

**Tentative Rulings for May 14, 2024**  
**Department 403**

**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)**

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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.*

22CECG03674      *Azam v. Galvez*

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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.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 403**

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**Tentative Ruling**

Re: ***Broms v. Fresno-Bullard Park I Owners Assoc.***  
Superior Court Case No. 23CECG02424

Hearing Date: May 14, 2024 (Dept. 403)

Motion: Demurrer to First Amended Cross-Complaint

**Tentative Ruling:**

To sustain the demurrers to the first, second and third causes of action without leave to amend. To overrule the demurrer to the fifth cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

To grant the motion to strike the requests for attorneys' fees at FACC ¶¶ 17, 24, 26, 33, and prayer for relief items 1, 3 and 8, without leave to amend. (Code Civ. Proc., § 436.)

Cross-defendants shall file their answer to the FACC within 10 days of service of the order by the clerk.

**Explanation:**

**Demurrer**

Plaintiff's personal injury complaint alleges causes of action for premises liability and negligence against Fresno-Bullard Park I Owners' Association ("Fresno-Bullard"). Fresno-Bullard has filed a cross-complaint against the owner of the property, Fresno Surgery Center LP dba Fresno Surgical Hospital ("FSC"), which leased the property to HCP CRS2 Fresno CA, LP ("HCP"). The operative pleading is the First Amended Cross-Complaint, which alleges that a 1984 Declaration of Restrictions was entered into by the Owners' Association and HCP, such that owners had the sole duty to maintain their buildings and lot. (FACC ¶ 8.) In 1994, HCP opted out of global insurance supplied by the Owners' Association, opting to maintain their own insurance. (FACC ¶ 9.) In 2011, the property involved in the lawsuit was deeded to HCP and "Cross-Defendant poured the subject walkway, which was no longer owned by Cross-Defendant." (FACC ¶ 10.) In 2011, FSC and HCP entered into a lease, where FSC would operate and maintain the property, including the sidewalks. (FACC ¶ 11.) In 2013, FSC confirmed it would provide its own liability insurance coverage. (FACC ¶ 12.) After plaintiff's fall in January 2023, FSC marked the concrete where plaintiff tripped, and the Owners' Association employed a grinding service to smooth out the fall area. (FACC ¶ 13.) Based on these facts, the FACC alleges cause of action for: 1. Equitable indemnity, 2. Implied contractual indemnity, 3. Contribution, 4. Breach of written contract, and 5. Declaratory relief. Cross-defendants demur to all but the fourth.

Cross-defendants first contend that the demurrers should be sustained because the causes of action are duplicative, but submit no authority supporting sustaining demurrers to these specific causes of action on this ground. The court declines to do so.

The right to equitable indemnity arises from the principle that an individual who *has paid damages* which ought to have been paid by another wrongdoer may recover from that wrongdoer. (*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1380.) A cause of action for equitable indemnity accrues when the indemnitee suffers a loss through payment of an adverse judgment or settlement. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp.* (1994) 8 Cal.4th 100, 110.) Here, because cross-complainant has incurred no such damages yet, there is no cause of action for equitable indemnity at this time.

Implied contractual indemnity "is ... viewed simply as 'a form of equitable indemnity.'" (*Prince v. Pac. Gas & Elec. Co.* (2009) 45 Cal.4th 1151, 1157, quoting *Bay Dev., Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1029.) Accordingly, the second cause of action is not ripe for adjudication either.

The third cause of action is for comparative partial indemnity. Again, "the right to indemnity flows from payment of a joint legal obligation on another's behalf." (*AmeriGas Propane, LP v. Landstar Ranger, Inc.* (2014) 230 Cal.App.4th 1153, 1167.) The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) *resulting damages* to the indemnitee for which the indemnitor is ... equitably responsible." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217.) Again, Fresno-Bullard has no damages yet. Moreover, the FACC actually alleges that there is no joint liability because Fresno-Bullard denies all responsibility for plaintiff's injury. (See FACC ¶ 27.)

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." (*Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 728.) Cross-defendants demur to the cause of action on the ground that no actual controversy has been alleged because while the FACC alleges contractual responsibilities, no contract was attached to the pleading, nor is there sufficient verbatim language quoting the contract to allow the court to determine the responsibilities of the parties, particularly as they relate to indemnification and defense.

Fresno-Bullard contends that the failure to attach the contract is not fatal to the cause of action because the FACC sets forth the essential terms of the contract. Fresno-Bullard also contends that the argument is improperly raised because the demurrer fails to cite to Code of Civil Procedure section 430.10, subdivision (g), citing *Miles v. Deutsche Bank Trust Co.* (2015) 236 Cal.App.4th 394, 401. However, the demurrer is not brought on the ground that the FACC fails to allege whether the contract is written, oral or implied.

The court intends to overrule the demurrer to the fifth cause of action, as the FACC adequately alleges and identifies the controversy regarding the parties' respective responsibilities for the loss or damages suffered by plaintiff in this matter.

The court intends to sustain the demurrers to the first, second and third causes of action without leave to amend. Fresno-Bullard requests leave to amend, but in light of the fact that it has incurred no damages yet, it is unclear how the cross-complaint could



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**Tentative Ruling**

Re: **Powe v. Hartman, et al.**  
Superior Court Case No. 21CECG00034

Hearing Date: May 14, 2024 (Dept. 403)

Motion: by Defendant Harlan Hartman for Terminating Sanctions

**Tentative Ruling:**

To grant defendant Harlan Hartman's motion for terminating sanctions and additional monetary sanctions. Plaintiff's complaint filed January 5, 2021 is ordered dismissed with prejudice as to defendant Harlan Hartman only.

Monetary sanctions in the amount of \$660 are ordered in favor of defendant and against plaintiff Malik Powe payable no later than 20 days from the date of this order, with time to run from the service of this minute order by the clerk.

**Explanation:**

Code of Civil Procedure section 2023.010(g) makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process," but sanctions are only authorized to the extent permitted by each discovery procedure.

Once a motion to compel answers is granted, continued failure to respond or inadequate answers may result in more severe sanctions, including evidence, issue or terminating sanctions, or further monetary sanctions. (Code Civ. Proc. § 2030.290, subd. (c), 2031.300, subd. (c).)

Sanctions for failure to comply with a court order are allowed only where the failure was willful. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 495; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.) If there has been a willful failure to comply with a discovery order, the court may strike out the offending party's pleadings or parts thereof, stay further proceedings by that party until the order is obeyed, dismiss that party's action, or render default judgment against that party. (Code Civ. Proc. § 2023.030(d).)

Evidence, issue, or terminating sanctions are intended to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. Sanctions should not constitute a "windfall" to the requesting party; i.e. the choice of sanctions should not give that party more than would have been obtained had the discovery been answered. (*Rylaarsdam & Edmon, Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2023) § 8:2216.*) "The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to



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**Tentative Ruling**

Re: **Emery v. Cheng**  
Superior Court Case No. 23CECG04214

Hearing Date: May 14, 2024 (Dept. 403)

Motion: Cross-Defendant's Demurrer and Motion to Strike

**Tentative Ruling:**

To continue the motions to Tuesday, June 18, 2024 at 3:30 p.m. in Department 403, in order to allow the parties to meet and confer in person or by telephone, as required. If this resolves the issues, cross-defendant shall call the calendar clerk to take the motion off calendar. If it does not resolve the issues, counsel for cross-defendant shall file a declaration, on or before June 4, 2024, stating the efforts made. If no declaration is filed, the motions will be taken off calendar.

To take the motion to strike off calendar as no moving papers have been filed.

**Explanation:**

Under Code of Civil Procedure section 430.41, “[b]efore filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.” (Code Civ. Proc., § 430.41, subd. (a).) “As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies.” (Code Civ. Proc., § 430.41, subd. (a)(1).)

“The demurring party shall file and serve with the demurrer a declaration stating either of the following: (A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer. (B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith.” (Code Civ. Proc., § 430.41m subd. (a)(3)(A), (B), paragraph breaks omitted.) The statute regarding motions to strike contains the same requirements regarding meet and confer efforts. (Code Civ. Proc. § 435.5.)

Here, counsel for cross-defendant has filed a declaration which includes as an exhibit correspondence identifying the action pending in Italy as the basis for his demurrer and inviting counsel for cross-complainant to call when he is available. (Jung Decl., ¶ 2, Exh. A.) The declaration does not show that counsel engaged in good faith meet and confer efforts before filing the demurrer.



