Tentative Rulings for September 1, 2022
Department 503

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.

21CECG02422 ***Doe v. Brien Tonkinson*** **is continued to Thursday, September 22, 2022 at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(20) **Tentative Ruling**

Re: ***Karbassi v. Soria***
Superior Court Case No. 22CECG01710

Hearing Date: September 1, 2022 (Dept. 503)

Motion: Defendants' Special Motion to Strike Complaint

Tentative Ruling:

To grant the special motion to strike the complaint on the ground it is a strategic lawsuit against public participation (SLAPP) action. (Code Civ. Proc., § 425.16.) Defendants are directed to submit to this court, within five (5) days of service of the minute order, a proposed judgment consistent with the court's order.

Explanation:

A special motion to strike provides a procedural remedy to dismiss nonmeritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 186.) The court engages in a two-step process in determining whether an action is subject to the anti-SLAPP statute. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories set forth in Code of Civil Procedure section 425.16, subdivision (e). Second, if the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc., §425.16; *Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 198.)

The instant case is a defamation action brought by Fresno City Councilmember Mike Karbassi ("Karbassi") against fellow Councilmember Esmeralda Soria, and her campaign Soria for Assembly 2022 (collectively, "Soria"). Karbassi and Soria were both running for State Assembly in the 27th District. Soria published a mailer that on one side looked like it claimed Karbassi assaulted a young woman, although on the reverse side (the "explanatory side") it clarifies that the assault was by a consultant hired by Karbassi. The explanatory side also states that Karbassi billed taxpayers over $13,000 for food, alcohol and travel expenses, and over $15,000 for public relations, including $500 for a DJ. The mailer also twice queries what else Karbassi has been hiding. (See Complaint Ex. A.)

Objections

Before addressing the merits, the court rules as follows on the evidentiary objections.

Karbassi's Objections to Pulliam Declaration: Sustain objections 2, 3, 4A (sustaining the objection only as to Exhibits G and H because the declarant cannot authenticate

the records), 5, 5A, 6, 7, 8; overrule objections 1, 4, 9, 10, 11. Most of the objections are sustained because Pulliam bases his declaration on the content of records that he obtained and reviewed regarding Karbassi's expenditures as a councilmember. These records are not authenticated simply by virtue of the fact that Pulliam obtained and reviewed them, as Soria seems to claim in response to the objections.

Karbassi's Objections to Soria Declaration: Sustain objection 1; overrule objection 2.

Soria's Objections to Karbassi Declaration: Sustain objections 1-3, 5, 8-11, 12, 13, 14; overrule objections 4, 6, 7.

Prong 1: Whether Karbassi's Action Arises from Soria's Constitutionally Protected Speech

The moving party first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.) A protected activity is "any act" that is completed "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue …." (Code Civ. Proc., § 425.16, subd. (b)(1).)

Campaign speech, including distribution of campaign mailers, is a protected activity for the purposes of Code of Civil Procedure section 425.16. (*Edward v. Ellis* (2021) 72 Cal.App.5th 780, 789.) Karbassi does not dispute that Soria has established the first prong—that the cause of action arises out of Soria's protected activity.

Prong 2: Probability of Success

A plaintiff's complaint need only be shown to have "minimal merit." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 95.) The plaintiff must show that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Id.* at pp. 88-89.) In considering this issue, the court looks at " 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' " (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3, citation omitted.)

The plaintiff must show: (1) a legally sufficient claim (i.e., a claim which, if supported by facts, is sustainable as a matter of law); and (2) that the claim is supported by competent, admissible evidence within the declarant's personal knowledge. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-655; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) It has been stated that this test is similar to the standard applied in summary judgment motions pursuant to Code of Civil Procedure section 437c; to wit, the plaintiff's burden is to demonstrate a prima facie case. (*Church of Scientology*, *supra* 42 Cal.App.4th at p. 654, fn. 10.)

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes

special damage." (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312, internal quotations omitted.)

> Whether a statement declares <u>*or implies*</u> a provably false assertion of fact is a question of law for the court to decide (*Eisenberg v. Alameda Newspapers, Inc.* [(1999)] 74 Cal.App.4th [1359,] 1382 … ; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 …), unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood (*Kahn v. Bower* [(1991)] 232 Cal.App.3d [1599,] 1608 … ; *Weller v. American Broadcasting Companies, Inc.* [(1991)] 232 Cal.App.3d [991,] 1001, fn. 8 …).

(*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385, emphasis added.)

In determining whether a statement is actionable fact or unactionable opinion, or whether the statement communicates or implies a provably false statement of fact, the court is to use a "totality of the circumstances" test. (*Ibid.*) "Under the totality of the circumstances test, '[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.... [¶] Next, the context in which the statement was made must be considered.' " (*Id.* at pp. 385-386, quoting *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–261.) "An opinion ... is actionable only ' "if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false." ' " (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471, quoting *Franklin*, *supra*, 116 Cal.App.4th at p. 386.)

Statements Regarding Sexual Assault

Karbassi contends that the mailer defamed him by making accusations that he:

- "was guilty of battery to a woman, molested a woman" (Complaint, ¶ 14);
- "engaged in criminal acts with students" (Complaint, ¶ 14);
- is a "criminal" and "commits crimes" (Complaint, ¶¶ 10, 14); and
- is "a harasser of women" and "an abuser of women" (Complaint, ¶¶ 10, 14).

It is clear that the side of the mailer with the photo of Karbassi intentionally seeks to make it appear like the allegations in the text boxes refer to Karbassi. That intent is made clear in Pulliam's declaration, as Pulliam states that the mailer was in response to Karbassi's flier's seeming to attribute certain quotes to Soria. But as noted above, the document must be read as a whole, considering the entire context.

Because the document must be read as a whole, the court finds that the mailer is not defamatory because the explanatory side makes clear that the person who allegedly committed the assault and battery was a consultant hired by Karbassi, not Karbassi himself.

Statements Regarding Use of Public Funds

Karbassi alleges that the mailer defamed him by stating that he:

- "causes waste of tax payer dollars unnecessarily" (Complaint, ¶ 10);
- "misused public funds" (Complaint, ¶ 14);
- is "dishonest" (Complaint, ¶ 14); and
- is an "abuser of public trust and funds" (Complaint, ¶ 14).

Truth is a complete defense against a claim of defamation. (See *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1553.) Soria contends that Karbassi cannot establish express defamation on the public funds statements, since the information is provably true. The problem is that the evidence submitted on this point is lacking in foundation and inadmissible. However, because the first prong is indisputably established, the burden lies with Karbassi to show probability of success. He must show that the statements are false.

With regards to use of public funds, the mailer makes a number of factual claims, only one of which is disputed by Karbassi—that he paid a DJ $500. With the Pulliam declaration, Soria attempts to submit evidence of the truthfulness of this statement. Exhibit H to the Pulliam declaration is the Detail Transaction Report for Karbassi, and it includes a $500 charge for a DJ. However, Pulliam cannot authenticate the document, so it is not admissible for purposes of proving the truth of the statement.

While Soria fails to show the truth of the statement regarding the $500 DJ payment, as the reply notes, this is a minor detail in an otherwise larger and unchallenged statement about Karbassi's expenditures. "[T]he law does not require [the defendant] to justify the literal truth of every word of the allegedly defamatory content.... It is sufficient if the defendant proves true the *substance* of the charge …." (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 708, internal quotations omitted, emphasis in original.) "Thus, 'the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." ' " (*Ibid.,* quoting *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516–517.) "[An] erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive.' " (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271-272, citation omitted.) Here, the substance of the charge is that Karbassi spent $15,000 for public relations (which included $500 for a DJ), and $13,000 on food, alcohol and travel. By challenging only a small component of those expenses, Karbassi fails to show that the statements regarding his use of public funds is not substantially true. Karbassi acknowledges in his declaration that public records indicate that he was responsible for the expenditure. Karbassi maintains that Soria somehow falsified or manipulated the transaction report to include the $500 DJ payment (Karbassi Decl., ¶ 7), but he offers no explanation for how this could have been accomplished. The contention is nothing more than a bare accusation.

Moreover, Karbassi submits no evidence that he has been damaged by this false statement of fact. In his declaration, Karbassi addresses how he was damaged by the mailer, but it appears that the negative feedback he received pertained to the assault and battery references. (See Karbassi Decl., ¶¶ 10, 11.) This does not establish the element of damages with regards to this one apparently false statement of fact in the mailer.

The "what's he been hiding" statements fall in the realm of unactionable opinion. Soria relies on *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, where a campaign mailer stated in an election for United States Congress that Richard Sybert "ripped off" taxpayers because he worked less than full-time while on the State's payroll, while maintaining a private law practice on the side. Sybert filed a complaint for libel and injunctive relief against his opponent who published the campaign mailer, Anthony Beilenson. (*Id.* at pp. 946-947.) Beilenson filed an anti-SLAPP motion, which was denied. After holding that Code of Civil Procedure section 425.16 applies to political campaigns, the court turned to the second prong of the analysis. The court analyzed the issue under the principle that, "[a]s a public figure, Sybert had the burden of showing, by clear and convincing evidence, that the objectionable statements had been made with actual malice." (*Id.* at p. 950.)

> The mailer here proclaimed it to be wrong for a state official to have an outside job, the implication being that all of the official's time, attention, and energies ought to be devoted to his public post. This conduct, in the opinion of Beilenson, was a "rip-off." *This colorful epithet, when taken in context with the other information contained in the mailer, was rhetorical hyperbole that is common in political debate*. (*Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14 … ; *Rizzuto v. Nexxus Products Co.* (S.D.N.Y. 1986) 641 F.Supp. 473, 481.) As such, the term "rip-off" was not defamatory.
>
> [¶] … [¶]
>
> Even if the statements are deemed to be untruthful and not statements of opinion, Sybert was required to establish by clear and convincing evidence that Beilenson was aware of the probable falsity of the statements and willfully directed the publication of the libel. (*Garrison v. Louisiana* (1964) 379 U.S. 64, 79 ….) Sybert charges that had Beilenson contacted the FPPC he would have discovered that Sybert was in compliance with the law. "Failure to investigate does not in itself establish bad faith." (*St. Amant v. Thompson* [(1968)] 390 U.S. 727, 733 … ; Evans v. Unkow [(1995)] 38 Cal.App.4th [1490,] 1498-1499.) The record here lacks evidence upon which a reasonable fact finder could find that Beilenson acted with the requisite malice.
>
> [¶] … [¶]
>
> … Moreover, under the precept of *New York Times* and its progeny, Sybert was required to show a likelihood that he could produce clear and convincing evidence of Beilenson's purported malice.

(*Beilenson*, *supra*, 44 Cal.App.4th at pp. 951-953, emphasis added.)

Similarly, in this case, the "what's he hiding" epithet is rhetorical hyperbole, which can mean any number of things to different readers. It was published in response to Karbassi criticizing Soria for the same kind of spending. This type of rhetoric is common in political campaigns.

Where the plaintiff is a public figure, he or she must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual malice—"that is, with knowledge that that statement was false or with reckless disregard of whether it was false or not." (*New York Times Co.*, *supra*, 376 U.S. at pp. 279-280; see also *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256-257.)

"Although at trial a public figure plaintiff must establish actual malice by clear and convincing evidence, in the context of an anti-SLAPP motion the plaintiff must instead establish only a 'probability' that he or she can produce clear and convincing evidence of actual malice." (*Edward*, *supra,* 72 Cal.App.5th at p. 793.)

Karbassi concedes that this standard is applicable here, due to his public figure status. The court finds, however, that he makes no showing of actual malice. Karbassi's evidence and argument regarding malice primarily addresses the sexual assault statements. As noted above, the only potentially false statement of fact pertains to the $500 payment for a DJ. Karbassi summarizes the argument regarding actual malice as follows:

> When they published the Mailer, Soria and her campaign knew, and disregarded, that the assertions and implications that Karbassi is a criminally violent sexual predator concerned someone else. (Pulliam Decl. ¶¶ 9, 11-13.) They published the mailer in response to prior quarrels. (Karbassi ¶¶ 12-13; Pulliam Decl. ¶ 6.) Indeed, in response to this lawsuit, Soria's campaign told the media that their motive was to give Karbassi a "taste of his own medicine" -- in other words, to punish Karbassi for perceived slights earlier in the campaign. (Karbassi Decl. ¶13.)

(Oppo. 4:3-8.)

The simple fact of publishing the mailer is not evidence of malice. The article referenced in paragraph 13 of Karbassi's declaration is hearsay, and, even if it were admissible, it is merely evidence of a reciprocal response to Karbassi's criticisms of Soria, common in political campaigns. Karbassi offers no evidence of malice with regards to the statement of payment for a DJ, implying without evidence that Soria manipulated the public record. Karbassi fails to show probability of success on his defamation claim.

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: KAG on 8/30/2022 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Dhoot v. DK Transport, Inc.***
Superior Court Case No. 21CECG00032

Hearing Date: September 1, 2022 (Dept. 503)

Motion: Defendant DK Transport, Inc.'s Motion to Set Aside Default and Default Judgment

Tentative Ruling:

To deny.

Explanation:

Defendant moves solely under Code of Civil Procedure section 473, subdivision (b) for relief from entry of default and default judgment. As an initial matter, the court notes that no judgment has been entered in the case. The motion purportedly seeks relief from entry of default on March 9, 2021.

Code of Civil Procedure section 473, subdivision (b) provides, in pertinent part:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.... Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

(Emphasis added.)

Thus, under Code of Civil Procedure section 473, subdivision (b), the court is empowered to relieve a party "upon any terms as may be just ... from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Relief under section 473, subdivision (b) can be based on either: an "attorney affidavit of fault," in which event relief is

mandatory, or declarations or other evidence showing "mistake, inadvertence, surprise, or excusable neglect," in which event relief is discretionary.

Mandatory Relief

Defendant appears to seek mandatory relief due to "excusable neglect for relying on counsel." Defendant recognizes that it was served with the complaint. (Dosanjh Decl., ¶ 2.) Defendant tendered the complaint to its insurance company. (*Id.* at ¶ 3.) Defendant believed the insurance company would hire counsel to represent it. (*Id.* at ¶ 4.) At some point prior to November 5, 2021, defendant became aware that the insurance company had not hired counsel for the claim. (Sodhi Decl., ¶ 4 & Ex. A.)

Defendant fails to demonstrate sufficient grounds to seek mandatory relief. No attorney affidavit of fault was submitted, nor could there have been. Defendant submits no evidence to suggest that it retained counsel at any point prior to the entry of default upon which an attorney's mistake, inadvertence, surprise, or excusable neglect could be founded. (Code Civ. Proc., § 473, subd. (b).)

Discretionary Relief

"While [Code of Civil Procedure section 473 relief] is remedial and to be liberally construed[,] the moving party must show 'mistake, inadvertence, surprise or excusable neglect.' … 'It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied.…'" (*Luz v. Lopes* (1960) 55 Cal.2d 54, 62, citations omitted.)

"Excusable neglect" is the most common ground for obtaining discretionary relief from default. The issue boils down to whether the moving party has shown a reasonable excuse for the default. (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905.) "The word 'excusable' means just that: inexcusable neglect prevents relief." (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895.) "Excusable neglect" is generally defined as an error that a reasonably prudent person under the same or similar circumstances might have made. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) "The burden of establishing excusable neglect is upon the party seeking relief who must prove it by a preponderance of the evidence." (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528, fn. omitted.) The court may also relieve a party from a default judgment taken against him through his mistake. The mistake may be either of fact (*see Lieberman v. Aetna Ins. Co.* (1967) 249 Cal.App.2d 515, 524) or law (s*ee Anderson v. Sherman* (1981) 125 Cal.App.3d 228, 237). "The term 'surprise,' as used in section 473, refers to ' "some condition or situation in which a party ... is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." ' " (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

Here, no grounds for relief have been established. Defendant does not deny it was served and identifies no defects in service. It admits actual knowledge of the lawsuit. Defendant was served with a summons which states: "NOTICE! You have been sued.

The court may decide against you without your being heard unless you respond within 30 days." (Summons at p. 1.)

Defendant submits only that it mistakenly believed that "the matter was being handled by his [sic] carrier's counsel and it was not." (Memo P's & A's, p. 3:25-26; see also Dosanjh Decl., ¶ 4.) Without more, the court cannot conclude that this mistaken belief was either reasonable or excusable. For example, defendant submits no evidence that, charged with the knowledge that a failure to respond within 30 days may result in the court deciding the matter against it, defendant inquired at any point prior to November 5, 2021 as to the status of its representation.

In addition, defendant's motion is untimely under Code of Civil Procedure section 473, subdivision (b). Pursuant to section 473, subdivision (b), a motion to set aside a default or default judgment must be brought within a reasonable time, "in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." "The six-month time limit for granting statutory relief is jurisdictional and the court may not consider a motion for relief made after that period has elapsed." (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42; *see also* Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 5:365 ["This limit is jurisdictional in the sense that the court has no power to grant relief after this time regardless of whether an 'attorney affidavit of fault'… is filed or how reasonable the excuse for the delay."].)

Defendant was required to seek relief under Code of Civil Procedure section 473, subdivision (b), no later than September 9, 2021. Defendant filed the instant motion for relief on March 9, 2022. Defendant's motion for relief under Code of Civil Procedure section 473, subdivision (b) is therefore untimely, and the court is without jurisdiction to grant relief.

Default Judgment

Defendant argues that relief may nevertheless be granted against a void judgment. (See Code Civ. Proc., § 580.) No judgment has been entered in the case. As such, the court does not reach the argument that any judgment would be void based on plaintiff's failure to serve a statement of damages. (See Code Civ. Proc., § 580, subd. (a).)

Defendant further argues that plaintiff failed to submit the claim to a worker's compensation forum. Defendant states no bases as to why this is relevant to the relief it seeks under Code of Civil Procedure section 473, subdivision (b).

The motion to set aside the entry of default and default judgment is therefore denied.

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: KAG on 8/30/2022 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Trinity Construction Enterprises, Inc. dba Trinity Power v. WDF Concrete Corp. et al.***
Superior Court Case No. 22CECG00392

Hearing Date: September 1, 2022 (Dept. 503)

Motion: Defendant WDF Concrete Corp.'s Motion for Leave to File an Amended Answer

Tentative Ruling:

To grant. Defendant WDF Concrete Corp.'s amended answer is to be filed within ten (10) days of service of the minute order by the clerk.

Explanation:

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading. (Code Civ. Proc., § 473, subd. (a)(1).) Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica (1972)* 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified: "If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530; see also *Mabie v. Hyatt, supra,* 61 Cal.App.4th at 596.)

Here, defendant WDF Concrete Corp. submits that it retained counsel on April 26, 2022, and thereafter engaged in meet-and-confer efforts with plaintiff regarding amending its answer. Following the conclusion of those efforts, defendant WDF Concrete Corp. promptly filed the instant motion. The court finds that the motion is timely made.

If the party seeking the amendment has been dilatory, and the delay has prejudiced the opposing party, the judge has discretion to deny leave to amend. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.) Prejudice exists where the amendment would require delaying the trial, resulting in loss of critical evidence or added costs of preparation, increased burden of discovery, etc. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488; *see also P & D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) But, the fact that the amendment involves a change in legal theory which would make admissible evidence damaging to the opposing party is *not* the kind of "prejudice" the court will consider. (*Hirsa v. Superior Court*, *supra*, 118 Cal.App.3d at p. 490.)

In the instant case, plaintiff will not be prejudiced. No trial date is presently set, and it is undisputed that discovery has commenced. Plaintiff submits no evidence or argument of loss of critical evidence. Plaintiff will still carry the same burden and cost to prove its claims. Plaintiff argues that it would be prejudiced because it has already propounded discovery on defendant WDF Concrete Corp. However, as defendant WDF Concrete Corp. notes, the discovery in question was propounded on February 24, 2022, over a month prior to its original answer. (Hamamjian Decl., ¶ 6, and Ex. A.)[1] Thus, the February 24, 2022 discovery could not be prejudiced by an amended answer because the discovery already did not rely on defendant WDF Concrete Corp.'s March 29, 2022 original answer.

Denying the motion for leave to file an amended answer, however, would greatly prejudice defendant WDF Concrete Corp. Defendant WDF Concrete Corp.'s original answer is improper because it was filed by a corporation in propria persona, contrary to established California law. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729 ["A corporation cannot represent itself in court, either in propria persona or through an officer or agent who is not an attorney."].) Plaintiff, through its meet-and-confer efforts on March 30, 2022, one day after defendant WDF Concrete Corp. filed its original answer, recognized the same. (Hamamjian Decl., ¶¶ 13-15 & Ex. D.) As no irreparable prejudice has been shown to plaintiff, the court exercises liberal discretion and grants defendant WDF Concrete Corp. leave to file an amended answer. (*See Nestle v. Santa Monica*, *supra*, 6 Cal.3d at p. 939.)

Plaintiff seeks to impose conditions on the leave to file an amended answer. Plaintiff argues that defendant WDF Concrete Corp. must not be permitted to contradict an admission made in its original pleadings through an amended answer. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1158, disapproved on other grounds *by ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175.) This argument goes to the merits of a future pleading attacking the proposed answer. Normally, the court will *not* consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Grounds for a demurrer or a motion to strike are premature as to a proposed pleading. After leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) Thus, plaintiff's assertion that the proposed pleading improperly contradicts judicial admissions is premature.

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: KAG on 8/30/2022 .
(Judge's initials) (Date)

[1] The discovery attached to the declaration as Exhibit A was dated and served on February 23, 2022. The discrepancy is inconsequential.

(38)

Tentative Ruling

Re: ***Jordan v. Bulldog Lane Investments, LLC, et al.***
Superior Court Case No. 18CECG04629

Hearing Date: September 1, 2022 (Dept. 503)

Motion: Plaintiffs' Motion to Substitute Personal Representative in Place of Deceased Plaintiff Chelene Jordan

Tentative Ruling:

To grant.

Explanation:

Pursuant to the court's August 11, 2022 order, this motion was continued to allow plaintiffs to file errata to the declarations to include a certified copy of decedent's death certificate, as referenced in the declarations. The errata and a certified copy of decedent's death certificate have now been filed with the court.

Therefore, for the reasons set forth in the August 11, 2022 order, the motion is granted.

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: KAG on 8/30/2022 .
(Judge's initials) (Date)