Tentative Rulings for June 6, 2023
Department 501
Unless otherwise ordered, all oral argument in Department 501 will be presented in person or telephonically (not through Zoom).

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 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 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Johnston v. Breckenridge Property Fund 2016, LLC, et al.***
Superior Court Case No. 22CECG02017

Hearing Date: June 6, 2023 (Dept. 501)

Motion: Defendant Terrance Malang's Demurrer and Motion to Strike Portions of Plaintiff's Complaint

In the event of a timely request for oral argument, such argument will be conducted on Tuesday, June 13, 2023, at 3:30 p.m. in Department 501.

Tentative Ruling:

To sustain the demurrer to plaintiff's Complaint for failure to state facts sufficient to constitute a cause of action and uncertainty, with leave to amend. (Code Civ. Proc., § 430.10, subds. (e), (f).) To deny the motion to strike as moot in light of the ruling on the demurrer. Plaintiff shall serve and file her First Amended Complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

In light of plaintiff's counsel's concession that he mistakenly filed a draft version of the Complaint, which resulted in a confusing and misleading pleading, the court intends to sustain the demurrer to the entire Complaint for failure to state facts sufficient to constitute a cause of action and uncertainty. The motion to strike is moot in light of the ruling on the demurrer, to the motion to strike will be denied. The court also intends to grant plaintiff leave to file a First Amended Complaint to cure the defects in the original Complaint.

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: DTT (Judge's initials) on 6/2/2023 (Date).

(27)

Tentative Ruling

Re: ***Stellar Solar, Inc. v. Amazing Energy Partners, Inc.***
Superior Court Case No. 22CECG02818

Hearing Date: June 6, 2023 (Dept. 501)

Motion: by Defendant Kota Construction, LLC for Order Discharging Stakeholder and for Related Orders

In the event of a timely request for oral argument, such argument will be conducted on Tuesday, June 13, 2023, at 3:30 p.m. in Department 501.

Tentative Ruling:

To deny, without prejudice. To the extent discovery demonstrates the amount in controversy is certain, the motion may be renewed. To overrule the objections of Amazing Energy Partners, Inc.

Explanation:

Interpleader, Generally

"When a person may be subject to conflicting claims for money or property, the person may bring an interpleader action to compel the claimants to litigate their claims among themselves." (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1122.) "An interpleader action is an equitable proceeding. [Citations.]" (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42–43.) In essence, "the code requires nothing more ... than to show that the parties to be called in make claims on him for the same thing, that the respective claims are adverse to each other, and that he cannot safely determine for himself which claim is right and lawful [citations]." (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 608.)

Here, Kota Construction, LLC ("Kota") contends that Stellar Solar, Inc. ("Stellar") has asserted no cause of action against it (Motion 9:19-20), and that there is no basis for Kota's liability. Stellar's non-opposition to the motion implies that it agrees with Kota's characterization. Furthermore, there is no evidence that Stellar has made a conflicting claim. Accordingly, Kota has not shown the existence of a conflicting claim.

Discharge of Stakeholder (Code Civ. Proc., § 386.5)

Whether a stakeholder may be permitted to deposit funds is "like that of any interpleader party[.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 876; Code Civ. Proc., § 386.5.) "The true test of suitability for interpleader is the stakeholder's disavowal of interest in the property sought to be interpleaded, coupled with the perceived ability of the court to resolve the entire controversy as to entitlement to that property without need for the stakeholder to be a party to the suit. ' "[I]f the relations of

the parties are such that the court's decision would determine the responsibility of the escrow-holder, he is for the purposes and within the scope of the code section authorizing interpleader a mere stake-holder."' (*Pacific Loan Management Corp. v. Superior Court* (1987) 196 Cal.App.3d 1485, 1490.)

"If the claims do not relate to the same thing, debt, or duty, then interpleader is improper." (*Hood v. Gonzales* (2019) 43 Cal.App.5th 57, 72.) In other words, "the very rationale of interpleader compels the conclusion that the amendment does not allow the remedy where each of the claimants asserts the right to a different debt, claim or duty. If the conflicting claims are mutually exclusive, interpleader cannot be maintained …." (*Hancock Oil Co. of Cal. v. Independent Distributing Co.* (1944) 24 Cal.2d 497, 504.) For example, in *Hood, supra,* 43 Cal.App.5th 57 the court of appeal concluded that a legally sufficient interpleader claim existed because the subject of the dispute was a specific settlement check. (*Id*. at 73.) Since the settlement amount was also subject to various loan repayments to other attorneys it was also subject to double or multiple claims. (*Ibid*.)

Unlike the specific settlement amount in *Hood, supra,* 43 Cal.App.5th 57, Kota and Amazing Energy Partners, Inc. ("AEPI") allege different amounts from the commissions owing. For example, AEPI's Cross-Complaint alleges that Kota owes AEPI "substantially more" than $230,274.38 and the total owed "is believed to be in excess of $730,274.38. (Cross-Complaint, ¶ 40.) Furthermore, the amount in dispute is largely derived from outstanding commissions determined with a multifactor and variable calculation. (See De Arman Decl. ¶¶ 3-4.) Accordingly, it is reasonably probable that as litigation and discovery progress the amount in dispute could change.

In addition, "'[i]nterpleader will not lie if the stakeholder has incurred some personal obligation to either of the claimants …." (*Hancock Oil Co. of Cal. v. Independent Distributing Co.* (1947) 24 Cal.2d 497, 505.) Here, AEPI's Cross-Complaint alleges that Kota owes over $730,000 in unpaid commissions (Cross-Complaint, ¶ 40), and thus demonstrates a personal obligation.

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: DTT on 6/2/2023.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Not Too Big To Fall Assoc., Inc. v. Bank of America, N.A., et al.***
Superior Court Case No. 19CECG03998

Hearing Date: June 6, 2023 (Dept. 501)

Motions: (1) by Bank of America et al. to Dismiss

(2) by Wells Fargo Bank to Dismiss

(3) Well Fargo Bank's Demurrer to First Amended Complaint

In the event of a timely request for oral argument, such argument will be conducted on Tuesday, June 13, 2023, at 3:30 p.m. in Department 501.

Tentative Ruling:

To deny the motions to dismiss.

To continue the demurrer to June 28, 2023, at 3:30 p.m. in Department 501. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

Explanation:

On 12/23/22, a motion to dismiss was filed by defendants Bank of America, N.A. (for itself and as successor by merger to BAC Home Loans Servicing, LP and Recontrust Company, N.A.), Mortgage Electronic Registration Systems, Inc., MERSCORP Holdings, Inc., and The Bank of New York Mellon (collectively referred to as "BofA et al." for purposes of this motion).

BofA et al. move to dismiss the action against them on the following grounds: (1) delay in prosecution pursuant to Code of Civil Procedure section 418.10 (failure to properly serve defendant named in the Complaint as "Recontrust, N.A."); (2) mandatory dismissal under section 583.210 et seq.; (3) discretionary dismissal under section 583.410, et seq.; (4) filing and service of the complaint were unauthorized due to plaintiff's suspension.

On 2/14/23, a motion to dismiss was filed by defendant Wells Fargo Bank, N.A. Wells Fargo moves to dismiss the action against it on three grounds: (1) failure to serve defendants within three years as required by Code of Civil Procedure section583.210; (2) delay in prosecution under section 583.420(a)(2); and (3) failure to join indispensable parties (the assignors).

1. Mandatory Dismissal Under Code of Civil Procedure section 583.210

Code of Civil Procedure section 583.210, subdivision (a), provides that the summons and complaint must be served on a defendant within three years after the action is commenced. For this purpose, an action is commenced at the time the

complaint is filed. Subdivision (b) provides that the proof of service of summons shall be filed within 60 days after expiration of the 3-year period.

Since the Complaint was filed on 11/12/19, the three year mark for service was 11/12/22, a Saturday. If the last day for service of summons and complaint ends on a Saturday, Sunday or holiday, the time for service is extended to the next court day. (Code Civ. Proc., § 12a; *Ystrom v. Handel* (1988) 205 Cal.App.3d 144, 147.) So that makes 11/14/22 the last day for service. Defendants were all served on 11/14/22. Service was accomplished on the last day of the three year period.

a. ReconTrust

BofA et al. argue that the summons should be quashed under Code of Civil Procedure section 418.10, subdivision (a)(1), and the action dismissed for failure to serve within three years, as to Recontrust Company, N.A., which has merged with Bank of America.

Where the alleged service occurs just before expiration of the three-year period, a motion to dismiss lies to challenge defective service, because the requirement that the summons be "served" within three years "necessarily raises the issue of the validity of the service." (*Mannesmann Demag, Ltd. v. Superior Court* (1985) 172 Cal.App.3d 1118, 1124-1125; *Dill v. Berquist Const. Co., Inc.* (1994) 24 Cal.App.4th 1426, 1433.)

BofA et al. point out that plaintiff's 11/14/22 proof of service declares that plaintiff served "ReconTrust, N.A., form of entity unknown." (Hsu Decl. ¶ 22, Ex. 20.) Secretary of State business records include an entity "Recontrust Company" with the name listed for the registered agent (Ryan Zachreson) on the filed proof of service (see Hsu Decl. ¶ 25; Ex. C to RJN), but the California Secretary of State business records do not list any entity or registered agent for "ReconTrust, N.A." or "Recontrust Company, N.A." (Hsu Decl., ¶¶ 26-27.)

Accordingly, plaintiff served the wrong entity. However, since ReconTrust no longer existed at the time of service, it could not be served. Service on Bank of America should be effective to pursue any claims previously held against ReconTrust, once plaintiff follows the proper procedure for substituting Bank of America for ReconTrust.

b. Defective Proofs of Service

Every one of the proofs of service filed on 11/14/22 was defective. Plaintiff did not cure the defective proofs of service until 5/23/23 and 5/31/23.

In addition to serving a defendant within three years of commencement of the action, Code of Civil Procedure section 583.210 also provides that a party must file proof of service within 60 days after expiration of the 3-year period. While plaintiff filed proofs of service within that time period, they were defective. The Rutter Guide notes, however, that "it seems doubtful the mere failure to comply with this directive would likewise result in dismissal." (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2022) ¶ 11:51; see also ¶ 4:400.) The court does not intend to dismiss the simply because the proofs of service were filled out incorrectly. They were timely filed.

The separate reply filed by MERSCORP Holding, Inc. points out that, as of the filing of that reply on 5/30/23, plaintiff still had not submitted a valid proof of service on MERSCORP Holding, Inc. However, on 5/31/23 plaintiff finally submitted a proof of service that was not labeled defective by the court. A valid proof of service has been submitted.

2. Discretionary Dismissal Under Code of Civil Procedure section 583.420

The court "may" dismiss an action for failure to prosecute if service is not made within two years after the action is commenced against the defendant. (Code Civ. Proc., § 583.240, subd. (a)(1).)

The discretionary dismissal statute simply requires plaintiff to proceed with reasonable diligence throughout the action. Other things being equal, the policy favoring trial on the merits is favored over the policy requiring dismissal for delay in prosecution. (Code Civ. Proc., § 583.130; see *Dunsmuir Masonic Temple* v. *Superior Court* (1970) 12 Cal.App.3d 17, 22.)

Dismissal for failure to serve summons within two years is a matter within the discretion of the trial court. (*Scarzella v. DeMers* (1993) 17 Cal.App.4th 1762, 1769–1770.) The court is not required to dismiss the action even when plaintiff fails to offer a credible excuse for the delay in service. (*Id.* at p. 1769, fn. 4; *United Farm Workers Nat'l Union v. International Broth. of Teamsters* (1978) 87 Cal.App.3d 225, 235.)

The court has considered the factors set forth in Code of Civil Procedure section 583.240 and Rules of Court, rule 3.1342, and the arguments of the parties in this regard. While plaintiff does not make a strong showing, the mistaken suspension of plaintiff's corporate status and internal problems, including the taking of corporate records and resignation of plaintiff's CEO, were complicating factors that contributed to the delay in service. The court exercises its discretion by refusing to dismiss the action.

Though plaintiff's opposition was late (see Cal. Rules of Court, rule 3.1342(d)), the motions ultimately were opposed with plenty of time for moving parties to submit meaningful replies well in advance of the hearing date. The court declines to grant the motion without a hearing on the merits.

3. Plaintiff's Corporate Status

BofA et al. seek to dismiss the action because plaintiff is a suspended corporation with no capacity to sue. That was the case through nearly the entire pendency of this action, but plaintiff is no longer a suspended corporation. Its status is now active. Plaintiff's prior suspension does not provide a basis to dismiss the action, where plaintiff is now in a position to proceed.

4. Failure to Join Indispensable Parties

Wells Fargo moves to dismiss on the ground that plaintiff failed to join indispensable parties; namely, the borrowers who allegedly their claims to plaintiff.

Wells Fargo argues that the court should also dismiss this action for the same reason it previously dismissed *Brown v. Bank of America, N.A.*, Case Nos. 15CECG01171 and 16CECG02223, two nearly identical suits which the court dismissed for failure to join the assignor/borrowers, whom the Court found to be indispensable parties. (Code Civ. Proc., § 389, subd. (b).) However, Wells Fargo provides no information about these two actions. It requests judicial notice of nothing, points to no relevant published appeal decisions. The simple reference to these two cases provides no basis for dismissal of the action.

If an indispensable party cannot be joined, the court must decide whether to dismiss the action without prejudice, "the absent person being thus regarded as indispensable." ((Code Civ. Proc., § 389, subd. (b).)

Wells Fargo fails to meet its burden as the moving party because it makes no argument or showing that the assignors, even if they are necessary and indispensable parties, cannot be joined. The court may only dismiss indispensable parties if they cannot be joined. (See Code Civ. Proc., § 389, subd. (b), emphasis added.) Since Wells Fargo skips a critical step in the analysis, the court will not grant the motion for failure to join indispensable parties.

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: DTT on 6/2/2023 .
(Judge's initials) (Date)