Tentative Rulings for May 31, 2023
Department 502

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

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

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(03)

Tentative Ruling

Re: ***Embree Development Group, Inc. v. City of Huron***
Superior Court Case No. 20CECG01450

Hearing Date: May 31, 2023 (Dept. 502)

Motion: Defendant City of Huron's Motion for Attorney's Fees

Tentative Ruling:

To deny defendant City of Huron's motion for attorney's fees, without prejudice, for lack of evidence to support the requested hourly rate for Mr. Slater.

Explanation:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) Also, under Code of Civil Procedure section 1033.5, subdivision (a)(10)(A), attorney's fees are recoverable as an item of costs when fees are authorized by contract.

Here, defendant City of Huron seeks an award of its attorney's fees, contending that the sale and purchase contract between the parties contains an attorney's fees clause. Neither party disputes that the contract provides for attorney's fees to the prevailing party in an action arising out of the subject contract.

There is also no dispute that the City was the prevailing party on the contract claim, as it obtained summary judgment as to all of the causes of action in the complaint including the contract claim. Therefore, the City has shown that it is entitled to its attorney's fees, at least with regard to the claims seeking to enforce or arising out of the contract.

On the other hand, plaintiff contends that the City is not entitled to recover its attorney's fees incurred in defending against the other claims, including the claim under the Mitigation Fee Act (MFA). Plaintiff argues that the MFA claim does not "arise out of" the contract, and therefore the City should not be able to recover any of the fees it incurred related to that claim. However, the City argues that all of the claims arise out of the contract because without the sale contract there would be no other claims. Therefore, the City contends that it is entitled to all of its fees incurred in the case.

" 'Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' For example, the holder of a note which provides for payment of fees incurred to collect the balance due is entitled to fees incurred in defending itself against 'interrelated' allegations of fraud." (*Abdallah v. United Savings Bank* (1996) 43

Cal.App.4th 1101, 1111, citations omitted.) "When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required." (*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1133, citation omitted.)

Also, if the contractual provision for attorney's fees is broadly worded, it may permit the prevailing party to recover attorney's fees for work performed on non-contract claims as well. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

In the present case, the contract's attorney's fees clause is broadly worded, as it permits the prevailing party to recover attorney's fees "[i]n the event of any proceeding brought by either Party to enforce the terms of or arising out of this Agreement..." (Contract, § 8.12.) Thus, even non-contract claims are potentially within the scope of the fees clause, as long as they generally "arise out of" the sales agreement.

Here, the plaintiff's claims all arise out of the sale agreement, since they are all related to the same general dispute over the sale and development of the subject real property on which plaintiff built the Dollar General Store. The first amended complaint alleged claims for unjust enrichment (later deemed by the court to be a claim under the Mitigation Fee Act), economic duress (later dismissed by the court on demurrer), breach of contract, and conversion (also dismissed by the court on demurrer). While the MFA, economic duress and conversion claims were all based on the allegation that the City charged improper fees and required plaintiff to perform additional work to develop the property, the claims are related to the contract by which plaintiff purchased the property from the City. All of the claims arose out of the sales contract and the subsequent project to build the Dollar General Store on the property. Thus, the claims all "arise out of" the contract that contains the fee clause, as well as being inextricably intertwined with the contract claims to such an extent that it would be impossible or impractical to apportion fees spent on the contract claims from fees spent on the non-contract claims. Consequently, the court will not apportion the fees between the contract and non-contract claims, but instead will treat all of the fees as being incurred in connection with the underlying contract.

Nevertheless, defendant has failed to establish that the amount of fees that it seeks were all reasonably and necessarily incurred, or that the hourly rate for one of its attorneys is reasonable. "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095, citations omitted.)

"Under *Serrano III*, a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case.' We

expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of attorney fees to the lodestar adjustment method '"is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."' In referring to '*reasonable*' compensation, we indicated that trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132, citations omitted.)

"Under *Serrano III*, the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The '"experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."'" (*Id.* at p. 1132, citations omitted.)

Here, the City's attorney, Neal Costanzo, alleges that his hourly rate is $375 per hour. (Costanzo decl., ¶¶ 6, 8.) He contends that his hourly rate is reasonable, and in fact below market rates for an attorney of his skill and experience. (*Id*. at ¶¶ 5, 6.) He has been practicing law for 37 years, and he has represented cities and special districts in litigation for 30 years. (*Id*. at ¶ 5.) Other attorneys with the same or less experience have received fees based on rates of $350 per hour or more. (*Id*. at ¶ 6.) Thus, Mr. Costanzo has presented sufficient evidence to establish that his claimed hourly rate of $375 is reasonable.

However, there is no similar declaration from Michael Slater, the associate attorney who also did considerable work on the case. Nor has Mr. Costanzo stated what hourly rate Mr. Slater charges, or what his skill, educational background, and experience are. Defendant is seeking the same hourly rate for both attorneys who worked on the case, $375 per hour. (Costanzo decl., ¶ 8.) Yet, based on his Bar number, Mr. Slater has considerably less experience than Mr. Costanzo, so it is unclear why the court should award the same hourly rate for both attorneys. Therefore, defendant has failed to provide the court with enough evidence to determine that Mr. Slater's hourly rate is reasonable.

Also, even assuming that the requested hourly rate is reasonable, it appears that defense counsel has included billings for work that was done in a different case, which should not have been included in the fee calculations here. For example, on page 23 of the billings attached to Costanzo's declaration, there is an entry for 2.5 hours for "Research related to confidentiality of records; duty to disclose records related to excessive force and retention period of records." (Exhibit A to Costanzo decl., p. 23, entry dated 6/14/2022.) On page 24 of the billing records, there is an entry for 0.30 hours for "Email exchange with Chief Turegano regarding potential settlement." (*Id*. at p. 24, entry dated 6/14/2022.) These billings appear to be incurred in a different case that is

unrelated to the present case, and therefore the court will not include these 2.8 hours in the computation of attorney's fees.

Defense counsel has also included billings for preparation of written discovery, even though, according to plaintiff, defendant never served any written discovery on plaintiff during the course of the case. Therefore, the court will not allow the billings regarding preparation of discovery requests. (See Exhibit A to Costanzo decl., p. 13, billings dated 8/2/2021, 8/9/2021, and 8/31/21, for 6.6 total hours.)

In addition, defendant has billed several hours of attorney time to prepare for expert depositions which, according to plaintiff, were never taken. (See Exhibit A to Costanzo decl., pp. 32-33, entries dated 10/3/2022, 10/4/2022, 10/6/2022, 10/13/2022, 10/14/2022, 10/18/2022, 10/19/2022, 10/31/2022, for 29.5 total hours.) These time entries appear to be unnecessary, as the experts' depositions were never taken. Therefore, the court will not permit defense counsel to recover for the 29.5 hours spent on preparing for the experts' depositions.

Plaintiff also complains that defense counsel spent over 54 hours to prepare responses to plaintiff's written discovery requests, which plaintiff contends is an excessive amount of time to respond to discovery. However, without knowing how many discovery requests were served, what documents and information were at issue, whether there were any significant disputes about discovery, and how complicated any issues raised by the parties were, it is difficult to determine whether defense counsel spent an excessive amount of time responding to discovery. There were no motions to compel initial or further responses filed, and no pretrial discovery conferences were requested by either party. However, it does appear from the billings that the parties engaged in at least some meet and confer efforts regarding discovery disputes. Therefore, the court will not reduce the amount of hours spent on responding to discovery.

On the other hand, as discussed above, defense counsel has failed to present any evidence to support the requested hourly rate for Mr. Slater. Counsel has also sought to recover several excessive or improper billings, totaling 38.9 hours of attorney time. Therefore, the court intends to deny the motion for attorney's fees for failure to provide evidence to support the requested billing rate for Mr. Slater and for requesting fees based on excessive and improper billings, without prejudice.

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 05/26/23.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Mary Ann Jones v. Solgen Construction, LLC***
Superior Court Case No. 22CECG01590

Hearing Date: May 31, 2023 (Dept. 502)

Motion: Plaintiff's Motion to Compel Initial Discovery Responses and Deposition Testimony, to Deem Admitted, and for Monetary Sanctions

Tentative Ruling:

To order the motion off calendar due to the stay effected by defendants' appeal of the court's order dated March 2, 2023. (Code Civ. Proc., § 916, subd. (a).)

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 05/20/23.
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***Jovanna Alford v. Fidel Alva***
Superior Court Case No. 21CECG03545

Hearing Date: May 31, 2023 (Dept. 502)

Motion: Defendants Fidel Alva and Chelseah Alva's Motions for an Order Compelling Plaintiff Jovanna Alford's Responses to Form Interrogatories, Special Interrogatories, and Demand for Production, and for Monetary Sanctions

Tentative Ruling:

To grant and to award monetary sanctions in the total amount of $360 against plaintiff Jovanna Alford, payable within 20 days of the date of this order, with the time to run from the service of this minute order by the clerk.

Jovanna Alford shall serve verified responses without objections, to defendants' Form Interrogatories (Set One), Special Interrogatories (Set One), and Demand for Production (Set One), no later than 20 days from the date of this order, with the time to run from the service of this minute order by the clerk.

Explanation:

Interrogatories and Document Production

Plaintiff Jovanna Alford has had ample time to respond to the discovery propounded by defendants, and has not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., §§ 2030.290, subd. (a), 2031.300, subd. (a); see *Leach v. Sup.Ct. (Markum)* (1980) 111 Cal.App.3d 902, 905-906.)

Monetary Sanctions

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, subd. (c) [interrogatories], 2031.300, subd. (c) [document demands], 2033.280, subd. (c) [requests for admission].) No opposition was filed, so no facts were presented to warrant finding sanctions unjust. The sanction amount awarded does not include the time for responding to an opposition and for appearing at the hearing, as this proved unnecessary. The court finds it reasonable to allow 1.5 hours (0.5 hours for each motion) for the preparation of these simple discovery motions, since the moving papers are significantly similar to one another, and $180 for the cost of filing these motions. The court finds the hourly rate of $120, provided by counsel, to be reasonable.

Therefore, the total amount of sanctions awarded is $360 ($180 for the motions and $180 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: KCK on 05/30/23.
(Judge's initials) (Date)