Tentative Rulings for May 9, 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.

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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(20) **Tentative Ruling**

Re: ***Cleveland v. Orange Coast Title Company of Northern California et al.***
Superior Court Case No. 23CECG03834

Hearing Date: May 9, 2024 (Dept. 403)

Motion: Trial Preference

Tentative Ruling:

To deny. (Code Civ. Proc., § 36, subd. (e).)

Explanation:

Plaintiffs move for trial preference pursuant to Code of Civil Procedure section 36, subdivisions (a) and (e).

Plaintiff Steve Cleveland states that he is 72 years old. Given his age, subdivision (a) might apply, but it requires a showing that "the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." (Code Civ. Proc., § 36, subd. (a)(2).)

According to plaintiffs' attorney, Mr. Cleveland "suffers from age-related decline in health, suffers from increasing deterioration of his spinal column having had microdisectomy with a fusion surgery scheduled sometime in the summer 2024 and is in the final stages of recovery for osteomyelitis, his last surgery was in 2023. Additionally, his general health is deteriorating." (Georgeson Decl., ¶ 3.) A declaration supporting a motion for section 36, subdivision (a) preference "may be signed by the attorney for the party seeking preference *based upon information and belief* as to the *medical diagnosis and prognosis* of *any party*." (Code Civ. Proc., § 36.5.) However, it is not clear how either condition supports a finding that preference is *necessary* to prevent prejudicing Mr. Cleveland's interest in the litigation. No context is provided as to how being in the final stages of recovery for osteomyelitis affects his health and well-being. Plaintiffs have not shown that these conditions are life threatening or require an extended recovery period. Nor is there any showing as to why it is necessary or preferable to have trial shortly after the fusion surgery this summer. As the opposition points out, it would seem better for Mr. Cleveland to have some recovery time before trial, instead of jumping into trial shortly after surgery.

Plaintiff Kip Cleveland will be 68 years old by the date of the hearing, and states that she "[has] been advised I need robotic laparoscopic sacrocolpopexy surgery and presently am taking six (6) different medications." There is no argument that this satisfies subdivision (d)'s provision for granting preference where the plaintiff may not survive six months.

There is no showing that the condition of either plaintiff warrants discretionary grant of trial preference pursuant to subdivision (e), which provides,

> Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.

The motion must be supported by declaration showing good cause to grant the motion. (Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (TRG 2020) at § 12:272; Cal. Rules of Court, Rule 3.1335(b).) There is no showing of good cause here.

Plaintiffs object to the declaration of defense counsel Christopher Kiernan, who attaches printouts of web pages describing the conditions and procedures referenced in the moving papers. The objections are well taken and are sustained. However, plaintiffs are the moving parties, and submit no information or evidence that would enable the court to conclude that the health of either plaintiff is such that preference is necessary to prevent prejudicing their interest in the litigation, or that the interest of justice will be served by granting preference. Defense counsel's conclusions are insufficient. In short, plaintiffs fail to show good cause to grant the motion.

Defendants contend that plaintiffs have not shown that they have a substantial interest in this litigation. This action seeks to recover moneys owed to the Steven C. Cleveland, Trustee and Kip Susan Cleveland, Trustee of the Cleveland Family Revocable Trust, as seller of real property. However, as the reply points out, trusts are not entities separate from the trustees. "[t]he real party in interest in litigation involving a trust is always the trustee." (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 913-914.) Plaintiffs are the real parties in interest with a substantial interest in the action as a whole. However, the court intends to deny the motion because plaintiffs do not establish that their health or medical conditions warrant or requires granting preference in trial setting.

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 5/6/2024 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Bamberger v. Doe***
Superior Court Case No. 23CECG01604

Hearing Date: May 9, 2024 (Dept. 403)

Motion: Plaintiff's Motion to Substitute Wyyatt Lucian Bamberger, by and through his Guardian Ad Litem, Rebecca Torres Navarro, as Successor in Interest to Wade Bamberger

Tentative Ruling:

To deny without prejudice.

Explanation:

Defective Notice:

Notice of this motion was defective, since the required number of days' notice was not given. Code of Civil Procedure section 1005, subdivision (b) requires all moving and supporting papers to be served and filed at least 16 court days before the hearing, and Code of Civil Procedure section 1010.6 increases this period by two *court* days where service is by email. Plaintiff served and filed the papers on April 17, 2024, which was exactly 16 court days before the hearing, so the additional two court days for service by email were not accounted for. Plaintiff should have served the papers no later than April 15, 2024, and of course should have filed the motion after it was timely served. It is also noted that plaintiffs proof of service cites a Covid emergency rule (Rule 12(b) that has long been repealed. Counsel should revise the firm's proof of service. While these defects were waived because defendant filed opposition on the merits (*Alliance Bank v. Murray*, (1984) 161 Cal.App.3d 1, 7 (argument on the merits waives defects)), plaintiff should take care to avoid these errors when refiling the motion.

Merits:

A pending action does not abate by reason of the death of a party if the cause of action survives. (Code Civ. Proc. § 377.21.) Instead, the cause of action passes to the decedent's successor(s) in interest. (Code Civ. Proc. § 377.30.) After the death of a person who commenced an action or proceeding, the successor can file a noticed motion to be substituted in place of that person. (Code Civ. Proc. § 377.31.) The motion must be accompanied by a declaration/affidavit of the proposed successor in interest. (Code Civ. Proc. § 377.32.)

The first problem here is that Rebecca Torres Navarro does not currently have standing to make this motion on behalf of Wyyatt Lucian Bamberger ("Wyyatt"). Given the wording of her declaration, it is apparent there is confusion between the terms "guardian" and "guardian ad litem," which are two completely separate things. Moreover, there is a distinction between a guardian *of the estate* and a guardian *of the*

person. Ms. Torres indicates she was appointed as Wyyat's guardian, and the attached exhibits show this was as guardian of his *person*, and not of his *estate*. She also states she has "been appointed as Guardian Ad Litem" for him, but there is no exhibit showing this appointment, and the file does not reflect any such appointment. A minor may appear in an action "either by a guardian . . . *of the estate* or by a guardian ad litem *appointed by the court* in which the action or proceeding is pending[.]" (Code Civ. Proc., § 372, subd. (a)(1), emphasis added.) Since Ms. Navarro is not the guardian of the estate, nor has she been appointed by this court, in this action, as guardian ad litem, she cannot make the statement required under Code of Civil Procedure section 377.32, subdivision (a)(5)(B), to wit, that she "is authorized to act on behalf of the decedent's successor in interest[.]" Currently, she is simply a stranger to the action. But since this a curable defect, the motion is denied without prejudice to bringing it again once the defect is cured.[1]

The second problem is that the declaration does not make all the statements required by Code of Civil Procedure section 377.32. Plaintiff concedes this in reply. The citation to cases concerning "substantial compliance" are unavailing, since they were dealing with government claims, and not compliance with the declaration requirement of Code of Civil Procedure section 337.32. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482.) Supplying a revised declaration on reply is also unavailing, since the general rule of motion practice is that "new evidence is not permitted with reply papers … [and] should only be allowed in the exceptional case." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.)

The third issue, raised by defendant, is that all the children of decedent are not made a part of this motion, as required. Code of Civil Procedure section 377.31 allows an action of a deceased plaintiff to be continued "by the . . . decedent's successor in interest." As pertinent here, Code of Civil Procedure section 377.11 defines "decedent's successor in interest" as "the beneficiary of the decedent's estate[.]" Where the decedent died without leaving a will, Code of Civil Procedure section 377.10 defines "beneficiary of the decedent's estate" as "the <u>sole person</u> ***or*** <u>all of the persons</u> who succeed to a cause of action[.]"[2] (*Id.,* subd. (b), emphasis added.) Pursuant to this definition, unless the person moving for substitution is the "sole person" to succeed to decedent's cause of action, then "all of the persons" who succeed must be involved. All will inherit the benefits of any judgment rendered in favor of decedent. In the event some or all of the other children of decedent here refuse to participate, Code of Civil Procedure section 377.33 allows the court to make "any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem." The Law Revision Commission Comment explains this as follows:

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[1]Plaintiff's counsel's declaration also refers to the mothers of decedent's other children as their "Guardian[s] Ad Litem," but since they have not been appointed as such in this action, these references are erroneous. A person must be appointed by the court as guardian ad litem, and the appointment is not a general appointment, but rather is specific to a particular action. (Code Civ. Proc., § 372.) While a parent is often, even typically, the person who serves as guardian ad litem, that does not mean the parent is automatically (and without court appointment) her child's guardian ad litem.

[2] Plaintiff's counsel declares that decedent was divorced and that he died intestate. However, since her declaration does not convey how she is competent to convey that information, this is incompetent evidence, which should be addressed more completely in the new motion.

> The references to appointment of the successor in interest as a special administrator or guardian ad litem are intended to recognize that there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries. See Code Civ.Proc. §§ 372-373.5 (guardian ad litem); Prob. Code §§ 8540-8547 (special administrator).

Moving party should take this into consideration in preparing the new motion. Also, in the event she asks to be appointed as guardian ad litem for the decedent's other children (i.e., if their own parents decline to be appointed themselves and serve along with Ms. Navarro as successor to the deceased plaintiff), the motion should be served on them as interested parties, in addition to serving defendant City of Fresno.

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 5/7/2024.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***John Trujillo v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 22CECG01274

Hearing Date: May 9, 2024 (Dept. 403)

Motion: 1) By Defendant Dr. Baysal for Summary Judgment or, in the Alternative, Summary Adjudication
2) By Defendant Fresno Community Hospital and Medical Center for Summary Judgment, or in the Alternative, Summary Adjudication

Tentative Ruling:

To continue the summary judgment motions to Wednesday, September 11, 2024 at 3:30 p.m. in Department 403.

Explanation:

A plaintiff may request a continuance by filing a declaration explaining why further discovery is essential to opposing the motion for summary judgment and why additional time is needed. (Code Civ. Proc., § 437c, subd. (h); *Combs v. Skyriver Communications, Inc*. (2008) 159 Cal.App.4th 1242, 1270.) The declaration must show facts that establish a likelihood that evidence may exist which would create a triable issue of fact, the reasons the evidence cannot be presented now, an estimate of the time to obtain the needed evidence, and the specific steps the party intends to take to obtain the needed evidence. (Code Civ. Proc., § 437c, subd. (h); *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 420.) There is a strong public policy favoring disposition on the merits, over judicial economy. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398.) Granting a request for continuance is "virtually mandated" when a summary judgment opponent makes the requisite showing. (*Id.* at p. 395.) The Legislature intended for such continuances to be granted liberally. (*Ibid.*)

Here, counsel has provided such a declaration explaining that during defendant Dr. Baysal's deposition, Dr. Baysal was asked about medical records regarding an intraoperative tibia fracture. (Romero Decl., Exh. 1, Baysal Depo. 26: 16-22.) Dr. Baysal's response suggested that he was not familiar with the plaintiff's x-rays. Based on this, plaintiffs intend to take the depositions of both residents who were assisting Dr. Baysal in plaintiff's surgical procedure and to provide these to plaintiffs' orthopedic expert in order to allow the expert to form an opinion on Dr. Baysal's potential medical negligence. The deposition of Dr. Woolwine was set for March 7, 2024, but did not go forward because Dr. Woolwine obtained counsel and counsel was unavailable. Efforts have been made to serve Dr. Wilson, but service has not been accomplished. It appears that Dr. Wilson may reside out of state at this time.

As such, plaintiffs have demonstrated that evidence may exist which would create a triable issue of fact. Plaintiffs have shown that the evidence cannot be presented without first obtaining the residents' deposition testimony. Plaintiffs have shown the steps taken thus far and those anticipated to accomplish obtaining these depositions. Thus, the court is granting plaintiffs' request for a continuance.

The court would note that plaintiffs have only requested a two-month continuance. However, plaintiffs have also indicated that Dr. Wilson may reside out of state now. Dr. Wilson is the resident who documented the intraoperative fracture. Dr. Wilson is not a party to this action and the court would note that a two-month continuance may prove to be insufficient to obtain Dr. Wilson's deposition. (See Code Civ. Proc., § 2026.010.)

Additionally, the court recognizes that the motion for summary judgment by Dr. Baysal has been continued previously. In the event any further continuances are anticipated, the parties need not wait until the opposition to request such, but may do so by an ex parte motion at any time on or before the opposition is due. (Code Civ. Proc., § 437c, subd. (h).)

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 5/8/2024.
(Judge's initials) (Date)