Tentative Rulings for June 8, 2023
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)

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Tentative Ruling

Re: ***Sovena USA, Inc. v. Central Valley Tank of California, Inc.***
Superior Court Case No. 20CECG01503

Hearing Date: June 8, 2023 (Dept. 403)

Motions: Contest of Application for Determination of Good Faith Settlement

Tentative Ruling:

To deny, and find the settlement between Grantham Engineering, Inc. and Sovena USA to be in good faith.

Explanation:

"Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc., § 877.6, subd. (a)(1).)

A determination that the settlement was made in good faith bars any other joint tortfeasor or co-obligor from further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (Code Civ. Proc., § 877.6, subd. (c).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc., § 877.6, subd. (b).)

The settlement is contested by defendants Kathy Biggs, Patrick Biggs, and Tank Construction and Engineering, Inc. (referred to collectively as "Contestants"). "The party asserting the lack of good faith shall have the burden of proof on that issue." (Code Civ. Proc., § 877.6, subd. (d).)

"[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. [Citation.] Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. '[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would

estimate the settling defendant's liability to be.' [Citation.] The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a 'settlement made in good faith' within the terms of section 877.6." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

"Another key factor is the settling tortfeasor's potential liability for indemnity to joint tortfeasors. The trial court calculates 'the culpability of the [settling] tortfeasor vis-à-vis other parties alleged to be responsible for the same injury. Potential liability for indemnity to a nonsettling defendant is an important consideration for the trial court in determining whether to approve a settlement by an alleged tortfeasor.'" (*Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, 873, internal citations and italics omitted.)

"Section 877.6 and *Tech–Bilt* require an evidentiary showing, through expert declarations or other means, that the proposed settlement is within the reasonable range permitted by the criterion of good faith." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1351, internal citations omitted.) "If 'there is no substantial evidence to support a critical assumption as to the nature and extent of a settling defendant's liability, then a determination of good faith based upon such assumption is an abuse of discretion.'" (*Id.* at p. 1350, internal citation and italics omitted.)

Here, the settlement was reached at the end of a day of mediation with respected mediator and retired judge, Hon. Donald. S. Black.

The settling party, Grantham Engineering, Inc. ("Grantham"), has no contractual privity with plaintiff Sovena USA. Central Valley Tank ("CVT") contracted with Sovena to manufacture and deliver 27 stainless steel tanks for Sovena's olive oil plant. For a fee of $8,400, Grantham contracted with Central Valley Tank to provide engineering calculations to verify that the tanks specified by CVT could be supported by drawings prepared by others. While there is a dispute over the enforceability of the Master Agreement ("MA") between Grantham and CVT, Contestants' contention that the MA is backdated overstates the dispute and ignores evidence that the agreement was submitted to the parties earlier than claimed by Contestants. Under the MA, CVT agreed to defend, indemnity and hold Grantham harmless from all liability except that arising from the sole negligence or willful misconduct of Grantham, and limited Grantham's total liability to CVT or Sovena to $50,000. (Pandell Decl., ¶ 4.)

The measure of damages against an engineer is the lesser of the difference between the cost to repair the design defect in the property or the diminution-in-value caused by the design defect. (*Gagne v. Bertran* (1954) 43 Cal.2d 481.) In the construction industry the premium an owner like Sovena has to pay for an engineer's negligence usually is between 10-30% of the value of the change order when the alleged negligence was discovered during construction. The cost of repair of the 16 tanks that had been delivered and that were subject to Grantham's calculation error was $149,750, putting Grantham's liability at $14,978 to $44,925. Grantham's hold harmless and $50,000

limitation of liability provisions in the MA with CVT provide viable defenses limiting its potential liability.

While the overall damages may be greater, Contestants have direct contractual liability to Sovena for problems with the tanks that have nothing to do with Grantham. Contestants have liability that extends beyond the engineering calculation errors made by Grantham.

Moreover, generally, a subcontractor is not liable in general negligence to a property owner with whom it has no direct contract. (*Weseloh Family Ltd. Partnership v. KL. Wessel Construction Co., Inc*. (2004) 125 Cal.App.4th 152, 164.) Contestants fail to show that this principle does not apply here. They do not make a convincing showing that a special relationship existed, such that a duty of care would be owed by Grantham to Sovena, so as to make Grantham liable for delays in opening Sovena's Modesto facility. (See *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 65 1.)

The court intends to deny the contest, and determine the settlement between Grantham and Sovena to be in good faith. Grantham's assignment of its express indemnity claims against Contestants (valued at $10,000), and settlement payment of $95,000, which is more than twice the value of the high range Grantham's potential liability ($44,925), satisfies the *Tech-Bilt* factors.

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 6/6/2023.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Ascentium Capital LLC v. Body Del Sol Medical Spa, Inc.***
Superior Court Case No. 20CECG02273

Hearing Date: June 8, 2022 (Dept. 403)

Motion: By Plaintiff for summary judgment, or alternatively, summary adjudication of the first and third causes of action

Tentative Ruling:

To overrule defendant's objections and grant plaintiff's motion for summary adjudication. (Code of Civ. Proc., § 437c, subd. (f).) Plaintiff is directed to submit to this court, within 5 days of service of the minute order, a proposed order consistent with the court's summary adjudication ruling.

Explanation:

Successive Motions for Summary Judgment/Adjudication

"A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court *unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion*." (Code Civ. Proc., § 437c, subd. (f)(2), emphasis added.)

Defendant Body Del Sol Medical Spa's ("Body Del Sol") opposition quotes a portion of subdivision (f)(2) of Code of Civil Procedures but omits the italicized portion above, which unambiguously preserves the court's discretion to consider new information. (See also *Marchall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1107 [Trial court has "authority to permit a party to file a successive motion for summary judgment and/or adjudication supported by evidence that was not presented in connection with a prior motion."].)

This court issued its ruling on plaintiff Ascentium Capital, LLC's ("Ascentium") first summary judgment/adjudication motion on December 13, 2023. The court denied the motion because the supporting evidence failed to explain all the amounts and calculations of the amount owed, i.e. Ascentium had not proved all of the alleged damages. In particular, Ascentium's evidence failed to include a calculation and explanation of the equipment's eventual sale for minimal value. As set forth below, Ascentium's current motion rests on an updated declaration by its Sydications Servicing Administrator which asserts new facts of the debt owing and damage calculation. Accordingly, the new information is satisfactory to support the issue of damages asserted in the motion.

First and Third Causes of Action: Breach of Contract and Money Lent

A cause of action for breach of contract requires "(1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damage to plaintiff therefrom." (*Acoustics, Inc. v. Trepte Constr. Co*. (1971) 14 Cal.App.3d 887, 913; see also *Dept. of Industrial Relations v. UI Video Stores* (1997) 55 Cal.App.4th 1084, 1097 [Damages is an essential element of an action based on contract.].) In addition, it is well established that a common count such as money lent, applies for "moneys paid, laid out, expended, loaned or advanced to and for the defendant by the plaintiff at the former's instance and request." (*Moya v. Northrup* (1970) 10 Cal.App.3d 276, 280; *Rubinstein v. Fakheri* (2020) 49 Cal.App.5th 797, 809-810; *Pleasant v. Samuels* (1896) 114 Cal. 34, 36-38.)

The updated declaration by Michele Rodriguez is based on personal knowledge of Ascentium's business records – including the records of Body Del Sol. Michele Rodriguez explains that the subject agreement was entered into in 2016 but Body Del Sol did not default on the payments until March, 2018. The subject equipment was recovered in August, 2018 and sold in "fair" condition for $4,000 at an auction for orderly liquidation value in March 2020. Unlike the evidence submitted in Ascentium's first motion for summary judgment, this information satisfactorily describes how the $4,000 sale price was arrived at. In addition, the Michele Rodriguez' declaration also describes the expenses incurred to repossess, repair, store, and remarket the equipment. It also describes the computations used to calculate interest. (Cf. *Dept. of Industrial Relations v. UI Video Stores, supra,* 55 Cal.App.4th at p. 1097 [The moving party had provided no calculation of damages altogether.]; see also *Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 243.)

Ascentium's evidence sets forth the contract, and the declaration by Michelle Rodriguez asserts evidence that Ascentium performed its contractual obligations and that Body Del Sol's default has caused damages. Therefore, Ascentium's evidence is sufficient to shift the burden to Body Del Sol "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).) The contentions raised in Body Del Sol's opposition, however, are insufficient to meet this burden.

Body Del Sol's opposition here argues, like it did in its opposition to the first summary judgment/adjudication motion, that Ascentium fails to establish damages. In particular, Body Del Sol contends that the Michele Rodriguez declaration "ignores" evidence that a payment of $36,000 had been made. (See Compendium of Evidence, Exhibit F, at p. 2 [indicating an Aug. 3, 2019 payment of $36,608.93.].) Despite the inclusion of declarations from Body Del Sol's president and attorney, however, Body Del Sol neither authenticates Exhibit F nor offers evidence supporting an inference that the payment was excluded from the damage calculation. In essence, it is speculative to infer that Ascentium's damages calculation omits the payment, and inferences that are speculative or conjecture do not defeat summary judgment. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.)

Therefore, Ascentium's evidence is sufficient to dispose of the first and third causes of action. (Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action …."].)

Remaining Opposition Contentions

Body Del Sol also argues that the equipment was defective and thus the contract lacked consideration. However, the agreement specified that there were no warranties, and the authority relied upon by Body Del Sol (*Hauter v. Zogarts* (1975) 14 Cal.3d 104) involved a manufacturer, not, as is the case here, an action brought by a financer. (*Id*. at p. 108.)

In addition, although Body Del Sol argues that Dr. Graham's bankruptcy discharged the debt, the court documents submitted in the opposition state only one debtor, Dr. Graham, sought bankruptcy protection. (See e.g. Body Del Sol's Compendium, Exs. 6 and 7.)

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 6/6/2023.
(Judge's initials) (Date)