Tentative Rulings for April 16, 2024
Department 501

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

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

22CECG01618 ***Tina Lara v. Cannable, LLC*** **is continued to Wednesday, May 22, 2024, at 3:30 p.m. in Department 501**

23CECG00279 ***Kevin Wedgewood v. Gianni Fine Jewelry, Inc.*** **is continued to Wednesday, May 22, 2024, at 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Kevorkian v. SunRun/SunRun Installation Service***
Case No. 22CECG01709

Hearing Date: April 16, 2024 (Dept. 501)

Motion: by Plaintiff to Set Aside Default and Default Judgment

Tentative Ruling:

To deny plaintiff's motion to set aside the default and default judgment (or, more accurately, the court's order granting the motion to compel arbitration).

If oral argument is timely requested, such argument will be entertained on Wednesday, April 17, 2024, at 3:30 p.m. in Department 501.

Explanation:

First, while plaintiff relies on Code of Civil Procedure section 473.5, subdivision (a), to support her motion, that provision of law does not apply here. That provision states that, "[w]hen service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." (Code Civ. Proc., § 473.5, subd. (a).)

Here, plaintiff has not had a default judgment entered against her, nor was she ever served with a summons. She is not a defendant who must be served with summons and defend against the action. In fact, she is the plaintiff in the action, so she is the one who had defendants served with a summons and complaint. No judgment has yet been entered in the case, much less a default judgment. The court *did* grant an order compelling her to attend arbitration, but the court's order was not a default or default judgment. The matter will have to be resolved at the arbitration before a judgment may be entered by the court. Therefore, plaintiff's reliance on section 473.5 is entirely misplaced, and she cannot obtain any relief from the court's order by relying on the procedures under that provision of law.

Next, to the extent plaintiff contends that she is entitled to relief from the court's order because she did not receive proper notice of the September 19, 2023, hearing date, she has failed to show that she was not given adequate notice of the hearing. Defendants originally obtained a hearing date of July 18, 2023, for their motion for an order compelling arbitration. They served plaintiff with the notice of motion that reflected the July 18, 2023, hearing date on February 2, 2023, by United States mail and email. (See proof of service attached to defendant's notice of motion to compel arbitration.) Thus, plaintiff had notice of the original July 18, 2023, hearing date.

The court then continued the hearing on the motion to September 14, 2023, by way of its tentative ruling page. (See court's tentative rulings of July 18, 2023, page one.) Later, the court again continued the matter on its tentative ruling page, this time to September 19, 2023. (See court's tentative rulings of September 14, 2023, page one.) On September 19, 2023, the court issued its tentative ruling on the motion to compel, indicating that it was intending to grant the motion as to plaintiff Michelle Kevorkian but deny as to plaintiff Jim Broaddus, and stay the entire court action until the arbitration is resolved. (Court's tentative ruling of September 19, 2023.) The court also indicated that, if oral argument was timely requested, it would be heard on September 20, 2023. (*Ibid*.) Neither plaintiff nor defendant ever requested oral argument, and therefore the court adopted its tentative ruling on September 19, 2023. (Court's minute order of September 19, 2023.)

As a result, plaintiff was given notice of the original July 18, 2023, hearing date, and she was on notice that the court would issue a tentative ruling for that hearing the day before the hearing was set. As a result, she had a duty to check the tentative rulings on July 17, 2023, to see how the court intended to rule. If she had done so, she would have seen that the court had continued the matter to September 14, 2023. In fact, it appears that she did check the court's tentative ruling page, since she filed additional opposition to the motion on August 4, 2023. She also had a duty to check the court's tentative rulings for September 14, 2023, the day before the hearing, and if she had done so she would have seen that the court had continued the matter again, this time to September 19, 2023. Consequently, she was given sufficient notice of the continued hearing dates, and she cannot claim that she was unaware of the September 19, 2023, hearing or that she needed to request oral argument to appear and oppose the motion.

Also, the court is permitted to issue tentative rulings under California Rules of Court, rule 3.1308(a)(1), and Fresno Superior Court Local Rule 2.2.5. "If the court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person." (Cal. Rules of Court, Rule 3.1308(a)(1).) Also, under Local Rule 2.2.5 B, "[i]f a party wishes to appear for oral argument, the notice to be given to the court, as required by Rule 3.1308(a)(1) of the California Rules of Court, must be given by telephone to the clerk in the department to which the matter is assigned for hearing."

Here, the court issued its tentative ruling on the day before the September 19, 2023, hearing, so plaintiff had to request oral argument by four p.m. on September 18, 2023 in order to preserve her right to present oral argument. Since she did not do so, she cannot claim that she was prejudiced when the court adopted its tentative ruling as the order of the court without allowing oral argument.

Furthermore, plaintiff has not shown that she was denied the right to file written opposition to the motion, as she actually filed two separate written opposition briefs to the motion. She filed her first opposition on February 2, 2023. She then filed a second opposition on August 4, 2023, after the July 18, 2023, hearing date had already been continued once. The court considered both oppositions when it ruled on the motion. Therefore, plaintiff has failed to demonstrate that she was prejudiced by the continuance of the hearing on the motion, or that she did not have an opportunity to oppose the

motion. Since she was given full notice of the original hearing date and each of the continuances, she is not entitled to an order setting aside the order granting the motion.

Finally, plaintiff has not shown diligence in seeking relief. Section 473.5, subdivisions(a) and (b), require the moving party to bring their motion to set aside within a "reasonable time." Here, the court granted defendants' motion on September 19, 2023, and the court clerk sent notice of the order to plaintiff on the same day. However, plaintiff did not file her motion to set aside the order until March 7, 2024, almost six months after being served with the order. Plaintiff has not explained why she waited nearly six months to seek relief from the court's order. Nor does it appear that it was reasonable to wait almost six months before bringing the motion to set aside the order. Therefore, the court intends to deny plaintiff's motion to set aside the order granting the motion to compel arbitration.

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: DTT on 4/9/2024.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***Samrane Xayadeth v. County of Fresno***
Superior Court Case No. 22CECG01779

Hearing Date: April 16, 2024 (Dept. 501)

Motion: by Defendant County of Fresno for Orders Compelling Initial Responses to (1) Special Interrogatories, Set One; (2) Form Interrogatories, Set One; and (3) Request for Production, Set One, and for an Order Imposing Monetary Sanctions

Tentative Ruling:

To grant defendant County of Fresno's motions. Within 20 days of service of this order by the clerk, plaintiff Samrane Xayadeth shall serve objection-free responses to Form Interrogatories, Set One; Special Interrogatories, Set One; and Request for Production, Set One.

To grant sanctions against plaintiff Samrane Xayadeth in the amount of $600.00, to be paid within 20 calendar days from the date of service of the minute order by the clerk.

If oral argument is timely requested, such argument will be entertained on Wednesday, April 17, 2024, at 3:30 p.m. in Department 501.

Explanation:

Defendant served discovery requests on plaintiff via mail on August 28, 2023, consisting of (1) Form Interrogatories, Set One; (2) Special Interrogatories, Set One; and (3) Requests for Production, Set One. Responses were due within 35 days after service, and should have been received by October 02, 2023. (Code Civ. Proc. §§ 2030.260, 2031.260 and 1013.) Plaintiff did not provide responses and did not file an opposition to these motions. Therefore, the motions to compel initial responses are granted.

Plaintiff's failure to provide responses to defendant's propounded discovery subjects her to sanctions. (Code Civ. Proc. § 2023.010, subd. (d).) The court may award sanctions in favor of a party who files a motion to compel discovery, even if no opposition to the motion was filed. (Cal. Rules of Court, rule 3.1348(a).) Thus, defendant is entitled to monetary sanctions.

Defendant's counsel includes in the sanction amount the time "spent writing letters and making telephone calls" to plaintiff in an effort to procure responses; this is not properly included in the sanction amount. (Plett Decl., ¶ 13.) The Discovery Act's sanctions statutes have generally been interpreted to only authorize awards for time the moving party's counsel spent in research and preparation of the motion, court time in connection therewith, and filing fees. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262.) Even where meet and confer is required (and it was not here), the court does

not allow time for this, since that time would need to be spent even where responses were served, making the motion unnecessary. Even so, the court should allow the $600.00 requested, since even if the attorney's time were reduced to approximately 2 hours, defendant is also entitled to include the filing fee in the sanction amount and here they paid $180.00 to file the three motions. Thus, $600.00 is a reasonable sanction amount.

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: DTT on 4/12/2024.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re:	***Wells v. Grossman, M.D., et al.*** Superior Court Case No. 22CECG00938
Hearing Date:	April 16, 2024 (Dept. 501)
Motions:	(1) by Defendant Jonathan Grossman, M.D., Demurring to the Second Amended Complaint; (2) by Defendant Saint Agnes Medical Center, Demurring to the Second Amended Complaint; and (3) by Defendant Sierra Pacific Orthopedics, Demurring to the Second Amended Complaint

Tentative Ruling:

To sustain the demurrers to the sole cause of action in the Second Amended Complaint, without leave to amend. (Code Civ. Proc., § 430.010, subd. (e).)

If oral argument is timely requested, such argument will be entertained on Wednesday, April 17, 2024, at 3:30 p.m. in Department 501.

Explanation:

Each defendant demurs to plaintiff's Second Amended Complaint, which alleges a single cause of action for medical malpractice. Defendants all contend that the cause of action is barred by the applicable statute of limitations under Code of Civil Procedure section 340.5.

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v Poag* (1984) 150 Cal.App.3d 541, 545) The test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of her complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) The truth of the facts alleged in the complaint are assumed true as well as the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 2 Cal.4th 876, 883.)

"The defense of statute of limitations may be asserted by general demurrer if the complaint shows on its face that the statute bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) However, in order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred." (*McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874.)

Statute of Limitations

It is undisputed that the applicable statute of limitation is governed by Code of Civil Procedure, section 340.5, which, in relevant part, provides:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

(Code Civ. Proc., § 340.5.)

"Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first "discovers" the injury and the negligent cause of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not "discover" the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1054.) There are, however, three exceptions to the three-year limitation period—fraud, intentional misrepresentation, and the presence of a nontherapeutic "foreign body" in the plaintiff's body. (*Ibid.*)

Defendants Previous Demurrers to the First Amended Complaint

Previously, in its tentative ruling adopted on August 2, 2023, this court sustained the demurrers of all three defendants to the medical malpractice cause of action in plaintiff's First Amended Complaint ("FAC"). The court found that the FAC failed to state facts sufficient to show that the limitations period was tolled by the foreign body exception. In particular, it was determined that plaintiff had failed to allege any facts showing that the surgical cement at issue had "no therapeutic or diagnostic purpose or effect…" (Code Civ. Proc., § 340.5.) The court further reiterated that absent facts establishing the tolling provision's application, the claim for medical malpractice was time-barred.

Although the facts pled in the FAC suggested that the cement was inserted into plaintiff's body for a therapeutic purpose, i.e., "to repair the fractured vertebrae" (see FAC, ¶ 11), plaintiff was granted one additional opportunity to amend her pleading.

Second Amended Complaint

Plaintiff's Second Amended Complaint ("SAC") includes new allegations that defendants "either negligently inserted, and/or negligently caused to be inserted, the

cement in [p]laintiff's back causing the cement to leak or negligently inserted the cement in the wrong area of [p]laintiff's back and thus did not repair the fractured vertebrae." (SAC, ¶ 12.) The SAC further alleges that since the cement was placed incorrectly and/or in the wrong area inside her body, it "served no therapeutic or diagnostic purpose and thus constitutes a foreign object." (SAC, ¶ 14.)

The new allegations in the SAC do not cure the defect. The SAC shows on its face that the statute of limitations bars the action. The conclusory statements that the cement "served no therapeutic or diagnostic purpose and thus constitutes a foreign object" is not sufficient to allege *facts* to that effect. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [the demurrer admits the truth of all material facts, i.e., ultimate facts, properly pleaded, but not contentions, deductions or conclusions of fact or law].) When a complaint makes both general allegations and specific allegations, and a conflict or inconsistency exists between them, the specific allegations control over the inconsistent general allegations and may render the complaint defective even though the general allegations standing alone might have been sufficient. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235-1236.) Additionally, a court may take judicial notice of inconsistent statements made by plaintiff in earlier pleadings. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)[1]

As explained in the court's previous adopted tentative ruling, the lack of a "therapeutic or diagnostic purpose" is a necessary element of the "foreign body" tolling provision of section 340.5. (*Trantafello v. Medical Center of Tarzana*, (1986) 182 Ca1.App.3d 315, 319-320.) "This clause applies where a foreign body is *inadvertently* left in the patient, such as a surgical sponge." (*Id*., at p. 319, emphasis in original.) The *Trantafello* court found "no merit at all to plaintiff's claim under the tolling provision of section 340.5" because it was undisputed that "the acrylic was intentionally implanted during surgery for the therapeutic *purpose* of maintaining the space between the vertebra." (*Id.*, at pp. 319-320, emphasis in original.)

Here, although it is alleged that the cement was inserted into the wrong area of plaintiff's back and therefore did not repair the fractured vertebrae (SAC, ¶ 12), it was previously alleged in plaintiff's FAC that the cement was intentionally inserted for the *purpose* of repairing the fractured vertebrae (FAC, ¶ 11). The court takes judicial notice of the prior allegation and assumes the purpose for the procedure—to repair the fractured vertebrae, to be true. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

However, while plaintiff concedes that the cement, by its design, was intended to be a permanent implantation, she relies on *Maher v. County of Alameda* (2014) 223 Cal.App.4th 1340 ("*Maher*") in support of the contention that the cement served no therapeutic or diagnostic purpose as it was not placed as designed, i.e., in the wrong area and/or it leaked into another area. Plaintiff's reliance on *Maher* is misplaced and unsupported by law.

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[1] Defendant Grossman's requests for judicial notice of the original Complaint and the FAC are granted. (Evid. Code, § 452, subd. (d).) The court also grants defendant Sierra Pacific Orthopedics' request for judicial notice of the court's January 5, 2023, tentative ruling, August 1, 2023, tentative ruling, and the SAC. (*Ibid*.)

In *Maher*, the First District Court of Appeal found that the limitations period was tolled from 1996 to 2010 under the "foreign body" exception of Code of Civil Procedure section 340.5 and reversed the order sustaining the defendant-medical providers' demurrers without leave to amend. (*Id.*, at p. 1344.)

There, plaintiff filed his action on April 29, 2011, for negligence and failure to provide access to medical records against various medical providers, arising from injuries sustained from the prolonged placement of a biliary stent. The biliary stent was implanted on May 24, 1996, when plaintiff was transported by ambulance to defendant hospital's facility following a gunshot injury. Plaintiff was unconscious or otherwise incapacitated when the stent was implanted, and was unaware of the stent's placement until it was discovered and removed in August 2010 after he sought treatment for abdominal pain. (*Id.*, at pp. 1344-1345.) It was further alleged that "(1) the biliary stent was by design intended to be temporary and should have been explanted generally between three to six months after being placed, but in no event should it have been allowed to remain for over 14 years; (2) the stent lost any efficacy it may have had within one year of placement and had at some point begun to disintegrate and had already migrated from the site where it was originally placed; and (3) the stent should be removed immediately." (*Id*., at p. 1345.) "None of the health care providers involved in his gunshot wound treatment had informed him of its placement, the fact it was designed to be temporary, or the need to monitor or remove it." (*Ibid.)*

Relying on *Huysman v. Kirsch* (1936) 6 Cal.2d 302 ("*Huysman*") and *Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046 ("*Ashworth*"), cases involving a nine-inch rubber tube inserted for the purpose of draining the wound (*Huysman*) and "'cotton pledgets' or 'sponges'" (*Ashworth*), the appellate court in *Maher* found the plaintiff's malpractice cause of action was not barred by the statute of limitations. The "requirement [that the foreign body have no therapeutic purpose or effect] can be satisfied even if the foreign body had such a purpose or effect when originally placed in the patient's body. It is enough that the foreign body was not removed after it had ceased having this therapeutic purpose or effect." (*Id*., at p. 1351 citing *Ashworth*, at p. 1057.) "*Sensibly, after enactment of* [Code of Civil Procedure] *section 340.5 the 'foreign body' rule still applies to 'foreign bodies' even though they had a 'therapeutic purpose or effect' at the time they were placed in the patient so long as it can be shown they were allowed to remain there too long*." (*Id*., at p. 1351 citing *Ashworth*, at p. 1059, italics in original.)

However, *Maher* explicitly distinguishes its holding from cases involving permanent implantations: "the 'no therapeutic or diagnostic purpose or effect' qualification in [Code of Civil Procedure] section 340.5 means ***the foreign body exception does not apply to objects and substances intended to be permanently implanted***, but items temporarily placed in the body as part of a procedure and meant to be removed at a later time do come within it." (*Maher* at p. 1352, emphasis added.)

Here, unlike in *Maher, Ashworth* and *Huysman*, no facts are alleged to show that the surgical cement was intended to be temporarily placed in plaintiff's body and should have been removed at a later time. Rather, plaintiff concedes that "the surgical cement by design was intended to be permanent." (Opp., 5:16.) Plaintiff also attempts to argue that *Maher* stands for the proposition that *all* objects which are placed in the improper

place or negligently placed in a patient's body, come within the "foreign body" exception. As explained above, *Maher* expressly provides that "the foreign body exception does not apply to objects and substances intended to be permanently implanted." (*Maher* at p. 1352.) Thus, *Maher* is wholly inapplicable to establish that the surgical cement falls within the scope of the foreign body exception to the statute of limitations.

Although plaintiff further argues that the cement became temporary when it was placed in the wrong area, or negligently placed so that it leaked into another area, plaintiff cannot simply redefine the word "temporary" to suit her circumstances.

Since plaintiff fails to state facts showing that the placement of cement (1) lacked a therapeutic or diagnostic purpose; and/or (2) was temporarily placed and intended to be removed at a later time, the SAC fails to state facts sufficient to establish that the foreign body exclusion applies to toll the statute of limitations of her medical malpractice claim.

Leave to Amend

Plaintiff has had multiple opportunities to allege facts sufficient to state a cause of action against the demurring defendants and has not done so. As this is the third failure to state facts sufficient to support a cause of action, the court finds that plaintiff is required to offer to the court additional facts to demonstrate a *reasonable possibility* of curing the defect. (Code Civ. Proc., § 430.41, subd. (e)(1).) As no showing was made and it appears by plaintiff's own concessions in her opposition that such a showing cannot be made in good faith, the demurrers are sustained, without leave to amend.

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: DTT on 4/12/2024.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***GBT Roadline, LLC v. Midline Insurance Services, Inc.***
Case No. 21CECG03688

Hearing Date: April 16, 2024 (Dept. 501)

Motion: by Plaintiffs for Default Judgment

Tentative Ruling:

To grant plaintiffs' motion for default judgment.

If oral argument is timely requested, such argument will be entertained on Wednesday, April 17, 2024, at 3:30 p.m. in Department 501.

Explanation:

Plaintiffs have offered evidence to prove up their claims for breach of contract, fraud, and breach of fiduciary duty. According to the complaint and the declaration of the owner of plaintiff, Bichattar Singh, there was a contract between the parties in which defendants were to procure insurance coverage for plaintiffs' trucking business and add new drivers to the policy as soon as plaintiff requested that the driver be added. Plaintiffs hired a new driver, Gurnoor Singh, on October 31, 2020. Plaintiffs informed defendants that they needed Singh added to the policy, but defendants failed to add him to the policy or notify plaintiffs that Singh was not qualified and could not be added. Instead, defendants continued to represent to plaintiffs that Singh had been added to the policy in a timely manner.

However, when Singh was involved in an accident and the truck, trailer and cargo were damaged, the insurance company denied coverage because Singh had not been added to the policy until after the accident. Plaintiffs have been unable to obtain insurance coverage for the accident and the loss of the truck, trailer, and cargo. Defendant Kaur then admitted that she had not added Singh to the policy until after the accident and offered to pay over $31,000 for the lost cargo, but her check subsequently bounced.

Therefore, plaintiffs have shown that defendants breached the contract with plaintiffs, committed fraud, and breached their fiduciary duties toward plaintiffs. Plaintiffs' evidence shows that defendants breached the contract to provide insurance to plaintiffs by failing to add the new driver to the policy as they had promised to do. They also engaged in fraud and breach of their fiduciary duties as insurance brokers by failing to add the new driver, and then lying and saying that they had added the driver when they had not. Defendants have admitted to the facts alleged against them in the complaint by failing to answer and defaulting.

Plaintiffs have also now submitted the declaration of plaintiff Bichattar Singh to prove up their damages. Mr. Singh states that plaintiffs suffered losses of (1) $65,000 for the loss of the truck, (2) $80,000 for the loss of the trailer, (3) $31,096.20 for the loss of the

cargo, and (4) ongoing business losses of $11,000 per month for six months, for a total of $242,096.20 since the date of the accident. (Singh decl., ¶¶ 10, 11, 18, 19, 20, 25, 26.) Mr. Singh does not attach any invoices or receipts to his declaration, so there is no documentation to support his claimed damages. However, he has stated under penalty of perjury what his losses were, and there is no evidence before the court that would tend to rebut his showing. Therefore, the court intends to find that plaintiffs have adequately proved up their damages.

Plaintiffs have also requested an award of court costs in the amount of $804.61, including court filing fees of $544.61, process server's fees of $80, and CourtCall fees of $216. These appear to be reasonable and proper costs, so the court intends to grant the request for the costs.

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: DTT on 4/12/2024.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Knight v. Kelley et al.***
Superior Court Case No. 23CECG04258

Hearing Date: April 16, 2024 (Dept. 501)

Motion: (1) by Plaintiff Amy L. Knight on Demurrer to Amended Answer of Defendant Christopher S. Kelley
(2) by Plaintiff Amy L. Knight for Interlocutory Judgment

Tentative Ruling:

To overrule the demurrer to defendant Christopher S. Kelley's Amended Answer as moot.

To continue the motion for interlocutory judgment to May 16, 2024, 3:30 p.m. in Department 501. Supplemental briefing is authorized to address the rights and interests of the parties in the subject real property. Defendant Christopher S. Kelley may file a supplemental opposition no later than 5:00 p.m. on May 3, 2024. Plaintiff Amy L. Knight may file a supplemental reply no later than 5:00 p.m. on May 9, 2024.

If oral argument is timely requested, such argument will be entertained on Wednesday, April 17, 2024, at 3:30 p.m. in Department 501.

Explanation:

Demurrer to Answer

On July 31, 2023, plaintiff Amy Knight ("Plaintiff") filed a Verified Complaint on a single cause of action for partition. The matter was filed in the Civil-Limited Division. On August 14, 2023, defendant Christopher Kelley ("Defendant") filed an Answer of general denial. On September 27, 2023, the court hearing the matter in the Civil-Limited Division granted Plaintiff's motion for reclassification to Civil-Unlimited. Accordingly, the case was reclassified with its present case designation and number. On September 28, 2023, Defendant filed an Amended Answer with the Civil-Limited case designation and number. On October 20, 2023, Plaintiff filed the present demurrer to the Amended Answer. On April 5, 2024, Defendant filed a Verified Answer with the present case designation and number.

Based on the above, the court finds that the Verified Answer filed under the present case designation and number supersedes the Amended Answer filed in the Civil-Limited case designation and number. (Code Civ. Proc. § 403.070, subd. (b) ["The court may allow or require whatever amendment of the pleadings… or other appropriate action, as may be necessary for the proper presentation and determination of the action or proceeding as reclassified."]) Plaintiff, in her reply brief, does not appear to contest the filing of the Verified Answer. Accordingly, the demurrer to the Amended Answer is overruled as moot.

Interlocutory Judgment

Plaintiff moves under Code of Civil Procedure sections 760.030 and 872.010 *et seq.* for an entry of interlocutory judgment on partition. Plaintiff submits that it is enough to show that she has an interest in the property, and therefore partition must occur.[2]

Code of Civil Procedure section 760.030 refers to actions to quiet title. In all cases to quiet title, the court shall examine into and determine the plaintiff's title against the claims of all the defendants. (Code Civ. Proc. § 764.010.) The court shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. (*Ibid.*) In other words, the court must hear any evidence offered by Defendant prior to rendering any judgment as a matter of quiet title and it is not enough to simply state that Plaintiff has an interest in the property to compel partition.

Code of Civil Procedure section 872.010 governs partition actions. As Plaintiff suggests, a partition action may be commenced and maintained by an owner in real property. (Code Civ. Proc. § 872.210, subd. (a)(2).) Plaintiff properly notes that a partition as to concurrent interests is a matter of right. (*Id.*, § 872.710, subd. (b).) However, to grant the relief sought, the court shall ascertain the state of the title to the property. (*Id.*, § 872.620; *see also Stoffer v. Verhellen* (1925) 195 Cal. 317, 318 ["In an action in partition it is indispensable that a decree, interlocutory in its character, be first entered definitely ascertaining the rights and interests of the respective parties in the subject-matter."]) The court shall determine the status and priority of all liens upon the property. (*Ibid.*; Code Civ. Proc. § 872.630, subd. (a).) An interlocutory judgment that does not adjudicate the interests of the respective parties is invalid. (*Stoffer v. Verhellen*, *supra*, 195 Cal. At p. 318.)

Here, Plaintiff submits that the property in question is owned in equal share with Defendant. Defendant acknowledges Plaintiff's evidence, which is a grant deed purporting ownership by Plaintiff and Defendant as joint tenants. However, Defendant argues that the joint tenancy was broken by the stipulated judgment of dissolution. Alternatively, Defendant argues that Plaintiff broke the joint tenancy, and the true status between the parties is, at best, tenants in common. Defendant seeks a determination of ownership interest in proportion to contribution in redefining the joint interest.

As Plaintiff notes on reply, Defendant does not submit any substantive evidence in support of his opposition. However, a partition action sits in equity. (Code Civ. Proc. § 872.140.) The court must determine the rights and interests in the property. The grant deed is presumptive evidence of a right and interest in the property, but as a presumption it may be rebutted. (Evid. Code § 1600.) The court notes that the Verified Answer was filed after the moving papers and concurrently with opposition on the present motion which now place the case at issue. Based on the arguments submitted by Defendant, which suggests conclusions either that Plaintiff never held equity in the property since the dissolution judgment, or that the actions by the parties since the dissolution judgment have vitiated any equity held by Plaintiff, the court continues hearing on the matter of an the propriety of an interlocutory judgment, and authorizes supplemental briefing to address the issue of whether Plaintiff has a right and interest in the property to thereon

[2] Plaintiff's Request for Judicial Notice is denied in its entirety.

seek partition. The supplemental briefing should also address why a partition by sale is necessary over a partition in kind.

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: DTT on 4/12/2024.
(Judge's initials) (Date)