

Tentative Rulings for January 25, 2024
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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 above rule also applies to cases listed in this "must appear" section.*

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

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Tentative Ruling

Re: ***Irene Heetebry v. Ken Baker***
Superior Court Case No. 21CECG00475

Hearing Date: January 25, 2024 (Dept. 502)

Motion: (1) By Plaintiff Irene Heetebry for an Award of Attorney Fees
(2) By Plaintiff Irene Heetebry to Amend Judgment

Tentative Ruling:

To grant the motion for an award of attorney fees and award \$150,000.00 in fees in favor of plaintiff Irene Heetebry.

To deny the motion to amend judgment.

Explanation:

Plaintiff Irene Heetebry, an individual and as Trustee of the Miller Family Trust of 2004, ("Plaintiff") seeks an award of attorney fees pursuant to Civil Code section 1717 following judgment after trial, which was entered in favor of Plaintiff against defendants Larry Oakander and Patricia Oakander (collectively "Defendants"). The First Amended Complaint stated one remaining cause of action against Defendants, for breach of installment note. Plaintiff now seeks a fee award of \$407,553.60.

Statutory Grounds

Under Civil Code section 1717, in any action on a contract, where the contract specifically provides that attorney fees and costs, which are incurred to enforce that contract, fees and costs shall be awarded either to one of the parties or the prevailing party. (Civ. Code § 1717, subd. (a).) The court, upon notice and motion by a party, shall determine who is the prevailing party on the contract for the purposes of a fee award. (*Id.*, § 1717, subd. (b)(1).) The prevailing party shall be the party who recovered a greater relief in the action, unless the court determines that there is no party prevailing. (*Ibid.*) Here, on September 5, 2023, judgment was entered in favor of Plaintiff. The judgment found that Plaintiff was entitled to seek, among other things fees. Defendants do not contest that Plaintiff is the prevailing party.

Reasonableness

Counsel for Defendant submits a total of 1,117.8 hours of billed time over the course of more than ten years on this matter at various hourly rates: \$575 per hour for Lenden Webb; \$250 to \$475 per hour for an associate attorney, Christopher E. Nichols, whose experience was not provided; \$250 to \$400 per hour for an associate attorney, Katherine E. Cervantes, who has been admitted to the State Bar in 2021; \$250 per hour for an associate attorney, Amy Tipton, whose experience was not provided; \$90 to \$150 per hour for a law clerk, Daniel Martin, who is also identified as an attorney; \$90 to \$225

per hour for various law clerks; \$100 to \$190 per hour for various paralegals, and \$110 per hour for a billing coordinator, Karen Alvarado. Based on these rates, Plaintiff seeks to set a lodestar at \$203,766.80. Plaintiff as the moving party bears the burden to prove the reasonableness of the number of hours devoted to this action. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1325.)¹ A trial court may not rubberstamp a request for attorney fees, and must determine the number of hours reasonably expended. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271.)

The court finds that some of the hourly rates are high. The reasonable hourly rate is that prevailing in the community for similar work. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The rate is measured in the market place, and reflects several factors: the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002.) No explanation was given as to why the billing rates of Katherine E. Cervantes is reasonable. An attorney of one year of experience in the local community does not have an hourly rate of \$325 per hour. An attorney of two years of experience in the local community does not have an hourly rate of \$400 per hour. These rates are excessive. The court sets the hourly rate for Katherine E. Cervantes at \$250 per hour, generally.

Following review of the 76 pages of entries, the court finds that many of the entries are overly generic (e.g., Notice of Lodgment, Ex. 3, p. 4 ["Office conference with Attorney ART regarding potential strengths and weaknesses of case and best way to proceed with same"]), are more akin to general education than case development (e.g., *id.*, Ex. 3, pp. 8 ["Legal research regarding the 12 different causes of action stated in the original complaint and the elements that must be proven to succeed in litigation for each, for the purpose of including necessary requests for admission in the course of discovery"], 32 ["Research how to get a fee waiver in state court"]), are purely clerical in nature (e.g., *id.*, Ex. 3, p. 10 ["Printed and organized discovery set one documents: request for admissions, request for production of documents, form interrogatories, and special interrogatories, to be sent to each defendant"]; p. 12 ["Prepared a package to be shipped via Ontrac to send the mandatory settlement conference statement to the Mariposa County Courthouse"]), are related to a separate claim (e.g., *id.*, Ex. 3, p. 9 ["Looking into small claims issues of servicing defendants..."]), are duplicative due to handoffs at various times between staff (e.g., *id.*, Ex. 3, p. 9 ["Read through client case file, familiarize with initial issues, facts and general reason for trial"]), or generally address claims that are unique to other defendants other than the present Defendants including various discovery disputes, bankruptcies, and property management (see generally, e.g., *id.*, Ex. 3, pp. 1-15). Some entries are double-billed meetings. (E.g., *id.*, Ex. 3, p. 19.) Some entries are not billable. (E.g., *id.*, Ex. 3, pp. 25 [regarding entries seeking a Westlaw password], 32 [researching the phone number of Mariposa County Superior Court after several entries noting telephone calls with a Mariposa County Superior Court clerk].) Some entries have no discernable purpose. (E.g., *id.*, Ex. 3, p. 29 ["Review of file" following near daily entries in the preceding two weeks].)

¹ The declaration of Deborah K. Boyett is disregarded. The declaration does not support a finding that Boyett, nor any firm she works for is the same as counsel of record, nor is she or a firm she works for noticed as associated with Plaintiff's current representation.

Based on the above, the court finds that many entries duplicate work performed whereby one firm member often conferred or reviewed other firm member's work in a non-supervisory capacity; that many entries are not clearly related to the prosecution of claims against Defendants or are so generically written that the task described has no discernable purpose; that many entries are generally not billable; and that many entries appear to bill for the training of firm members. The court finds that approximately half of the time submitted was not reasonably expended for the prosecution of this action against Defendants. The court reduces the hours submitted by 50 percent. Along with the rate adjustment, the court sets the lodestar in the reduced amount of \$100,000.00.

Plaintiff seeks the employment of a lodestar multiplier. As explained by the California Supreme Court regarding lodestar multipliers, sometimes referred to as fee enhancements:

...the trial court is *not required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof. In each case, the trial court should consider whether, and to what extent, the attorney and client have been able to mitigate the risk of nonpayment, e.g., because the client has agreed to pay some portion of the lodestar amount regardless of outcome. It should also consider the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*. We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate. (See *Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004, 185 Cal.Rptr. 145.) Indeed, the " 'reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors ... the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' " (*Ibid.*) Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139 [emphasis original].)

Once a lodestar is fixed, the lodestar may be adjusted based on certain factors, including: (1) the novelty and difficulty of the questions involved; (2) the skill displayed in presenting them; (3) the extent to which the nature of the litigation precluded other

employment by the attorneys; and (4) the contingent nature of the fee award. (*Id.* at p. 1132, citing *Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 49.)

Here, Plaintiff argues that a multiplier is warranted due to the contingent nature of the representation and the complex nature of the litigation in this action. Though Defendants argue that the action only required the resolution of a breach of written instrument, the original complaint stated more than the sole remaining cause of action against Defendants. The original complaint stated nine causes of action against Defendants.

The court acknowledges the contingent nature of the fee award sought. Though counsel argues that the difficulty of the questions involved and skill required were high, many of the issues raised and much of the time spent in this action was not specific to Defendants compared to other defendants such as Ken Baker. The court nevertheless acknowledges that this action incurred two court trials, two summary judgment motions, and an appeal. The court applies a lodestar multiplier of 1.5. Accordingly, the motion for an award of attorney fees is granted in the amount of \$150,000.00.

Amend Judgment

Plaintiff additionally seeks to amend the September 5, 2023 Judgment ("Judgment"). Plaintiff argues that the Judgment contains a clerical error wherein the Judgment calculates prejudgment interest from April 2, 2012, the date of the original filing of the present action, instead of from July 16, 2007, when the breach of the installment note occurred.

On November 3, 2023, Defendants filed a Notice of Appeal, taken from the Judgment. A trial court is divested of its jurisdiction upon appeal of any matter that is related to the appeal, subject to certain exceptions. (Code Civ. Proc. § 916.) Such an exception is to correct clerical errors. (*Boylan v. Marine* (1951) 104 Cal.App.2d 321, 322.) The trial court retains these powers as inherent. (*Id.*, citing *Haynes v. Los Angeles R. R. Corp.* (1927) 80 Cal.App. 776, 780.) Where a modification increases the losing party's obligation to pay the prevailing party's expenses, the increase is not clerical, but substantial. (*Stone v. Regents of Univ. of Cal.* (1999) 77 Cal.App.4th 736, 743-744.)

Here, Plaintiff correctly notes that the Judgment awarded prejudgment interest. However, the Judgment and Statement of Decision made no specific findings as to a date certain with regards to prejudgment interest. Nor did any of the briefs submitted in connection to this trial by Plaintiff make any specific arguments as to a date certain. As the proposed change in date substantially increases Defendants' obligations under the Judgment, and in the absence of any specific considerations made or submitted on the issue, the court finds that the proposed amendment is not merely clerical. Accordingly, the court finds that it is without jurisdiction to enter an amended judgment while an appeal from the Judgment is pending, and the motion to amend judgment is denied.

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Tentative Ruling

Re: **CSAA Insurance Exchange as Subrogee of Heidi Mathys v. Kohler Co.**
Superior Court Case No. 19CECG04075

Hearing Date: January 25, 2024 (Dept. 502)

Motion: Defendant LSP Product Group Inc.'s Motion for Summary Judgment
against Plaintiff

Tentative Ruling:

To deny defendants' motion for summary judgment, as a triable issue of material fact exists as to the date upon which decedent Heidi Mathys knew or should have known that a claim accrued.

Explanation:

This case arises out of severe water damage which decedent's house sustained after an integrated water supply part located within an upstairs bathroom faucet failed and caused the home to flood. Unfortunately, decedent had suffered a stroke and was not living in her home at the time in question. Decedent stated that she learned of the claim when the water utility contacted her to advise that her water had been shut off following an unusually large spike in water usage. Decedent met the remediation contractor to survey the property the next day, which was November 17, 2016. Decedent notified her insurer (plaintiff) on that same date. Plaintiff paid decedent's claim and, on November 8, 2019, filed a complaint for subrogation against the faucet and water supply part manufacturers. The latter seeks to obtain summary judgment against plaintiff on the grounds that it did not comply with the applicable three (3) year statute of limitations period (a complete defense).

Facts:

Defendant LSP Products Group, Inc. ("LSP") asserts that water damage occurred upon the premises at 38848 Ridge Road, Shaver Lake, California, "for several weeks or months" prior to November 17, 2016. LSP relies upon the bimonthly water bills and a report from remediation contractor (Puma Construction) who estimated damage occurred three (3) to four (4) weeks prior to its inspection. LSP points out that the bimonthly bills evidenced increased water usage and on time payments. LSP argues that such facts were sufficient to place a reasonable person on inquiry notice weeks or months prior to November 17, 2016. (UMF No. 15).

During the processing of the claim, plaintiff made inquiry of the water utility concerning the date damage occurred upon the premises. The water utility opined that it probably occurred during the week of November 14, 2016. (Declaration of Kraemer, Exhibit A). The facts demonstrate that decedent received a telephone call from the utility stating that the water had been shut off (Declaration of Kraemer, Exhibit C) and that she attended inspection by the remediation contractor (Puma Construction) the

