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)

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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Tentative Rulings for Department 403

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(20) <u>Tentative Ruling</u>

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., \S 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

effectively be amended at this time. The court is open to granting leave to amend if counsel requests oral argument and articulates how these causes of action could effectively be amended.

Motion to Strike

The unopposed motion to strike the allegations and prayers for attorneys' fees must be granted. Code of Civil Procedure section 1021 provides that, except as specifically provided for by statute, recovery of attorneys' fees is left to the agreement of the parties. No statutory or contractual basis for recovery of attorneys' fees is alleged in the FACC. In light of the lack of opposition to the motion, there appears to be no basis for seeking attorneys' fees. Accordingly, the court intends to strike allegations 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:	JS	on	5/10/2024	
-	(Judge's initials)		(Date)	

(34)

<u>Tentative Ruling</u>

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

impose punishment. [Citations.]" (Caryl Richards, Inc. v. Superior Court (1961) 188 Cal.App.2d 300, 304.)

Appellate courts have generally held that, before imposing a terminating sanction, trial courts should usually grant lesser sanctions first, such as orders declaring the matters admitted if answers are not received by a specific date. (Rylaarsdam & Edmon, supra, § 8:2235.) However this is not an "inflexible" rule of law, and it is not an abuse of discretion to issue terminating sanctions on the first request, where circumstances justify it (e.g. where the violation is egregious or the party is using failure to respond as a delaying tactic). (Id. at § 8:2236.)

Counsel for defendant attempted unsuccessfully to obtain the deposition of plaintiff beginning in April 2021 and was met with repeated objections or requests for rescheduling by plaintiff's former attorney. (Buttry Decl., ¶¶ 2-10, Exh. A-I.) After plaintiff's attorney was relieved of representing plaintiff on August 11, 2022, subsequent attempts to obtain plaintiff's deposition resulted in non-appearances on January 31, 2023 and July 27, 2023. (Id. at ¶¶ 11-12, 14, Exh. J,K, M.) Defendant then moved the court for an order compelling plaintiff's attendance at deposition.

On January 17, 2024, the Court ordered plaintiff Malik Powe to appear for his deposition as noticed, as well as to pay \$860 in monetary sanctions to defendant Harlan Hartman's attorney within 20 days. (Buttry Decl., \P 15, Exh. N.) The court's order was served on plaintiff by the Court on January 17, 2024, by mail. Additionally, defendant served a Notice of Ruling regarding the order on January 17, 2024 by mail and email. On January 17,2024, defendant served his Eighth Re-Notice of Taking Deposition of Plaintiff on all parties to the action. (Id. at \P 16, Exh. O.) Plaintiff neither objected nor appeared for the deposition as noticed. (Id. at \P 14.)

The evidence presented by defendant Hartman of plaintiff's repeated failure to participate in discovery as ordered and the prosecution of his own lawsuit demonstrate willfulness in the plaintiff's failure to comply with the court's orders. It does not appear additional monetary sanctions or lesser sanctions will prompt plaintiff's compliance with court orders.

Therefore, the court intends to grant defendant Hartman's motion for terminating sanctions and dismiss the complaint filed by plaintiff Malik Powe on January 5, 2021 as to defendant Harlan Hartman only. Additionally, the court orders monetary sanctions against plaintiff for the reasonable attorney's fees and costs of \$660 incurred to bring this motion.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

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Issued By:	JS	on	5/10/2024	
-	(Judge's initials)		(Date)	

(34)

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 <u>in person or by telephone</u>, 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.

The parties must engage in good faith meet and confer, in person or by telephone, as set forth in the statute. The court's normal practice is to take such motions off calendar, subject to being re-calendared once the parties have met and conferred. Presently, however, given the congestion in the court's calendar, rather than take the motion off calendar, the court will instead continue the hearing to allow the parties to meet and confer, and only if efforts are unsuccessful will it rule on the merits.

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 Rul	ing			
Issued By:	JS	on	5/10/2024	
	(Judge's initials)		(Date)	