Tentative Rulings for February 1, 2023
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).)

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

19CECG01169 ***FCERA Realty Group, LLC v. Boardwalk at Palm Bluffs, LP*** **is continued to Wednesday, February 2, 2023, at 3:30 p.m. in Department 502**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Financial Pacific Leasing, Inc. v. Sergio Almeida***
Superior Court Case No. 22CECG02060

Hearing Date: February 1, 2023 (Dept. 502)

Motion: Plaintiff's Applications for Writ of Possession and for Writ of Attachment

Tentative Ruling:

To deny in light of the entry of default against defendants Sergio Vivanco Almeida and S&A Installations, LLC on October 5, 2022.

Explanation:

These motions request a prejudgment writ of attachment and a writ of possession, which is proper to request before final adjudication of the claims sued upon. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1476.) However, after serving the moving papers on defendants (served along with the summons and complaint), plaintiff requested entry of defendants' defaults and the clerk entered their defaults on October 5, 2022. The entry of default instantly cuts off a defendant's right to appear in the action or participate in the proceedings unless the default is set aside or judgment is entered (i.e., giving the defendant the right to appeal). (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385.) Due process would not be served by allowing a plaintiff to give the defendant notice of a motion when defendant's right to defend itself regarding that motion had already been cut off. The court notes that plaintiff has requested default judgment against defendants by submitting the default judgment packet, which will be reviewed in due course. After judgment has been obtained it may proceed with all post-judgment enforcement procedures which are available.

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: KCK on 01/31/23.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Montes v. Nissan North America, Inc.***
Superior Court Case No. 21CECG00459

Hearing Date: February 1, 2023 (Dept. 502)

Motion: by Defendant to Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (CCP § 1281.2) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505) "Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute." (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541.)

Defendant Nissan North American, Inc. ("Nissan") moves to compel arbitration of plaintiffs' action on an arbitration clause in a retail installment sales contract ("RISC") made between plaintiffs and the nonparty dealership.

Nissan is not a signatory to the arbitration agreement in question found in the "Retail Installment Sale Contract – Simple Finance Charge (With Arbitration Provision)." (See Liss Decl. Exh. 4.) "Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142, internal quotes and citation omitted.) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352.) Here, Nissan contends it may compel arbitration because plaintiffs expressly agreed to it and under the theory of equitable estoppel or alternatively as a third party beneficiary of the contract. (*Felisilda v. FCA US LLC* (2020)53 Cal.App.5th 486, 496.) These are considered in turn.

Pertinent Language of the Arbitration Agreement

As pertinent to the issue of standing to compel arbitration based on either equitable estoppel or as a third party beneficiary, the arbitration agreement included in the RISC plaintiffs signed reads as follows:

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
> […]
>
> Any claim or dispute, whether in contract, tort, statute or otherwise…between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(Liss Decl., ¶ 5, Ex. 4, p. 5 and 6.)

The first page of the RISC indicates that the word "you" refers to "the Buyer (and Co-Buyer, If any)" (i.e., plaintiffs), and the words "we" or "us" refers to the "Seller – Creditor" (i.e., Lithia Nissan of Fresno). (Liss Dec., ¶ 5, Ex. 4, p. 1.) Defendant Nissan is neither of these parties and cannot be said to have "express" authority to compel arbitration under the plain language of the Arbitration Agreement.

Equitable Estoppel

"The *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 213-214.) Even if a plaintiff's claims touch matters relating to the arbitration agreement, the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action. (*Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th at p. 552.) "The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract." (*DMS Services, LLC v. Superior Court, supra,* 205 Cal.App.4th at p. 1354.)

None of plaintiff's claims against Nissan are intimately founded in the RISC. Nissan contends that the warranties forming the basis of plaintiffs' claims and standing to pursue claims under the Song-Beverly Consumer Warranty Act are rooted in their purchase of the new vehicle pursuant to the RISC. Defendant is correct that the Song-Beverly Act requires that a consumer buy or lease "a new motor vehicle from a person (or entity) engaged in the business of manufacturing, distributing, selling, or leasing new motor vehicles at retail" to bring a claim. (*Dagher v. Nissan Motor Co.* (2015) 238 Cal.App.4th 905, 926.) However the RISC is an agreement between the parties regarding the *financing* of the purchase of the vehicle. The manufacturer warranties forming the basis of plaintiffs' causes of action are specifically disclaimed from the agreement. (Liss Decl., Exh. 4, p. 4, Item 4 "Warranties Seller Disclaims.")

Moreover, the manufacturer warranties forming the basis of the claims do not *depend upon* the financing of the sale described in the RISC in order to bring them. If plainitffs had paid cash for the vehicle, and thus would not have signed the RISC, they still could bring claims under the Song-Beverly Act and under common law. (See, *e.g., Fuentes v. TMCSF, Inc., supra,* 26 Cal.App.5th p. 553 [finding no standing to compel arbitration based on equitable estoppel because "[e]ven if he had paid cash for the motorcycle, his complaint would be identical."].) The fact that the RISC governs the financing of the purchase of the vehicle does not mean plainitffs' claim is intimately founded *in that contract*. Therefore, it is inaccurate to say that in plaintiffs' causes of action against Nissan they are "taking advantage of" the RISC, such that it would be equitable to find they are estopped from avoiding its terms requiring arbitration.

Defendant relies on a recent opinion out of the Third District Court of Appeal, *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 ("*Felisilda*") in arguing that equitable estoppel is appropriate here because the arbitration clause in that case used the exact same language as used in the RISC (as quoted above). (See *id.* at p. 490.) In *Felisilda*, the motion to compel arbitration was filed by the dealership (Elk Grove Dodge), and included a request that its co-defendant, manufacturer FCA, US, LLC ("FCA") also be included as a party to the arbitration. (*Id.* at p. 498.) FCA filed a notice of nonopposition. (*Ibid.*) The trial court granted the motion. After the motion was granted, plaintiff dismissed Elk Grove Dodge. (*Id.* at p. 489.) FCA prevailed at arbitration, and the Felisildas appealed. The appellate court found that it was appropriate to compel arbitration based on the theory of equitable estoppel. (*Id.* at p. 497.) Nissan argues that this case controls, and mandates that this court find that it has standing to compel arbitration based on equitable estoppel.

However, there are important distinctions between the facts of that case and the one at bench. The motion there was by the dealership and not the manufacturer, which took no part in the motion beyond filing a notice of nonopposition. Also, the plaintiffs did not dismiss the dealership until *after* the motion to compel was granted, whereas here the court is ruling on the motion at a time when Nissan is the only defendant. This makes a difference and limits the application of *Felisilda*. At best, *Felisilda* stands for the proposition that where a plaintiff buyer files a complaint against both the dealership and the manufacturer, the dealership can compel plaintiff to arbitrate the claims against both. This is actually consistent with the language of the arbitration agreement, since it provides that any claim or dispute "which arises out of or relates to your…purchase or condition of this vehicle…or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, <u>*at your or our election*</u> be resolved" by arbitration. As defined by the contract, the word "our" means Lithia Nisan of Fresno, not Nissan North America, Inc. Thus, under the express language of the arbitration clause, arbitration could be compelled <u>*on behalf of*</u> a third party non-signatory, and there is nothing in this language authorizing it to be compelled <u>*by*</u> a third party non-signatory.

As the appellate court in *Felisilda* clearly stated, "It is the motion that determines the relief that may be granted by the trial court." (*Felisilda, supra,* 53 Cal.App.5th at p. 498.) The motion before the trial court, and thus, the issue considered on appeal, was whether the dealership's motion, asking for arbitration to also be compelled <u>*on behalf of*</u>

the nonsignatory manufacturer, was correctly granted. Therefore, the court had no cause to consider whether a nonsignatory manufacturer, as sole defendant, could successfully compel arbitration. That was not the posture of the case. As the court summed up its holding, since *the dealership's motion* argued that the claim against both defendants should be arbitrated, "the trial court had the prerogative to compel arbitration of the claim against FCA." (*Id.* at p. 499.) Also, the phrase "had the prerogative" suggests that the court of appeal was supporting the trial court's *use of discretion* in making its ruling, and was not finding that compelling arbitration was mandated under the equitable estoppel theory. In short, it is not clear how the Third District Court of Appeal would have ruled had the trial court ruling emanated from a motion brought by the sole defendant, the nonsignatory manufacturer, as here. The court will not extend *Felisilda* beyond its borders.

Another important distinction between *Felisilda* and the case at bench is that there the plaintiffs' complaint consisted of one combined cause of action against both defendants. (*Felisilda, supra,* 53 Cal.App.5th at p. 491.) No doubt that factor weighed heavily in the court's finding that plaintiffs' claims against the manufacturer were intertwined with their claims against the dealership, such that it was fair to require arbitration to proceed against both. Here, however, plaintiffs' complaint states causes of action only against defendant Nissan and, as discussed above, the claims against Nissan do not "depend upon," nor are they "intimately found in" the financing contract plaintiffs entered into with the non-party dealership.

Third Party Beneficiary

Third-party beneficiaries are permitted to enforce arbitration clauses even if not named in the agreement. (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 856.) The gist of defendant's third party beneficiary argument is that the arbitration agreement expressly states it applies to "**any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract**)," and Nissan is a third party, so the agreement was intended to benefit Nissan. (Mot., p. 12:1-10, emphasis original.)

"A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit." (*Jensen v. U-Haul Co. of California*, *supra,* 18 Cal.App.5th at p. 301, citing and quoting *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 602.) The intent to benefit that third party must appear from the terms of the contract. (*Ibid.*) The third party must show that the arbitration clause was "made expressly for his benefit." (*Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 552.) "A nonsignatory is entitled to bring an action to enforce a contract as a third party beneficiary if the nonsignatory establishes that it was likely to benefit from the contract, that a motivating purpose of the contracting parties was to provide a benefit to the third party, and that permitting the third party to enforce the contract against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Hom v. Petrou* (2021) 67 Cal.App.5th 459, citing *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 821.)

As applied to the facts here, simply pointing out that the agreement contains a reference to "third parties" and that defendant is a "third party" does not show that the

arbitration clause was expressly intended to benefit any particular third party, much less does it show that this provision was made expressly for Nissan's benefit. There is nothing in the RISC indicating that the motivating purpose for the parties to the contract was to benefit Nissan, or that allowing Nissan to independently compel arbitration was within the parties' reasonable expectations at the time of contracting. The court cannot find Nissan to be a third party beneficiary of the arbitration agreement. As such, Nissan does not have standing to compel arbitration pursuant to the RISC.

Nissan's relies on *Ronay Family Limited Partnership v. Tweed*, 216 Cal.App.4th 830, for the premise that a third-party beneficiary need not be named. *Ronay* is inapposite. There the court found that the party seeking to compel arbitration was an agent of the signatory party, and the agreement expressly named agents. (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 838-839.) Under that specific circumstance, *Ronay* held that it is not necessary that the beneficiary be named and identified as an individual. (*Ibid.*) Here, there is no argument that Nissan is an employee, agent, successor or assign to Lithia such that the holding in *Ronay* would apply.

For the reasons stated above, the motion for an order compelling arbitration is denied.

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: KCK on 01/31/23.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***2 Boyz, Inc. v. Steven Villagomez***
Superior Court Case No. 22CECG03346

Hearing Date: February 1, 2023 (Dept. 502)

Motion: By Cross-Defendants Frank Villagomez and Leonel Villagomez to Strike (Anti-SLAPP) Cross-Complainant Steven Villagomez's Second Cause of Action in the Cross-Complaint

Tentative Ruling:

To grant.

Explanation:

This motion is brought to the second cause of action in the cross-complaint, which alleges, "Cross-Defendants actions of provoking a confrontation, attacking Cross-Complainant, surreptitiously recording it, and using the footage in an effort to have Cross-Complainant unjustly fired, is so extreme as to be beyond all bounds of decency tolerated by society." (Cross Complaint, ¶ 22.)

A SLAPP suit (Strategic Litigation Against Public Participation) is a suit brought "primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) The anti-SLAPP statute permits a defendant whose free speech rights and/or right to petition have been infringed to move the court to strike the SLAPP suit. The anti-SLAPP statute may be invoked to challenge suits based on four different categories of speech:

> (1) statements made before a legislative, executive, judicial, or other official proceeding;
> (2) statements made in connection with an issue being considered by a legislative, executive, or judicial body;
> (3) statements made in a public forum or in connection with an issue of public interest; OR
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or free speech, in connection with an issue of public interest.

(Code Civ. Proc., § 425.16, subd. (e).)

The anti-SLAPP is one of the few motions where the burden is on the party opposing the motion. First, the defendant must make a prima facie showing that plaintiff's lawsuit arises from "an act in furtherance of a person's right of petition or free speech under the United States or California Constitutions in connection with a public issue," as defined in subdivision (e). Once defendants make such prima facie showing, the burden shifts to the plaintiff to establish a "probability" that it will prevail on whatever claims are asserted against the defendants. (See Code Civ. Proc., § 425.16, subd. (b); *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 744.) The plaintiff must show: (1) a legally sufficient claim (i.e., a claim which, if supported by facts, is sustainable as a matter of law); and (2) that the

claim is supported by competent, admissible evidence within the declarant's personal knowledge. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

First Prong

The moving party only needs to make a prima facie showing that the cause of action arises from constitutionally protected free speech or petition activity. (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458-459.) Both Code of Civil Procedure section 425.16 and Civil Procedure section 47 protect a litigant's right to access the courts without fear of subsequent derivative tort actions. (*Healy v. Tuscany Hills Landscape & Recreation Corp*. (2006) 137 Cal.App.4th 1, 5.) Thus communication is protected where it is related to judicial proceedings. (*Ibid*.) Here, the cross-defendants sent a letter to cross-complainant's employer in anticipation of litigation. The employer is a public entity, and therefore a tort claim would be necessary if the cross-defendants are to pursue litigation against the employer. Cross-defendants submitted declarations indicating their intent to this effect.

A claim is only subject to the anti-SLAPP statute if the protected activity forms the basis for the claim. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.) The act underlying the cause of action must have been in furtherance of the free speech or right of petition. (*Id*. at 1063.) Here, the parties dispute what the underlying act leading to the claim of intentional infliction of emotional distress is—provoking and using the camera footage to get cross-complainant fired or sending the demand letter/tort claim. Critically, cross-complainant's own cross-complaint and his opposition to this motion rely on the use of the camera footage to get him fired as the basis for his intentional infliction of emotional distress claim. The protected activity is the communication to the employer by sending the demand letter/tort claim, with the camera footage.

Cross-complainant's opposition and his cross-complaint appear to allege that his brother's acted together with a plan to provoke him, attack him, and use his reaction against him with his employer, akin to a conspiracy. In *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, 1037, the court noted that where "liability is asserted for the target act of a conspiracy, the preliminary speech or petitioning activity is simply evidence of the defendant's liability, not the wrong complained of.'" Courts have looked to the thrust of the cause of action and distinguished whether the protected activity was incidental. (*Id*. at p. 1038.) The court in *Spencer* looked at the tortious acts in which the defendants were alleged to have conspired and found that none of those acts were protected speech or petitioning activity. (*Id*. at p. 1040.) Thus there, the anti-SLAPP motion was denied on its first prong. (*Ibid*.)

This is different than *Spencer* though. Here, the communication to the school district is not incidental, but is the gravamen of the second cause of action. Yes, cross-complainant suggests that his brothers provoked him and perhaps even that they orchestrated the fight that ensued, but his focus is on the use of the footage of the fight with his employer. That is, communication which was sent in contemplation of litigation. Therefore, the act of sending the letter to the school district is not incidental to the cause of action. The court finds that cross-defendants have met the first prong.

Second Prong

If the moving party can meet the first prong, then the burden shifts to the opposing party to show a probability that he will prevail on the claims based on protected activity asserted against the moving party. (See Code Civ. Proc., 425.16, subd. (b).) The opposing party must produce evidence which would be admissible at trial. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) The probability of prevailing is established if the opposing party presents evidence which would result in a judgment for the opposing party, if believed by the trier of fact. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 637.) In considering this issue, the court looks at the pleadings and evidentiary submissions of the parties, without weighing the credibility or strength of competing evidence. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

The elements of a prima facie case of intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) intent to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of emotional distress. (*Bartling v. Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 961, 969.) "Outrageous conduct" denotes conduct which is so extreme as to exceed all bounds of decency and which is to be regarded as "atrocious and utterly intolerable in a civilized community." (*Ibid*.)

Here, cross-complainant does not explain how the provision of the footage to his employer is outrageous. He merely makes conclusory statements that this conduct is outrageous. In order to prevail on a claim for intentional infliction of emotional distress, cross-complainant must demonstrate that his brothers' conduct was outrageous, exceeding the bounds of decency tolerated by society. Therefore, cross-complainant has not met his burden in showing a probability he will prevail on his second cause of action for intentional infliction of emotional distress.

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: KCK on 01/31/23.
(Judge's initials) (Date)