno contends that plaintiff has no probability of prevailing on its real property claims regarding the subject property because it did not have the ability to obtain financing to pay for the purchase of the property as shown by the numerous extensions of time it needed to complete the transaction, and the City of Fresno revoked the "regulatory agreement" that was a necessary condition precedent to the purchase agreement, which meant that the purchase agreement could not have been completed. Also, to the extent that plaintiff alleges that the County and City committed fraud by failing to disclose the fact that the City was considering revoking the regulatory agreement until March 30, 2021, just before escrow was set to close, the County claims that it gave plaintiff notice that the City no longer wanted to carry out the regulatory agreement in November of 2020, several months before the escrow was going to close. (Cederborg decl., ¶¶ 35-43, and Exhibits 13-19 thereto.) Despite being notified of the City's reluctance to carry out the regulatory agreement, plaintiff executed two additional amendments to the purchase agreement, including agreeing that its $500,000 deposit would be nonrefundable if the deal fell through. (*Id*. at ¶¶ 45-46, 50-59.) Therefore, the County contends that plaintiff has no probability of prevailing on its fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, specific performance, or declaratory relief claims, and the motion to expunge the lis pendens must be granted.

In its opposition, plaintiff claims that it has a probability of prevailing on its claims because the City's consent to the regulatory agreement was not a necessary condition precedent to the purchase agreement, plaintiff had secured financing for the purchase, the County's breach of the purchase agreement excused plaintiff from having to perform its duties under the agreement, and the County and City conspired to kill the purchase agreement so that the County could sell the property to the City for a $2 million profit.

Plaintiff's President, Mark Stevenson, asserts in his declaration that plaintiff had secured financing to close escrow through Professional Lenders. (Stevenson decl., ¶ 2.) He states that the financing was based on "the current positions of the deal, which included the signed 'Regulatory Agreement from the City of Fresno.'" (*Ibid*.) However, he also admits that "[t]his change [presumably the City's change of heart regarding carrying out the regulatory agreement] created certain questions." (*Ibid*.) On the other hand, he states that, "[a]t all times, financing was available to move forward with the project on April 1, 2021 and continued thereafter." (*Ibid*.) "The major question was which

entity would take over the monitoring required by the Regulatory Agreement." (*Ibid*.) He also claims that "[t]his change of the 'Regulatory Agreement' was not considered material to the lenders in relation to whether the project would be funded." (*Ibid*.)

First, Stevenson's statements regarding the availability of financing for the purchase are not supported by any documentation or other evidence to show that financing was actually available. Presumably, if plaintiff had actually secured financing for the purchase, which would have required a loan for millions of dollars, there would be a written financing agreement and other documents such as letters or emails to indicate that the lender had agreed to fund the deal. The fact that Stevenson has not provided any such documents undermines his claim that financing was available.

Stevenson's claim to have secured financing is also called into question by the fact that plaintiff had to request numerous extensions of the escrow closing date in order to secure financing, and its ongoing problems with obtaining financing for the purchase. Stevenson seems to admit that the lenders had some concern with having someone else take over the regulatory agreement in the event that the City revoked its consent to the agreement, and he admits that the County was not willing to use another entity to oversee the regulatory agreement if the City dropped out. Given the City's clear reluctance to carry out the regulatory agreement and its last-minute decision to revoke the agreement, it is difficult to believe that any lender would have been willing to extend financing for the purchase until another entity had agreed to take over the regulatory agreement. Since Stevenson admits that the County was not willing to consider having a different entity like a private company oversee the project, Stevenson's claim to have secured financing for the purchase is not credible, especially since it is unsupported by any documents or other evidence.

Plaintiff has also argued that the City's willingness to carry out the regulatory agreement was not a condition precedent to the purchase of the property, and that another entity like the County or a private company could have carried out the monitoring duties under Government Code section 25539.4. However, the County has provided evidence that it repeatedly told plaintiff that it was not willing or able to perform the monitoring duties required under section 25539.4, nor was it willing to agree to have a private company perform those duties. (Cederborg decl., ¶¶ 8-14, 53, 61, 64.) The County's position had always been that the City needed to agree to monitor the project, or the purchase could not go forward. (*Ibid*.) Indeed, the purchase agreement itself clearly states that the agreement was contingent on the City executing the regulatory agreement and assuming the monitoring duties under section 25534.9. (Exhibit 4 to Cederborg decl., Purchase Agreement, p. 9, ¶ 4.02(h) i, ii, iii.) "The sale of the Real Property in this Agreement shall be expressly contingent on the City of Fresno's City Council legally approving and executing the Regulatory Agreement as a party, and assuming all rights and obligations of the Seller under said Regulatory Agreement." (*Id*. at p. 9, ¶ 4.02(h) ii.)

Therefore, plaintiff's contention that the City's agreement to perform monitoring duties under section 25539.4 was not a necessary condition precedent to the purchase of the property is unsupported and inconsistent with the plain language of the parties' agreement. Also, while plaintiff contends that another entity could have performed the duties under the regulatory agreement, the County was unwilling to agree to have any

entity other than the City perform the monitoring duties, and the parties specifically structured the purchase agreement to make the City's execution of the regulatory agreement a requirement prior to the close of the purchase agreement. Likewise, while plaintiff argues that the regulatory agreement could have been carried out later because the residential units would not be completed for years after the close of escrow, the parties expressly agreed that the purchase would not go forward unless the City executed and assumed the statutory monitoring duties under the regulatory agreement. (Purchase Agreement, p. 9, ¶ 4.02(h) i-iii.)

There is no dispute that the City revoked its consent to the regulatory agreement before escrow closed. (Cederborg decl., ¶ 63.) As a result, plaintiff has failed to show that the County breached the purchase agreement, because the City's revocation of the regulatory agreement meant that the purchase agreement could no longer go forward due to the failure of a necessary condition precedent to the agreement. Also, plaintiff has failed to meet its burden of showing that it had the necessary financing to complete the purchase even if the City had not revoked the regulatory agreement.

Moreover, to the extent that plaintiff has alleged that the County breached the implied covenant of good faith and fair dealing or committed fraudulent concealment by failing to disclose to plaintiff that the City was going to revoke the regulatory agreement, the evidence presented by the County shows that County Counsel sent plaintiff's counsel several emails in November of 2020, months before escrow was set to close, that the City considered the regulatory agreement to be expired and that the deal was "dead". (Cederborg decl., ¶¶ 35-43, and Exhibits 13-19 thereto.) Nevertheless, despite being notified of the City's intent to abandon the regulatory agreement, plaintiff executed two additional amendments to the purchase agreement, including an agreement that its $500,000 deposit would be nonrefundable if the deal fell through. (*Id*. at ¶¶ 45-46, 50-59.) Thus, it is difficult to see how plaintiff can prevail on its fraud or breach of implied covenant claims given the fact that the County had repeatedly told plaintiff that the City was having second thoughts about the regulatory agreement, and that it was likely to back out of the agreement.

Plaintiff does not deny any of these facts, but contends that the County is still liable for fraud and breach of the implied covenant because it did not affirmatively tell plaintiff that the City was revoking the regulatory agreement until just before escrow was set to close. Stevenson alleges that he was not aware of the fact that the City considered the regulatory agreement to be expired and that it no longer wanted to participate in the agreement until March 19, 2020. (Stevenson decl., ¶¶ 16, 17.)

However, Stevenson's denial of any knowledge that the City no longer wanted to participate in the regulatory agreement lacks credibility in light of the fact that County Counsel had sent multiple emails to plaintiff's counsel since November of 2020, in which he repeatedly stated that the City was expressing reservations about the regulatory agreement, that the City considered the agreement to be expired and "dead", and that the parties would need to get the City "back on board" with the regulatory agreement in order to allow the purchase agreement to go forward. (Cederborg decl., ¶¶ 35-43, and Exhibits 13-19 thereto.) Plaintiff has not denied that it received these emails, nor could it credibly do so given that plaintiff's counsel replied to many of them and appeared to understand that the City was likely to pull out of the regulatory agreement.

While the County may not have affirmatively stated that the City was going to revoke the regulatory agreement, the message of the emails was clear that the City did not consider itself bound by the regulatory agreement and did not intend to perform its duties under it. Therefore, the plaintiff has failed to show that the County concealed or failed to disclose that the City was not going to perform under the regulatory agreement.

Plaintiff also alleges that the County conspired with the City to undermine the purchase agreement, and assisted it by giving it legal advice on how to revoke the regulatory agreement and prevent the purchase agreement from being completed. The City then purchased the property from the County for $2 million more than what plaintiff was going to pay. Plaintiff contends that the County and the City entered into this scheme in order to allow the County to sell the property for a profit. It argues that the County should not be allowed to take actions to make the performance of the agreement impossible, and then use the failure of the condition precedent as an excuse to escape liability for its conduct.

However, plaintiff fails to present any evidence to support its claim of a conspiracy between the County and the City other than the declaration of Stevenson, which appears to be based on nothing more than speculation. Stevenson claims that County Counsel advised the City on how to revoke the regulatory agreement, and thus created the circumstances that the County used as an excuse to refuse to complete the purchase agreement. (Stevenson decl., ¶¶ 4 – 6, 8, 18.) Yet Stevenson cites to no documents or other evidence to support his claim that County Counsel gave legal advice to the City about revoking the regulatory agreement. Instead, he seems to be speculating that County Counsel gave advice to the City in order to help it revoke the agreement.

Stevenson may be referring to the email that County Counsel sent to the City on March 12, 2021, in which County Counsel explained to the City Attorney that the regulatory agreement had not expired, that it contained no expiration date, and that the City had not formally revoked the agreement. (Cederborg decl., ¶ 48, and Exhibit 22 thereto.) Yet the letter does not contain any statements that constitute legal advice to the City, and instead it appears to be an attempt by the County to persuade the City to keep its original promise to perform under the regulatory agreement by pointing out that the agreement had not expired or been revoked, and thus was still binding on the City. In fact, the letter seems to hint that, if the City did not perform under the agreement, plaintiff might sue for breach of contract. (*Ibid*.) Therefore, there is no evidence to support plaintiff's assertion that the County and the City conspired together to have the City revoke the regulatory agreement, or to kill the purchase agreement so that the City could later buy the property itself.

Plaintiff's other claims for specific performance and declaratory relief are dependent on the viability of the breach of contract, breach of implied covenant, or fraud claims. Since plaintiff has not shown that it has a probability of prevailing on those claims, the specific performance and declaratory relief claims are likewise unsupported and plaintiff is not likely to prevail on them either.

As a result, plaintiff has failed to meet its burden of showing by a preponderance of the evidence that it has a probability of prevailing on its claims. Consequently, the

court intends to grant the motion to expunge the lis pendens recorded against the property.

Finally, the court intends to deny the County's request for attorney's fees and costs against plaintiff, without prejudice to the County bringing a separate motion for fees. As discussed above, under Code of Civil Procedure section 405.38, "[t]he court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (Code Civ. Proc., § 405.38.) Here, the County is the prevailing party on the motion to expunge, and plaintiff has not shown that it acted with substantial justification or that there are any other circumstances that would make the imposition of sanctions unjust. Therefore, an award of sanctions in favor of the County would normally be mandatory.

In its motion, the County has requested an award of $9,905 in attorney's fees and costs. However, in its reply the County only requests $3,887.50 in fees and costs. In any event, the County has not provided any evidence to support the amount of fees it requests, such as a declaration from counsel stating the hours worked on the case, the tasks performed by counsel, or counsel's hourly rate. Nor has the County provided a breakdown of the costs incurred. Therefore, there is no way for the court to determine whether the requested amount of fees and costs is reasonable, or even whether the fees were incurred in connection with the present motion to expunge. Therefore, the court will deny the request for attorney's fees and costs, without prejudice to the County bringing a separate fees motion.

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: jyh on 1/17/2023.
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***Kangas v. Stoneledge Furniture LLC et al.***
Superior Court Case No. 20CECG01142

Hearing Date: January 18, 2023 (Dept. 503)

Motion: By Defendants to Bifurcate Punitive Damages

Tentative Ruling:

To grant. Trial shall be bifurcated as follows: should a jury find liability on any of the causes of action and liability for punitive damages, the parties will then present evidence on punitive damages. (Civ. Code § 3295(d).)

Explanation:

"The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order … that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case…." (Code Civ. Proc., § 598.) Similarly, Code of Civil Procedure section 1048 provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action … or of any separate issue or of any number of causes of action or issues." (Code Civ. Proc., § 1048, subd. (b).)

These sections are generally relied upon for bifurcation, usually to try issues of liability before damages issues. (*Horton v. Jones* (1972) 26 Cal.App.3d 952, 954.) The objective of bifurcation "is avoidance of the waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff." (*Id*. at p. 955.) The decision to grant or deny a motion to bifurcate issues, and/or to have separate trials, lies within the court's sound discretion. (*Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 503-504 [describing the scope of discretion as "broad"].)

Civil Code section 3295, subdivision (d), provides in relevant part: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294." Our Supreme Court has explained, "As an evidentiary restriction, section 3295(d) requires a court, upon application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. Bifurcation minimizes potential prejudice by preventing jurors from

learning of a defendant's 'deep pockets' before they determine these threshold issues." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777-778.)

Here, as the *Torres* decision makes clear, bifurcation under Civil Code section 3295, subdivision (d) is mandatory, as defendants have made the proper application. Plaintiff has filed a "Conditional Non-Opposition" in which he states he "is not opposed to a motion to bifurcate the trial so long as the Court orders Defendant to produce its financial documents at the end of Phase I during the trial." However, plaintiff cites to no authority for such a condition, and in any event the issue is prematurely raised. The outcome of Phase 1 of the trial will determine whether or not an order regarding the production of financial documents is appropriate. Bifurcation under this section "means that all evidence relating to the *amount* of punitive damages is to be offered in the second phase, while the determination whether the plaintiff is entitled to punitive damages (i.e., whether the defendant is guilty of malice, fraud or oppression) is decided in the first phase along with compensatory damages." (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 919, emphasis in original.)

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: jyh on 1/17/2023.
(Judge's initials) (Date)