Tentative Rulings for June 7, 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.

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re: ***Marlon Guillen v. Max's Artisan Breads, Inc.***
Superior Court Case No. 21CECG02164

Hearing Date: June 7, 2023 (Dept. 502)

Motion: Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement

Tentative Ruling:

To grant the plaintiff's motion for preliminary approval of class action and PAGA settlement.

Explanation:

1. Class Certification

a. Standards

First, the court must determine whether the proposed class meets the requirements for certification before it can grant preliminary approval of the proposed settlement. An agreement of the parties is not sufficient to establish a class for settlement purposes. There must be an independent assessment by a neutral court of evidence showing that a class action is proper. (*Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (rev. denied); see also Newberg, *Newberg on Class Actions* (T.R. Westlaw, 2017) Section 7:3: "The parties' representation of an uncontested motion for class certification does not relieve the Court of the duty of determining whether certification is appropriate.") "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there will be no trial. But other specifications of the rule -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context." (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620, internal citation omitted.)

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.)

b. Numerosity and Ascertainability

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of

class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, plaintiff seeks to certify a class for the purpose of approving the settlement consisting of all current and former employees of defendants from July 28, 2017 to May 22, 2022. The class appears to be ascertainable, as defendants' personnel records should be sufficient to allow the parties to identify the class members. The class is likely also sufficiently numerous to justify certification, as plaintiff's counsel claims that there are approximately 506 class members. Therefore, the court finds that the class is sufficiently numerous and ascertainable for certification.

c. Community of Interest

"[T]he 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.) "The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.) "[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669.)

Here, it does appear that there are common questions of law and fact, as all of the proposed class members worked for the same defendant and allegedly suffered the same type of Labor Code violations. Therefore, the proposed class involves common issues of law and fact.

With regard to the requirement of typicality of the representative's claims, it does appear that Mr. Guillen's claims are typical of the rest of the class and that he seeks the same relief as the other class members based on his allegations and prayer for relief in the complaint. There is no evidence that he has any conflicts between his interests and the interests of the other class members that would make him unsuitable to represent their interests. Therefore, plaintiffs have shown that Mr. Guillen has claims typical of the other class members.

In addition, the declaration of plaintiff's counsel establishes that class counsel are experienced and qualified to represent the class based on the declarations of counsel. (Davis decl., ¶¶ 2-12, 57.) Therefore, the court finds that the community of interest requirement has been met.

d. Superiority of Class Certification

It does appear that certifying the class would be superior to any other available means of resolving the disputes between the parties. Absent class certification, each employee of defendants would have to litigate their claims individually, which would result in wasted time and resources relitigating the same issues and presenting the same testimony and evidence. Class certification will allow the employees' claims to be resolved in a relatively efficient and fair manner. (*Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Therefore, it does appear that class certification is the superior means of resolving the plaintiffs' claims.

Conclusion: Plaintiff has met his burden of showing that the class should be certified for the purposes of settlement.

2. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 129.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the … court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id*. at p. 129.)

b. Fairness and Reasonableness of the Settlement

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the

presence of a governmental participant, and the reaction of the class members to the proposed settlement.' The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–245, internal citations omitted, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Here, plaintiff's counsel has presented a sufficient discussion of the strength of the case if it went to trial, the risks, complexity, and duration of further litigation, and an explanation of why the settlement is fair and reasonable in light of the risks of taking the case to trial. (See Davis decl., ¶¶ 65-105.) Plaintiff's counsel has provided a detailed explanation of the claims and defenses raised by the parties, and the problems and risks inherent in plaintiff's case. Counsel's analysis supports a finding that the risks, costs and uncertainties of taking the case to trial weigh in favor of settling the action for $499,000 as opposed to the potential maximum recovery of $5,567,708.60. Plaintiff also offers evidence regarding the views and experience of counsel, who state that they believe that the settlement is fair and reasonable based on their experience with class litigation. (*Ibid*.) Plaintiff also points out that the settlement was reached after arm's length mediation, and that counsel conducted extensive discovery to investigate the claims and learn the strengths and weaknesses of the case. These factors also weigh in favor of finding that the settlement is fair, adequate, and reasonable.

c. Proposed Class Notice

The proposed notice appears to be adequate, as the settlement administrator will mail out notices to the class members. The notices will provide the class members with information regarding their time to opt out or object, the nature and amount of the settlement, the impact on class members if they do not opt out, the amount of attorney's fees and costs, and the service award to the named class representatives. Therefore, the court finds that the proposed class notice is adequate.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks attorney's fees of 34% of the gross settlement, or $169,660. They also seek court costs not to exceed $30,000. Counsel has now provided a supplemental declaration that explains the basis for the fees request. (See Supplemental Davis decl.) Ms. Davis describes the education, skill, and experience of the attorneys who worked on the case, as well as the challenges presented in the litigation. The firm took the case on a contingent basis, so they assumed the risk that they would receive nothing if they were unsuccessful. Plaintiff's counsel bill at rates of $350 per hour to $800 per hour, depending on the experience of the attorney. Ms. Davis bills at $800 per hour, Mr. Nayebdadash bills at $700-725 per hour, Mr. Carlos Jimenez bills at $700 per hour, Ms. Minne bills at $650 per hour, Mr. Clapp bills at $400-600 per hour, Mr. Jeffrey Jimenez bills at $300 per hour, and Ms. Tan bills at $350 per hour. Counsel claims that these rates are consistent with normal billing rates in class action litigation in California.

Counsel has billed 179.5 hours on the case so far, and they expect to bill approximately 30 more hours before the case is finished. Not including the additional 30 hours, to date their lodestar fees are $97,280. Counsel also claims that it is appropriate

to use a multiplier of 1.75 in the case in order to take into account the risks, difficulty, complexity, and contingent nature of the litigation, as well as the excellent results for the class. Therefore, counsel requests that they be allowed to recover $169,660 in fees.

Counsel also seeks $30,000 in costs. So far, counsel has incurred about $20,373.96 in costs. They will likely incur further costs in the future, so they request that the court approve a maximum of $30,000 in costs. If total costs are less than $30,000, then any remaining amounts will be included in the net settlement amount and redistributed to the class.

Counsel has now provided the court with sufficient information to show that the requested fees and costs are reasonable. While the billing rates of some of plaintiff's counsel are high when compared to Fresno attorneys' rates, they appear to be comparable to other attorneys in Southern California who specialize in class action litigation. Also, the request for a 1.75 multiplier appears to be reasonable in light of the risks of taking the case on a contingent basis, as well as the excellent results for the class. Therefore, the court will grant preliminary approval of the requested fees.

The request for $30,000 in costs exceeds the actual costs incurred so far in the case, but counsel anticipates incurring further costs before the final approval hearing. Also, if counsel incurs less than $30,000 in costs, then the remaining amount will be added back to the net settlement amount and given to the class. Therefore, the court will grant preliminary approval of the requested costs.

4. Payment to Class Representative

Plaintiff seeks preliminary approval of a $5,000 "enhancement payment" to the named plaintiff/class representative, Mr. Guillen. Mr. Guillen has provided his own declaration explaining what work he did on the case and why the requested enhancement payment is reasonable. (Guillen decl., ¶¶ 11-23.) Plaintiff's counsel also states that Mr. Guillen assisted counsel with various tasks. (Davis decl., ¶¶ 106-108.) Therefore, the court finds that the $5,000 enhancement payment to the named class representative is fair and reasonable.

5. Payment to Class Administrator

Plaintiff seeks approval of $10,000 for the settlement administrator's fees. Plaintiff has presented the declaration of Jodey Lawrence from the settlement administrator, Phoenix Settlement Administrators, to support the requested payment. She explains the background of Phoenix and the tasks that it will perform in administering the settlement. (Lawrence decl., ¶¶ 5-17.) Therefore, plaintiff has shown that the $10,000 payment to the settlement administrator is fair and reasonable.

6. PAGA Settlement

Plaintiff proposes to allocate $50,000 of the settlement to the PAGA claims, with $37,500 being paid to the LWDA as required by law and the other $12,500 being paid out to the class members. Plaintiff's counsel has also sent notice of the settlement to the LWDA, and they have not objected to the settlement. (Davis decl., ¶ 126.) Plaintiff's

counsel has adequately explained why the $50,000 PAGA allocation is reasonable under the circumstances.

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 06/05/23.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Renova Home Improvements, Inc. v. Smriti 786, Inc.***
Superior Court Case No. 22CECG03660

Hearing Date: June 7, 2023 (Dept. 502)

Motion: Demurrer to complaint by defendants Smriti 786, Inc. and Davinder Singh

Tentative Ruling:

To overrule the demurrer with defendants granted leave to answer within 10 days. The time to answer shall run from the date of service by the clerk of the minute order.

Explanation:

Defendants demur to the complaint on the ground that the "[c]omplaint fails to state facts sufficient to constitute a cause of action[.] " (Dem., p. 2:15-17, citing Code Civ. Proc., §430.10, subd. (e).) Any valid cause of action overcomes a general demurrer. (*Quelimane Co., Inc. v. Stewart Title Guarantee Co.* (1998) 19 Cal.426, 38-39.) The court must overrule a general demurrer if the complaint states a cause of action under any possible legal theory. (*Sheehan v. San Francisco 49ers, Ltd*. (2009) 45 Cal.4th 992, 998.)

Demurrer Based on the First Cause of Action for Breach of Contract

Defendants attack the first cause of action for breach of contract on two grounds: (1) plaintiff did not sign the contract; and (2) plaintiff was not licensed to perform roofing work.

Plaintiff Alleges the Terms of a Written Contract Between Plaintiff and Defendants

At paragraph 7 of the complaint, plaintiff alleges plaintiff and defendants entered into a written Roof Installation Contract (the Agreement). Plaintiff describes the Agreement's terms in paragraph 7 and incorporates the terms of the attached exhibit B [one-page form Roof Installation Contract] by reference. Defendant Singh signed the copy of the Agreement attached as exhibit B. In paragraph 8 of the complaint plaintiff alleges a modification of the Agreement wherein the defendants agreed to pay a new, lower contract price. Thus, in the operative complaint, plaintiff alleges a written contract between plaintiff and defendants.

Defendants Fail to Provide Argument with Authority to Show Plaintiff Lacked the Necessary License

Defendants are correct that Business & Professions Code section 7031, subdivision (a) bars a person from suing to recover compensation for any work performed under an agreement for services requiring a contractor's license unless proper licensure is in place. Defendants contend the breach of contract cause of action fails because plaintiff was

not licensed to perform roofing work, which requires a Class C-39 license. Defendants admit plaintiff was a Class B general building contractor at the relevant times, but do not analyze the permissible work plaintiff could perform under that license.

Defendants cite Business and Professions Code section 7057, which describes the scope of work allowed under a general contractor's license. Subdivision (b) of section 7057 provides that a general building contractor may contract for specialty work, such as roofing, but must hold a specialty license for that work *or actually have a specialty contractor do the work* (unless the project involves two unrelated trades). Therefore, plaintiff as a general contractor is authorized to enter into a roofing contract, but without the necessary C-39 specialty license, must use a subcontractor to do the work, unless the project involves two unrelated trades. Plaintiff's allegations are sufficient to survive defendants' demurrer.

The Issue of Whether Plaintiff Completed Enough Work to Seek Payment Cannot Be Resolved on Demurrer

Defendants contend plaintiff did not complete enough work to seek payment. Defendants ask the court to take judicial notice of a City of Fresno Inspection Correction Notice, which lists defects in plaintiff's work, to establish this purported fact. "The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114.) Plaintiff is correct that a demurrer is not the appropriate procedure to resolve the issue of whether plaintiff performed all obligations required under the Agreement.

Demurrer Based on the Second Cause of Action for Common Counts

Defendants fail to address the validity of the second cause of action labeled in the complaint's title as "Common Counts," and described in the body of the complaint as a claim for work, labor and services furnished, except to note that it is based on the same facts as the breach of contract claim. Plaintiff's memorandum sets forth the necessary elements for a common count as alleged in the complaint, which defendants do not dispute. Therefore, the complaint provides grounds for relief based on a common count.

Demurrer Based on the Third Cause of Action for Foreclosure of Mechanic's Lien

Defendants cite repealed statutes and ignore relevant provisions in support of their argument that plaintiff's cause of action for foreclosure of mechanic's lien fails. (See, e.g., Def. Mmo., p. 6:1-5 [citing to repealed "sections" 3097, 3097.1 and 3114 (without specifying the code)]. These Civil Code sections have been repealed.) Civil Code section 8200, subdivision (e)(2) provides: "A Claimant with a direct contractual relationship with an owner or reputed owner is required to give preliminary notice only to the construction lender or reputed construction lender, if any." Plaintiff alleges it had a direct contractual relationship with the defendants, who are owners of the subject property. Therefore, plaintiff was not required to give defendants a preliminary notice. Plaintiff alleges sufficient facts in its third cause of action to survive demurrer.

Request for Judicial Notice

The court denies the request for judicial notice of the "Roof Invoice" attached to the Davidson declaration as exhibit 2. (All further references to exhibits are references to the exhibits attached to the Davidson declaration.)

The court denies the request for judicial notice of exhibit 3A, which is a printout of from the Contractors State License Board website of a license status check for License No 1025111 (with some added hand-written lines). Assuming exhibit 3A constitutes an "official act of a state agency" (see Evid. Code, § 452, subd. (d)), which is doubtful, the truth of the matters asserted in this document is not subject to judicial notice. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App. 4th 471, 482.)

The court takes judicial notice of the statutes and regulations presented in exhibits 3B, 3C, 3D, and 3F, under Evidence Code section 452, subdivision (c), which permits the court to take judicial notice of the official acts of the legislative, executive, and judicial departments of the state.

The court denies the defendants' final request for judicial notice, which is misidentified as "said Invoice." Defendants describe an Inspection Correction Notice performed by an Inspector for the City of Fresno Planning and Development Department. Defendants ask for judicial notice of exhibit 3, but attach the Inspection Correction Notice as exhibit 4. In any event, the truth of the matters asserted in this document is not subject to judicial notice. (*Arce v. Kaiser Foundation Health Plan, Inc., supra,* 181 Cal.App. 4th at p. 482.)

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 06/05/23.
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***In Re: Nazinah Bilal***
Superior Court Case No. 23CECG01486

Hearing Date: June 7, 2023 (Dept. 502)

Motion: Petition to Transfer Structured Settlement Payment Rights

Tentative Ruling:

To deny without prejudice.

Explanation:

Annuity issuer Transamerica Life Insurance Company, successor by merger with Transamerica Occidental Life Insurance Company, ("Transamerica" or "Petitioner") petitions the court for approval of a transfer of structured settlement payment rights between Nazinah Bilal ("Payee") and Petitioner, pursuant to the California Structured Settlement Protection Act. Insurance Code section 10137 requires that any such transfer be "fair and reasonable and in the best interests of the payee . . ." (See also Ins. Code, § 10139.5, subd. (a)(1).) Subdivision (a) sets forth the findings the court must make to approve the transfer:

> (1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.
> (2) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received that advice or knowingly waived, in writing, the opportunity to receive the advice.
> (3) The transferee has complied with the notification requirements pursuant to paragraph (2) of subdivision (f), the transferee has provided the payee with a disclosure form that complies with Section 10136, and the transfer agreement complies with Sections 10136 and 10138.
> (4) The transfer does not contravene any applicable statute or the order of any court or other government authority.
> (5) The payee understands the terms of the transfer agreement, including the terms set forth in the disclosure statement required by Section 10136.
> (6) The payee understands and does not wish to exercise the payee's right to cancel the transfer agreement.

Redacted Documents

As an initial matter, the court cannot make the required findings because the following essential exhibits to the Petition are excessively redacted, and in some cases the exhibits are misidentified in the Petition. The only information that should be redacted from the documents submitted with the Petition is the information required to be redacted by California Rules of Court, rules 1.201(a) and 8.83 (d)(2).

1. The submitted copies of the underlying Settlement Agreement entered into by certain tort defendants ("Defendants") and Payee (then a minor) through her guardian ad litem and the transcript of the Los Angeles County Superior Court proceedings of January 23, 1992 regarding approval of that agreement (Petition, **Exh. B)** redact key terms of the agreement that are necessary for this court to review.

2. The copy of the affidavit of Enrico J. Treglia on behalf of Transamerica Life Insurance Company (Petition, **Exh. C)** contains numerous redactions of key terms and the names of relevant persons, as well as multiple inexplicable redactions of large portions (multiple lines) of the affidavit.

   Additionally, the Petition misidentifies Exhibit C as a "true and correct redacted copy" of a Qualified Assignment pursuant to which Defendants assigned the obligation to make periodic payments to Wilton Re Annuity Service Corporation f/k/a Transamerica Annuity Service Corporation ("Wilton Re'). (Petition, ¶ 4.) However, Exhibit C is **not** a copy of the Qualified Assignment – it is an affidavit describing, upon Mr. Treglia's "information and belief" the existence of the Qualified Assignment (Treglia Decl., ¶ 8) and explaining that Transamerica Life Insurance Company has been unsuccessful in its attempts to obtain a copy of the Qualified Assignment. (Treglia Decl., ¶¶ 11-13.)

3. Copies of the annuity contracts purchased by Wilton Re from Transamerica to fund payments to Payee (Petition, **Exh. D**) contain numerous redactions of key terms as well as multiple inexplicable redactions of large portions (multiple lines) of the documents.

4. The submitted copy of the proposed transfer agreement (Petition, **Exh. E**) contains numerous inexplicable redactions

5. Exhibits **F, H,** and **I** inexplicably redact the name of Payee.

Independent Professional Advice & Best Interest of Payee

Petitioner states that "… due to Payee's prior transfers with third party factoring companies, Transamerica has specifically required that Payee obtain independent professional advice surrounding the Proposed Transfer. Further, Transamerica has required that the independent advisor **recommend that Payee move forward** with the Proposed Transfer, ***which he has***. See Affirmation of Independent Professional Advice, a copy of which is attached hereto as Exhibit "I". (Petition, ¶ 13, emphasis added.) However, Exhibit "I" does not support this assertion. The exhibit includes a "Certification of Independent Professional Advisor" signed by attorney Edward L. Fanucchi, the professional who Payee has identified as her advisor in this matter. In his certification, Mr. Fanucchi merely states that he "rendered advice…concerning the legal, financial, tax, and other implications of" the transfer agreement. Contrary to the representation made in the Petition, there is nothing in Exhibit "I" (or anywhere else in the documents submitted) that Mr. Fanucchi recommended "that Payee move forward with the Proposed Transfer."

Also, Payee states in her declaration that she is "earning approximately $3,100.00 per month" in her current employment. (Petition, Exh. G, Payee Decl., ¶ 13.) However, in the budget attached as Exhibit C to her declaration, Payee's employment income is represented as $2,600.00 per month. This is a significant discrepancy, and the court cannot make a determination as to whether the proposed transfer agreement is fair and reasonable and in the best interests of Payee until the discrepancy is resolved.

Compliance with Local Rule 2.8.7

The Petition also fails to provide the documentation required by Local Rule 2.8.7.

Until these inconsistencies and omissions are resolved, the court cannot approve the Petition.

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 06/05/23.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Jesus Ramirez v. Jaspal Singh***
Superior Court Case No. 22CECG03715

Hearing Date: June 7, 2023 (Dept. 502)

Motion: By Plaintiff to Deem Request for Admissions, set one, Admitted

Tentative Ruling:

To deem plaintiffs' request for admissions, set one, admitted, (Code Civ. Proc. §2033.280, subd. (b))

To grant plaintiffs' request for monetary sanctions in the amount of $510, payable to plaintiffs' counsel within 30 days from the date of service of this order.

Explanation:

Plaintiff's motion is supported by a declaration from attorney Kevin Piercy which states that the request for admissions (set one) was served on February 8, 2023 and no response has been received. (Piercy, Decl. ¶¶ 2-3.) The request for admissions is attached to counsel's declaration, and the accompanying executed proof of service states that the request for admission was served in an envelope addressed to defendant's attorney Michael Parker at Parker, PLLC 501 West Broadway, Suite 800, San Diego, CA 92101 in a sealed envelope, deposited with the United States Postal Service with postage fully prepaid. This is also counsel's address on record with the court. Accordingly, the proof of service is sufficient to raise the rebuttable presumption of effective service. (*Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795; Code Civ. Proc., § 1013, subd. (a).)

Defendant's opposing contentions are unavailing as defendant has produced no evidence rebutting the presumption raised by the valid and fully executed proof of service. Furthermore, a failure to respond to initial discovery is exempt from Superior Court, County of Fresno, Local Rules, rule 2.1.17. Similarly, statutory meet and confer requirements are also inapplicable. (See *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905.)

Therefore, plaintiff's motion to deem admitted the requests for admissions (set one) is granted. (Code Civ. Proc., § 2033.280, subds. (a) and (b).) Monetary sanctions are mandatory. (§ 2033.280, subd. (c) [Monetary sanctions mandatory even if responses are ultimately served].) Finally, moving counsel's $510 in monetary sanctions for bringing the motion does not appear unreasonable.

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 06/06/23.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***TD Bank N.A. v. Jose Villagrana***
Superior Court Case No. 22CECG01126

Hearing Date: June 07, 2023 (Dept. 502)

Motion: Default Prove-Up

Tentative Ruling:

To continue the hearing to Wednesday, June 14, 2023, at 3:30 p.m. in Department 502. Plaintiff must submit supplemental briefing addressing defendants' labor, tow, and storage fees, and a corrected proposed order to reflect its election of remedies, no later than on Friday, June 9, 2023.

Explanation:

Plaintiff seeks a judgment for both monetary recovery and possession of the subject vehicle, the 2015 Ford F-250, Vehicle Identification Number 1FT7W2BT1FEC76344. In particular, plaintiff requests for $39,375, which it represents to be the fair market value of the subject vehicle. Plaintiff also specifies in its proposed judgment that in the event that plaintiff regains possession of the subject vehicle, the proceeds of the sale of the vehicle will be credited to the judgment against all defendants.

However, the default application fails to address the $6,560 that defendants are believed to have accrued in labor, tow, and storage fees for the subject vehicle. (Dumas Decl, ¶ 12.) A prove-up brief addressing whether defendants are required to be made whole by the damages caused by non-party and signator of the contract for the purchase of the subject vehicle is not submitted.

Also, the court cannot grant a judgment for monetary recovery in addition to a judgment for possession of the subject vehicle, because this would result in a double recovery. The language providing that the proceeds of the sale of the subject vehicle will be credited to the judgment against all defendants does not serve to adequately remedy this defect.

Where a party has two concurrent remedies to obtain relief on the same state of facts, and these remedies are inconsistent, it must choose, or elect, between them. A person who has clearly elected to proceed on one remedy is bound by this election and cannot therefore pursue the other remedy. While a plaintiff may file a complaint in a single action alleging inconsistent counts, at some point before judgment, the plaintiff may be required to elect one or another remedy. (*Mansfield v. Pickwick Stages, Northern Division, Inc.* (1923) 191 Cal. 129, 130.) Damages and restitution are alternative remedies, and an election to pursue one is a bar to invoking the other. (*Alder v. Drudis* (1947) 30 Cal.2d 372, 383.)

Plaintiff may elect between its remedies now that it is seeking a judgment. It can obtain a monetary judgment, or alternatively, a judgment for possession of the subject vehicle.

The court continues the hearing to allow plaintiff time to submit supplemental briefing on the issue pertaining to the defendants' labor, tow, and storage fees and a corrected proposed order reflecting its election of remedies.

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 06/06/23.
(Judge's initials) (Date)