Tentative Rulings for September 27, 2022
Department 501

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.

21CECG02879 ***Fresno Community Hospital v. Wells*** **is continued to Thursday, October 27, 2022 at 3:30 p.m. in Department 501**

20CECG03170 ***Ghost Golf v. Newson*** **is continued to Wednesday, October 26, 2022 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(20)

Tentative Ruling

Re: ***Roque v. Acromex Bros., et al.***
Superior Court Case No. 21CECG02618

Hearing Date: September 27, 2022 (Dept. 501)

Motion: by Plaintiff for Relief From Dismissal

Tentative Ruling:

To grant and set aside the dismissal entered on March 24, 2022. (Code Civ. Proc., § 473, subd. (b).)

Explanation:

"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." (Code Civ. Proc., § 473, subd. (b).) Relief can be based either on:

- 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.

Where an "attorney affidavit of fault" is filed, there is no requirement that the attorney's mistake, inadvertence, etc., be excusable. Relief must be granted even where the default resulted from inexcusable neglect by defendant's attorney. (*Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 897.)

Plaintiff's counsel has filed an affidavit taking responsibility for the failures to appear that resulted in the dismissal. Additionally, the court finds that plaintiff has made an adequate showing of mistake, inadvertence or excusable neglect. The motion will therefore be granted, and the dismissal set aside.

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 9/26/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Viking Insurance Co. v. Muhammad***
Case No. 20CECG02927

Hearing Date: September 27, 2022 (Dept. 501)

Motion: by Court to Reclassify the Action as a Limited Civil Case

Tentative Ruling:

To grant the court's motion to reclassify the case as as a limited civil action, since the damages sought by plaintiff in the Complaint are less than the $25,000 jurisdictional limit for unlimited civil cases. (Code Civ. Proc. §§ 85; 403.040.)

Explanation:

Under Code of Civil Procedure section 85, subdivision (a), "an action or special proceeding shall not be treated as a limited civil case unless all of the following conditions are satisfied: [¶] (a) The amount in controversy does not exceed twenty-five thousand dollars ($25,000)." (Code Civ. Proc. § 85, subd. (a).) "As used in this section, 'amount in controversy' means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees, interest, and costs." (*Ibid*.)

Under Code of Civil Procedure section 403.040, subdivision (a), "[t]he court, on its own motion, may reclassify a case at any time… The court shall grant the motion and enter an order for reclassification, regardless of any fault or lack of fault, if the case has been classified in an incorrect jurisdictional classification." (Code Civ. Proc., § 403.040, subd. (a).) "If a case is reclassified as a limited civil case, no reclassification fee is required." (Code Civ. Proc., § 403.040, subd. (c)(2).)

In *Walker v. Superior Court* (1991) 53 Cal.3d 257, the California Supreme Court held that the trial court has discretion to reclassify a case when it determines that the case will necessarily result in a verdict below $25,000. (*Id*. at pp. 271-274.) A court contemplating ordering jurisdictional reclassification of a civil matter on its own motion must provide notice to the parties and give them an opportunity to respond and offer reasons why reclassification should or should not be ordered. (*Id*. at pp. 271-272, see also *Stern v. Superior Court* (2003) 105 Cal.App.4th 223, 230.) Even if no hearing is held, before ordering jurisdictional reclassification of a civil matter, the court must afford the parties an opportunity to contest reclassification. (*Walker*, *supra*, at pp. 271-272, *Stern*, *supra*, at p. 230) "Regarding valuation of the amount of a future judgment, *Walker* holds that a matter can be transferred (or reclassified) when (1) before trial, the complaint, petition, or related documents make the absence of jurisdiction apparent; or (2) during pretrial litigation, it becomes clear that the matter will 'necessarily' result in a verdict below the jurisdictional amount. (*Stern, supra,* at pp. 230–231, citing *Walker, supra,* at p. 262.)

Here, plaintiff's Complaint clearly alleges that it only incurred $15,000 in damages when it paid out benefits on the insurance policy to its insured after she was struck and injured by defendant's car. (Complaint, ¶¶ 16, 23, 32, 40 and 49.) Plaintiff's summary judgment motion also confirms that it only suffered $15,000 in damages based on the payment to its insured. (Plaintiff's Separate Statement of Undisputed Facts, Fact No. 11.) Therefore, it appears that the value of plaintiff's case is limited to $15,000, which is well below the $25,000 jurisdictional limit for unlimited civil actions.

When it denied plaintiff's summary judgment motion, the court also set a hearing on its own motion and gave notice to the parties to allow them to respond to the court's concern that plaintiff's damages are below the $25,000 jurisdictional limit. The parties have not responded to the motion or filed any briefing. Therefore, at this time there is nothing before the court to indicate that the case has been properly classified as an unlimited civil matter. The only evidence in the record indicates that plaintiff's damages are limited to $15,000. Indeed, plaintiff has judicially admitted in its Complaint and motion for summary judgment that it only paid $15,000 on the insurance policy, so the court intends to find that plaintiff's damages are necessarily less than $25,000.

Therefore, the court intends to grant the motion to reclassify the case as a limited civil action. However, since the case is being reclassified to limited civil, plaintiff will not be required to pay a reclassification fee to continue the action.

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 9/20/2022.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Imidacloprid Cases***
Superior Court Case No. 22JCCP05241

Hearing Date: September 27, 2022 (Dept. 501)

Motion: Petition for Coordination

Tentative Ruling:

To grant.

Explanation:

The court intends the grant the unopposed Petition for Coordination. The court finds that each of the seven cases at issue are complex and meet the standards specified in Code of Civil Procedure section 404.1. The court also intends to recommend the Tulare County Superior Court as the site of the coordination proceedings as that county appears to be the geographic center of the pending cases.

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 the 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 9/26/2022.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***The Bank of New York Mellon v. Trinidad, et al.***
Superior Court Case No. 17CECG01907

Hearing Date: September 27, 2022 (Dept. 501)

Motion: Application for Quiet Title or, Alternatively, Default Judgment

Tentative Ruling:

To deny.

Explanation:

Introduction

Plaintiff's application and proposed judgment seek to quiet title in defendant Jose Trinidad. Alternatively, plaintiff's application seeks a default judgment on the basis of adverse possession (also in relation to defendant Jose Trinidad), reformation and declaratory relief. These theories, however, are not adequately supported by the application. Therefore, plaintiff's request for quiet title/default judgment is denied.

Notice

Presumably relying on their defaulted status, plaintiff has not filed any proof of service or other document showing that the defaulted defendants have knowledge of this hearing. Under typical default circumstances the defendant is no longer entitled to participate in the proceedings. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.) Nevertheless, reflecting the general uniqueness conferred to real property, quiet title proceedings do not follow the typical path toward obtaining judgment. (*Harbour Vista, LLC v. HSBC Mortgage Services Inc*. (2011) 201 Cal.App.4th 1496, 1505.) Consequently, "notwithstanding a defendant's default in a quiet title action, the plaintiff is not automatically entitled to judgment in its favor but must prove its case in an evidentiary hearing with live witnesses and any other admissible evidence …." (*Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 947; see also Code Civ. Proc., § 764.010 ["The court shall not enter judgment by default …."].) Furthermore, defaulted defendants are entitled to participate in the quiet title proceedings and present competing evidence. (*Nickell v. Matlock, supra,* 206 Cal.App.4th at pp. 944, 947; *Harbour Vista, LLC v. HSBC Mortg. Services Inc., supra,* 201 Cal.App.4th at p. 1508 [trial court erred when it entered default quiet title judgment without allowing competing evidence from the defendant.)

Plaintiff has only included a proof of service of the application on defendant Jose Trinidad, not the other defaulted defendants. Consequently, a judgment quieting title to the subject residence cannot be granted on the current record.

Adverse Possession

"In no case shall adverse possession be considered established under the provision of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have timely paid all state, county, or municipal taxes that have been levied and assessed upon the land for the period of five years during which the land has been occupied and claimed. Payment of those taxes by the party or persons, their predecessors and grantors shall be established by certified records of the county tax collector." (Code Civ. Proc., § 325, subd. (b).)

The claimant of the property through adverse possession must show "tax payment and open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner and under a claim of title." (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321.) "[T]he requirements of adverse possession are rigid, precise and must be construed in favor of the person sought to be dispossessed."]; *Finley v. Yuba County Water Dist.* (1979) 99 Cal.App.3d 691, 700; see also *Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1310 ["[A]party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence."]; *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032 [" 'the claimant must prove use of the property ....'" citations omitted.].)

Plaintiff's current application and proposed judgment seeks to quiet title of the subject property in Defendant Jose Trinidad, i.e. not plaintiff. As a basis to quiet title, plaintiff's application attempts to satisfy the elements of adverse possession through the declaration of its agent's foreclosure specialist, Sally Leidal.

Ms. Leidal describes the subject property as bearing the address 742 ½ 3rd Street, Parlier, California, and assigned Assessor's Parcel Number 355-191-30. (Leidal, Decl. ¶ 7.) Ms. Leidal "more particularly" describes the subject property as consisting of two legal descriptions. (*Ibid*.) Ms. Leidal also states that defendant Jose Trinidad encumbered the subject property to securitize a $160,000 loan in 2006, to which plaintiff became a beneficiary in 2012. (*Id*. at ¶¶ 16, 17.)

Ms. Leidal states that plaintiff's records show that defendant Jose Trinidad has not paid any amount of his mortgage since March 2008. (Leidal, Decl. ¶ 20.) She also states that plaintiff has been regularly paying the property taxes for the Subject Property from 2008 to now, with no contribution from Mr. Trinidad. (*Id*. at ¶ 21.)

Absent from Ms. Leidal's declaration, however, is any demonstration that plaintiff is in possession of the subject property. In other words, plaintiff is not the claimant. Furthermore, Ms. Leidal's declaration states that Mr. Trinidad – who would be the proper claimant under these facts – has not paid the property taxes since 2008, let alone the last five years. Consequently, plaintiff has not provided evidence sufficient to establish adverse possession.

Reformation/Declaratory Relief

As the court ruled in plaintiff's first application for judgment, the Complaint fails to state a cause of action for reformation under the applicable statute of limitations. Particularly, any "mistake" as to the legal descriptions had been apparent for 37 years,

which is well beyond the applicable statute of limitations. Furthermore, although plaintiff contends that defendants have waived the statute of limitations, no waiver has been presented by Defendant Jose Trinidad, who remains the owner of record.

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 9/26/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Ireit Fresno El Paseo v. Naify, et al.***
Superior Court Case No. 21CECG03397

Hearing Date: September 27, 2022 (Dept. 501)

Motions: by Defendant Crave Cookie LLC Demurring to the Complaint; and by Defendant Excelsior J D Co., LLC dba Java Detour Demurring to the Complaint

Tentative Ruling:

To sustain, with leave to amend, Crave Cookie LLC ("Crave Cookie") and Excelsior J D Co., LLC dba Java Detour's ("Excelsior") demurrers to the first cause of action. (Code Civ. Proc., § 430.10, subds. (e) and (f).)

Plaintiff is granted 20 days' leave to file a First Amended Complaint. The time to file such pleading will run from service by the clerk of the minute order. All new allegations in the pleading are to be set in **boldface** type.

Explanation:

Untimely Opposition:

"All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days […] before the hearing." (Code Civ. Proc., § 1005, subd. (b).) Here, as Crave Cookie points out, plaintiff untimely filed and served its opposition on June 27, 2022, six court days prior to the original date (July 6) Crave Cookie's demurrer was scheduled to be heard. Crave Cookie does *not* waive proper service. However, "[n]o paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." (Cal. Rule of Court, rule 3.1300(d).)

In determining whether to consider a late filed paper, one court provides that a trial court must "properly exercise its discretion by considering all factors relevant to granting relief under [Code of Civil Procedure] section 473." (*Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 30.) Another court has held that "[i]n view of the strong policy of the law favoring the disposition of cases on the merits…" a trial court has discretion to consider late-filed papers even without a Code of Civil Procedure section 473 showing. (*Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal.App.5th 1197, 1202 [Since the filing was only two days late and no showing of prejudice was made by the moving party, the trial court did not abuse its discretion by considering the late-filed papers.].)

Once a published Supreme Court or appellate court decision becomes final, it is binding on lower courts under the doctrine of "stare decisis". (*Sierra Club v. San Joaquin Local Agency Formation* (1999) 21 Cal.4th 489, 503-505; see also *Auto Equity Sales, Inc. v.*

Superior Court (1962) 57 Cal.2d 450, 455 [a court of appeal decision must be followed by all superior courts, regardless of which appellate district rendered the opinion.).] When there are conflicting court of appeal decisions on point, the trial court can choose to follow either of them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

Here, plaintiff has made no showing of mistake or excusable neglect for its untimely response. Similarly, no showing has been made to establish prejudice to Crave Cookie. "The salutary purpose of such rules regulating the filing of opposing papers is to '... ensure that the court and the parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time.'" (*Kapitanski v. Von's Grocery Co. (1983) 146 Cal.App.3d 29,* 33 [internal citations omitted].) Since Crave Cookie has timely filed its reply on the merits, and in light of the strong policy of law favoring the disposition of cases on the merits, the court intends to consider plaintiff's late-filed opposition, despite there being no section 473 showing.

Demurrer to the First Cause of Action for Breach of Lease:

Crave Cookie and Excelsior demur to the first cause of action for breach of lease on the grounds that the Complaint fails to state sufficient facts to state a claim and for uncertainty. Defendants contend that the Complaint fails to sufficiently allege the terms of the contract and defendants' breach thereof.

"The lease has a dual character; it is a conveyance of an estate for years, and a contract between lessor and lessee. The result is that dual obligations arise,—contractual obligations from the terms of the lease, and obligations under the law from the creation of the tenancy." (*Ellingson v. Walsh, O' Connor & Barneson* (1940) 15 Cal.2d 673, 675.) "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) "A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993.)

Plaintiff contends that the Complaint sufficiently pleads the legal effect of the agreement. "In order to plead a contract by its legal effect, plaintiff must allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions." (*Ibid.* [internal citations omitted]; *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-99 ("*Construction Protective Services*").)

In *Construction Protective Services* California's Supreme Court held that the plaintiff was entitled to plead the legal effect of the contract rather than its precise language. There, the plaintiff brought suit against its insurer for breach of contract. Plaintiff alleged that defendant insurer was at all times its general liability insurer and that the insurance policy obligated the defendant insurer to defend and indemnify plaintiff against suits seeking damages. A contractor had hired plaintiff to provide security services at a construction site. After a fire occurred at the site, plaintiff sued the

contractor for the contractor's failure to pay for plaintiff's services. In its answer, the contractor asserted a setoff claim, arguing that plaintiff was legally responsible for the fire damage. Although plaintiff alleged that the contractor's setoff claim fell within the scope of its insurance policy, defendant insurer refused to defend plaintiff against the claim or indemnify plaintiff for any setoff that was ultimately awarded. (*Id*. at p. 193-94.) The court found that these allegations satisfactorily alleged the legal effect of the contract. (*Id*. at p. 198-99.)

Here, however, the Complaint alleges as follows: on or around October 28, 2013, Excelsior entered into a written lease agreement with Robert Naify and Crave Cookie to rent the subject property to them. On July 15, 2020, Crave Cookie entered into a sublease agreement with Excelsior. Plaintiff acquired Excelsior's interest in the lease and the subject property. The terms of the lease are not alleged, only that defendants breached the lease by failing to pay the sums due thereunder and that plaintiff has also been damaged by defendants' failure to open and operate, which has triggered co-tenancy provision(s) in the lease. While the Complaint identifies the subject contract to be the October 28 lease agreement, the Complaint fails to adequately describe how and which defendants breached the lease. For example, while it may be inferred that Crave Cookie was obligated to pay rent, no such allegation is actually made. As such, it is unclear what sums Crave Cookie has failed to pay, i.e., rental payments, taxes, utilities, etc. Similarly, no allegation is made that Excelsior is obligated to pay for the damages plaintiff is seeking. It is unclear how Excelsior, plaintiff's predecessor-in-interest, is obligated to pay plaintiff for the unspecified sums under the October 28 lease agreement. Further, no explanation is provided to explain what is meant by "co-tenancy provision." Thus, the Complaint fails to sufficiently state a cause of action for breach of lease.

- <u>Leave to Amend:</u>

Defendants further request that the demurrer be sustained without leave to amend, because plaintiff's claim against them is unripe. Fresno Municipal Code, section 2-514, in relevant part, provides:

> Rent Deferral, Eviction Moratorium, and Foreclosures.
>
> (1) To the extent allowed by State law, no residential tenant, including, without limitation, a mobile home tenant, in the City shall be evicted for nonpayment of rent during the state of emergency caused by the COVID-19 outbreak.
> (2) To the extent allowed by State law, commercial landlords in the City are hereby prohibited from evicting commercial tenants for nonpayment of rent during the state of emergency caused by COVID-19.
> (3) A tenant, whether residential or commercial, must notify their landlord in writing they cannot pay rent due to a COVID-19 related impact. Within ten days of this notice, the tenant must provide documentation to support the claim that they cannot pay rent…
> (4) Tenants will have up to six months after the termination of the emergency declaration to repay any back-due rent. No interest, late fees, or other penalties shall accrue or be owed as a result of rent deferrals pursuant to this Section.

(Fresno Municipal Code, § 2-514, subd. (g)(1)-(4).)

Defendants contend that plaintiff cannot seek damages from non-payment of rent until at least six months after the cessation of the emergency declaration. However, as plaintiff points out, the regulation is inapplicable to the case at bar. First, there are no allegations to indicate that plaintiff is seeking damages from non-payment of rent. The Complaint merely alleges that defendants have breached the lease by failing to pay an unidentified sum. Since a demurrer admits only material facts well-pled, the court cannot assume that the damages plaintiff is seeking are for non-payment of rent. Second, even if this were the case, the Complaint is silent on whether defendants have completed the necessary procedural measures to afford them relief under Fresno Municipal Code, section 2-514. More specifically, it is not alleged, nor is there a request for judicial notice of—the fact that defendants notified plaintiff *in writing* that they could not pay rent *due to a COVID-19 related impact.* Thus, the court intends to grant leave to amend.

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 9/26/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***West v. Locatelli, et al.***
Superior Court Case No. 19CECG02777

Hearing Date: September 27, 2022 (Dept. 501)

Motion: by Defendants Demurring to the Second Amended Complaint

Tentative Ruling:

To overrule the demurrer to the first and fourth causes of action and to sustain, with leave to amend, the demurrer to the second, ninth, tenth, eleventh, twelfth and thirteenth causes of action. (Code Civ. Proc., § 430.10, subd. (e).)

Plaintiff is granted 20 days' leave to file a Third Amended Complaint. The time to such pleading will run from service by the clerk of the minute order. All new allegations in the pleading are to be set in **boldface** type.

Explanation:

Demurrer to the First and Fourth Causes of Action for Breach of Written Contract and Breach of Implied Covenant of Good Faith and Fair Dealing:

Defendants demur to the first and fourth causes of action on the grounds that these causes of action cannot be maintained as they fail to (1) comply with the statutory requirements of the statute of frauds; and (2) state facts sufficient to state a claim.

- Statute of Frauds:

Where the complaint seeks to enforce an agreement required to be in writing under the statute of frauds, but nonetheless alleges the agreement was *oral*, a general demurrer lies. (*Parker v. Solomon* (1959) 171 Cal.App.2d 125, 136.) Code of Civil Procedure section 1624 provides that certain contracts "are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent." (Code Civ. Proc., § 1624, subd. (a).) One of such contracts is "[a]n agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein…" (*Id*. at subd. (a)(3).) No dispute is made as to the applicability of Code of Civil Procedure section 1624, subdivision (a)(3).

Defendants contend that the pleadings are completely devoid of any written contract. However, the Second Amended Complaint (the SAC) alleges that plaintiff and defendant Chelsea Marie Locatelli ("Chelsea") entered into a written and verbal agreement to purchase the subject property. (SAC, ¶ 9, 16.) The demurrer admits the truth of all material facts properly pleaded. (*Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 713.) Since no contention is made that this allegation is inconsistent to any

other pleadings, exhibits, and/or judicially noticeable fact, the SAC sufficiently alleges the existence of a written agreement to support the first and fourth causes of action.

- Breach of Written Contract:

To state a cause of action for breach of contract, the plaintiff must plead (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damage. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458.) To establish the existence of a contract, there must be "(1) Parties capable of contracting; (2) Their consent; (3) A Lawful Object; and (4) A Sufficient Cause or Consideration." (Civil Code, § 1550.) Further, "the complaint must [also] indicate on its face whether the contract is written, oral, or implied by conduct." (*Id*. at 458-59 citing Code Civ. Proc., § 430.10, subd. (g).) "If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pac. Transportation Co., supra,* 166 Cal.App.3d 452 at p. 459 [internal citations omitted].)

Here, the SAC alleges that plaintiff and Chelsea entered into an agreement on or around February 1, 2015, to purchase, remodel and then sell the subject property. Plaintiff and Chelsea agreed to both contribute towards the down payment and for plaintiff to contribute equity in the amount of $68,818. The parties further agreed that plaintiff would be compensated an additional $29,682 for his labor towards remodeling the property, and Chelsea would receive 50% of the net proceeds of the sale of the property. (SAC, ¶ 11, 20, 27.) Notably, the terms of the contract, as alleged, do not mention what the parties intended to do with the remaining 50%. However, the allegations indicate that plaintiff expected to receive the remaining 50% of the net proceeds. (SAC, ¶ 12, 21-22, 28-29.) Plaintiff also alleges that he has been damaged by failing to receive the proceeds of the sale and compensation for his financial and labor contributions to the property. (*Ibid.*) These allegations are sufficient to state a cause of action for breach of contract.

However, defendants contend that the contract as alleged in the SAC must be disregarded, because the alleged contractual terms are inconsistent with the facts derived from the exhibit attached. "[A] general description of an exhibit attached to a complaint will be disregarded where inconsistent with the exhibit." (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953 citing *Stoddard v. Treadwell* (1864) 26 Cal. 294, 303.) The SAC expressly alleges, "[a]s displayed in various text messages between [plaintiff] and [Chelsea] attached hereto as **Exhibit 1**, both intended to form a partnership and enter into a contract to purchase property. The terms of the contract are…" as set forth above. (SAC, ¶ 11, 20, 27, emphasis in original.)

As defendants point out, the requisite elements of a contract are not provided for in the messages attached as Exhibit 1. Nor does the exhibit reflect the alleged terms of the contract. (SAC, Exh. 1) Equally however, the messages do not directly contradict the allegations of the operative complaint and it is unclear whether plaintiff is, in fact, alleging that the terms of the contract are derived from Exhibit 1. For example, if Exhibit 1 is attached purely for the purpose of showing the parties' intent to form a partnership and enter into a contract, rather than to indicate that the exhibit *provides for* the terms of the contract, then the exhibit does not contradict plaintiff's allegations. At best, the

messages in Exhibit 1 only vaguely relate to and refer to the factual allegations of the SAC. Where the exhibit is ambiguous and can be construed in the manner stated in the complaint, the court must accept the construction offered by plaintiff. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.) Thus, a cause of action for breach of written contract is sufficiently alleged.

- Breach of Implied Covenant of Good Faith and Fair Dealing:

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to *receive the benefits of the agreement actually made*." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349 [internal citations omitted].) To establish a claim for breach of the implied covenant of good faith and fair dealing, the plaintiff must show (1) the existence of a contract; (2) plaintiff's performance; (3) the conditions required for defendant's performance were met or excused; (4) that defendant's conduct prevented plaintiff from receiving the benefits under the contract; (5) that by doing so, defendant did not act fairly and in good faith; and (6) that plaintiff was harmed by defendant's conduct. (Judicial Council of Cal. Civ. Jury Instns. (May 2020 rev.) CACI No. 325.)

Defendants argue that the SAC fails to sufficiently allege the existence of a contract. As previously discussed, a written contract between plaintiff and Chelsea is sufficiently alleged. Consequently, the court intends to overrule the demurrer to the first and fourth causes of action.

Demurrer to the Second Cause of Action—Breach of Verbal Contract:

Defendants demur to the second cause of action on the ground that it fails to comply with the statutory requirements of the statute of frauds. The relevant authority, Code of Civil Procedure section 1624, subdivision (a)(3), is discussed in the previous section.

In support of the second cause of action for breach of oral contract, plaintiff argues that the SAC sufficiently alleges part performance to preclude the application of the statute of frauds. "[W]here assertion of the statute of frauds would cause unconscionable injury, part performance allows specific enforcement of a contract that lacks requisite writing." (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1159 citing *Earhart v. William Low Co.* (1979) 25 Cal.3d 503, 514.) Although defendants argue that *Earhart* does not create an exception to the statute of frauds, "[t]he doctrine of part performance… is a well recognized exception to the statute of frauds as applied to contracts for the sale or lease of real property." (*Sutton v. Warner* (1993) 12 Cal.App.4th 415, 422.) "Under the doctrine of part performance, the oral agreement for the transfer of an interest in real property is enforced when the buyer has taken possession of the property *and either* makes a full or partial payment of the purchase price, *or makes* valuable and substantial improvements on the property, in *reliance* on the oral agreement." (*Ibid.*; see also 1 Miller & Starr, Cal. Real Estate (4th ed. 2022) § 1:76.) The performance by the buyer must clearly relate to, and it must be pursuant to, the terms of the oral agreement. (*In re Marriage of Benson, supra,* 36 Cal.4th at p. 1109 citing *Sutton v. Warner, supra,* 12 Cal.App.4th at p. 422.)

Plaintiff contends that he has sufficiently alleged part performance to enforce the oral contract, because he made continuous monthly payments to Chelsea following the purchase of the property. Plaintiff indicates that he made bimonthly payments anywhere between $300 - $900 dollars to Chelsea, and that these payments were sufficient part performance to preclude the application of the statute of frauds. However, these payments are not alleged in the SAC. Although the messages attached as Exhibit 1 to the SAC refers to the number 900, as follows: "900 at a time. I transferred more." (SAC, Exh. 1.) No further context is provided to explain what this message is in reference to and how it relates to the pleadings. Moreover, it is unclear whether the message was even sent by plaintiff, since the sender, "desertrunner2470@gmail.com", is not identified. The allegations made in plaintiff's opposition is also insufficient to supplement the operative complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [Matters outside of the pleading, other than that which is judicially noticeable, cannot be considered on demurrer.].)

Consequently, the only factual allegations which support plaintiff's claim of part performance are his initial contribution of $8,000 to the purchase price of the property and his labor towards remodeling the property. Since there are no allegations showing plaintiff's possession of the property, plaintiff has failed to allege sufficient part performance to preclude the application of the statute of frauds. Thus, the SAC fails to sufficiently allege facts to state a cause of action for breach of oral contract.

The court intends to sustain the demurrer as to the second cause of action for breach of oral contract, with leave to amend.

Demurrer to the Ninth, Tenth, Eleventh, Twelfth and Thirteenth Causes of Action—Failure to Reimburse Expenses, Failure to Pay Minimum Wages, Failure to Pay Overtime Wages, Failure to Pay Wages When Due and Failure to Provide Accurate Itemized Statements:

Defendants demur to the ninth, tenth, eleventh, twelfth and thirteenth causes of action on the grounds that the SAC fails to allege sufficient facts to state a claim for these causes of action. In particular, defendants contend that plaintiff has failed to allege the existence of an employer-employee relationship. To state a claim for each of these causes of action, it is undisputed that plaintiff must allege the existence of an employer-employee relationship. (Lab. Code, 2802, subd. (a); Lab. Code, § 1194, subd. (a); Lab. Code, § 201-203; and Lab. Code, § 226.) Since there is no allegation made that such an employer-employee relationship existed between the parties, the demurrer to the ninth, tenth, eleventh, twelfth and thirteenth causes of action is sustained with leave to amend.

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 9/26/2022.
(Judge's initials) (Date)