

Tentative Rulings for November 16, 2023
Department 501

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.*

20CECG01278 *Avedisian v. Avedisian* (Dept. 501)

23CECG01907 *Laura Palacios v. Fast N Esy 28 Corporation* (Dept. 501)

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: **Luna v. Rojas**
Superior Court Case No. 23CECG01070

Hearing Date: November 16, 2023 (Dept. 501)

Motion: by Defendants to Change Venue to Appropriate Court

Tentative Ruling:

To deny defendants' motion to change venue to Sacramento County, without prejudice.

If oral argument is timely requested, such argument will be entertained on Friday, November 17, 2023, at 10:00 a.m.

Explanation:

Defendants have moved to transfer venue to Sacramento County based on the theory that plaintiff filed the action in the wrong county, as defendants reside in Sacramento and the contract was entered into and was to be performed in Sacramento. Under Code of Civil Procedure section 395, subdivision (a), "[e]xcept as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (Code Civ. Proc., § 395, subd. (a).) Also, "if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary." (*Ibid.*)

If the defendant contends that the plaintiff has filed the action in the wrong county, they may file a motion to change venue under Code of Civil Procedure section 396b. However, the defendant may waive the right to challenge venue based on the wrong county by filing an answer or other responsive pleading before filing a motion to transfer venue.

"Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject matter thereof, other than the court designated as the proper court for the trial thereof, under this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, *at the time he or she answers, demurs, or moves to strike, or, at his or her option, without answering, demurring, or moving to strike and within the time otherwise allowed to respond to the complaint*, files with the clerk, a notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the

adverse party, of a copy of those papers. Upon the hearing of the motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the action or proceeding transferred to the proper court.” (Code Civ. Proc., § 396b, subd. (a), *italics added*.)

Thus, if the defendant files an answer or other responsive pleading before filing a motion to change venue, they waive their right to challenge venue based on the theory that the case was brought in the wrong county. (*Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811, 819 [defendant’s objection to venue waived by filing answer, even though answer raised improper venue as an affirmative defense].) “Notwithstanding the governing venue provisions, unless the defendant makes a timely motion for change of venue, the action may generally be tried where commenced.” (*Forster v. Superior Court* (1992) 11 Cal.App.4th 782, 787, citation omitted.)

“Under this statute [section 396b] a defendant who fails to demand at the proper time and in the proper manner that the action be tried in the proper county is precluded from later raising the question, except in cases coming within the constitutional requirement, wherein there can be no waiver of the right to have the action commenced in the county in which the real property is situated. This confirms the view that in cases other than those coming under the constitutional provision, the venue question is not jurisdictional, and a proceeding in prohibition will not lie to obtain relief upon denial of a motion for change of venue.” (*Brock v. Superior Court of Stanislaus County* (1947) 29 Cal.2d 629, 634, citation omitted.)

Here, defendants filed their answer on July 10, 2023, in which they admitted that venue was proper in Fresno County, although they also stated that they intended to file a motion for change of venue. (Answer, p. 1, ¶ B.) Defendants also filed their cross-complaint on July 14, 2023, which again conceded that venue is proper in Fresno County, although defendants stated that they will seek a change of venue to Sacramento because “all action detailed in the Second Amended Complaint is situated in the County of Sacramento and the Cross-Complainants reside in Sacramento...” (Cross-Complaint, ¶ 5.) However, defendants did not actually file their motion for change of venue until August 22, 2023, over a month after they filed their answer and cross-complaint. As a result, defendants have waived their right to challenge venue on the ground that the action was filed in the wrong county under Code of Civil Procedure section 396b.

In their reply, defendants seem to concede that their motion under section 396b cannot be granted, but then request in the alternative that the court grant a change of venue under Code of Civil Procedure section 397, subdivision (c). They claim that all of the witnesses in the case live and work in Sacramento County, that they are low income restaurant workers, and that it would be inconvenient for them to take time off work to travel to Fresno to testify in the case. They also allege that the restaurant and property that is the subject of the action is also located in Sacramento. Therefore, they ask that the court grant a change of venue on the ground that it would serve the ends of justice and the convenience of witnesses to transfer the action to Sacramento.

Section 397, subdivision (c), states that, “[t]he court may, on motion, change the place of trial in the following cases: [¶] (c) When the convenience of witnesses and the ends of justice would be promoted by the change.” There is no set time limit to bring a

motion to transfer venue based on the convenience of witnesses and the ends of justice. Instead, such motions must simply be brought "within a reasonable time." (*Willingham v. Pecora* (1941) 44 Cal.App.2d 289, 294-295.) Also, if all of the evidence submitted to the court shows that the convenience of witnesses and the ends of justice would be promoted by a change of venue, and the motion was brought within a reasonable time, it is an abuse of discretion to deny the motion. (*Richfield Hotel Management, Inc. v. Superior Court* (1994) 22 Cal.App.4th 222, 226-227.)

Here, defendants claim that all of the witnesses work and reside in Sacramento, that they are low income restaurant workers who cannot take time off work to travel to Fresno to testify but they can appear in Sacramento, and that the restaurant that is the subject of the action is located in Sacramento, so it would promote the convenience of witnesses and the ends of justice to grant a change of venue to Sacramento. However, defendants did not raise their contentions under section 397(c) until they filed their reply. Their original motion relied entirely on sections 395(a) and 396b, and they did not submit any evidence to show that the convenience of the witnesses and the ends of justice would be promoted by a change of venue to Sacramento until they filed their reply brief. Thus, plaintiff has had no opportunity to examine and respond to defendants' arguments under section 397(c) until very recently. As a result, it would be a denial of plaintiff's due process rights to grant the motion to change venue based on the convenience of witnesses and the ends of justice without giving plaintiff a chance to respond to the new arguments and evidence.

Consequently, the court will not allow defendants to change their theory at the last minute and seek a transfer of venue based on section 397(c). Instead, the court intends to deny the motion to transfer venue to Sacramento, without prejudice to defendants bringing a new motion under section 397(c).

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 11/9/2023.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Soheili v. Thomason, et al.***
Superior Court Case No. 23CECG00448

Hearing Date: November 16, 2023 (Dept. 501)

Motion: by Defendant Thomason for an Order Compelling the Joinder
of Omitted Plaintiff Chhoun Douring

Tentative Ruling:

To deny.

If oral argument is timely requested, such argument will be entertained on Friday, November 17, 2023, at 10:00 a.m.

Explanation:

Defendant moves the court for an order joining Chhoun Douring as a necessary party to this action based on his interest in the insurance policy limit available to settle claim against her. (Code Civ. Proc., § 389, subd. (a)(2).)

Under Code of Civil Procedure section 389, subdivision (a),

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Defendant alleges Chhoun Douring was the driver of a vehicle involved in the accident that is the subject of these consolidated actions and has made a claim for damages against defendant Thomason. Prior to the filing of the complaint, defendant's insurer offered the policy limit jointly to Douring, Soheili, Figel and Hoyos to settle their claims for injuries caused by the motor vehicle accident. (McDonald Decl., ¶¶ 3-4.) Three of the four claimants filed their now-consolidated actions after the parties disagreed as to how to apportion the policy limit. (*Id.* at ¶ 5.) Based on the asserted agreement by the four claimants to accept the global policy limits tendered, defendant argues Douring's absence from this action will impair or impede his ability to protect his interest in the insurance policy funds available to settle claims. (Code Civ. Proc. § 389, subd. (a)(2)(i).) Additionally, she argues there is a substantial risk of incurring multiple or otherwise

inconsistent obligations should the policy limit be exhausted and her personal assets subject to exposure in a later claim by Douring. (*Id.* at § 389, subd. (a)(2)(ii).)

In opposition, plaintiff Soheili argues that Douring cannot be joined as a party plaintiff where he failed to bring an action for damages against Thomason before the expiration of the two-year statute of limitations. (Code Civ. Proc., § 335.1.) Defendant argues in reply that the parties' agreement to settle for the policy limit pre-dates the expiration of the statute of limitations and can be enforced by Douring against Thomason. As a result, Thomason remains exposed to multiple or inconsistent obligations in the event Douring pursues a cause of action for breach of the settlement agreement she argues was reached on February 1, 2023.

Where, as here, plaintiffs each have separate claims for damages arising from the same accident, their personal injury claims may be joined in one action under Code of Civil Procedure section 378. (See, *Anaya v. Superior Court* (1984) 160 Cal.App.3d 228, 232 [right to relief arising from the same transaction exists where several plaintiffs sue for personal injuries suffered in the same accident supporting permissive joinder of their claims].) "If joinder is merely permissive, defendant *cannot compel* plaintiff to join others with similar claims as coplaintiffs in a single action. Defendant's remedy when faced with multiple lawsuits by plaintiffs with similar claims is a *motion to consolidate ...* ." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before trial (The Rutter Group 2023) ¶ 2:206, emphasis original.)

Defendant's motion is premised on the enforceability of a settlement agreement that is not the subject of the plaintiffs' personal injury complaint. Defendant has failed to present admissible evidence of the alleged settlement agreement with her moving papers. This alone supports denial of the motion.

Defendant additionally has not cited authority to support her position that the alleged pre-litigation settlement or Douring's pre-litigation claim against the policy was sufficient to preserve his claim against the statute of limitations to allow him to be joined as a plaintiff in this action. Defendant's argument that a breach of contract action is viable and may be filed by Douring is speculative and is not persuasive. A theoretical possibility of a claim resulting in multiple liabilities cannot support finding Douring is a necessary party to this action. (Code Civ. Proc. § 389, subd. (a)(2)(ii); *Van Zant v. Apple Inc.* (2014) 229 Cal.App.4th 965, 977 ["[A] 'substantial risk' means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter."].)

Even accepting the premise that the alleged settlement agreement supports finding Douring is a necessary party to this action, defendant acknowledges in her reply that the statute of limitations has run for the claims arising from the February 12, 2021 accident which prevents joinder of his personal injury claim in this action. (*Pinto Lake MHP LLC v. County of Santa Cruz* (2020) 56 Cal.App.5th 1006, 1014.) The question for the court becomes whether this action should proceed with the current parties or be dismissed without prejudice due to the absence of an indispensable party. (Code Civ. Proc. §389, subd. (b).) Here, there is no question the plaintiffs' personal injury action can proceed in Douring's absence.

The evidence does not support finding Chhoun Douring is an indispensable or necessary party to the case at bench. Plaintiffs each have separate claims for damages arising from the same motor vehicle accident. There are no allegations within the complaint or arguments made in this motion that would support finding the disposition of one plaintiff's claim for damages impedes the others' ability to protect their own interest or the disposition of one plaintiff's claim for damages would leave defendant at substantial risk of inconsistent obligations. There is no reason the action cannot proceed as to those plaintiffs who timely filed their complaints against defendant for their damages arising from the February 12, 2021 collision.

Therefore, the court intends to deny the motion.

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** 11/14/2023.
(Judge's initials) (Date)

(44)

Tentative Ruling

Re: **Kam Nigam v. Joseph Boyd**
Superior Court Case No. 22CECG02370

Hearing Date: November 16, 2023 (Dept. 501)

Motions: Defendant's Demurrer and Motion to Strike First Amended Complaint (as supplemented); Request for Judicial Notice

Tentative Ruling:

To sustain the general and special demurrers, with ten (10) days leave to amend which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

To grant the motion to strike with ten (10) days leave to amend which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

To grant defendant's request for judicial notice. The court will take notice of its own records in the instant and related probate cases (defendant's Exhibits A through F) for the fact of the filing of each but not for the truth of the matters stated therein.

If oral argument is timely requested, such argument will be entertained on Friday, November 17, 2023, at 10:00 a.m.

Explanation:

The express basis for the demurrer is that the First Amended Complaint¹ (which notably contains no titled cause(s) of action) fails to state sufficient facts to constitute a cause of action, based upon Code of Civil Procedure section 431.10, subdivision (e), and is otherwise uncertain, based upon Code of Civil Procedure section 431.10, subdivision (f). Defendant met and conferred with plaintiff in person before filing his demurrer and motion to strike, per the declaration of Boyd. Plaintiff has filed no opposition.

Plaintiff generally pleads the conclusion that defendant, while representing her in her capacity as administrator of her husband's estate², prepared a first and final account (Exh. B) which generated probate examiner notes that needed to be but were never cleared (Exh. K), described a sale of real property (4313 Tulare Street, Fresno, California) to a then non-existent LLC (Exh. D), stated that she waived commission which was not true, generated fees and costs when a fee waiver should have been requested (Exhibit F), and included conflicting documents detailing the indebtedness on the real property (first and second mortgages) (Exhs. G and H). While it is difficult to decipher plaintiff's

¹ The March 15, 2023, minute order indicated that plaintiff would file an amended complaint.

² Estate of Arvind Raj Nigam, Fresno County Superior Court Case No. 20CEPR00629.

allegations and request for relief, the gist of it appears to be “fraudulent representation” by defendant. This attempted claim could be one for professional malpractice or for fraudulent misrepresentation. The necessary averments are absent for each. Plaintiff simply requests \$75,698.14 (for her administrator fees, discrepancies in satisfying the mortgages, and refund of a fire insurance premium) plus “pain and suffering”.

The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (Civ. Code §1709.) (*Lacher v. Superior Court* (1991) 230 C.A.3d 1038, 1046, 281 C.R. 640 [“It is the element of intent which makes the fraud actionable, irrespective of any contractual or fiduciary duty one party might owe the other”]); *Conrad v. Bank of America* (1996) 45 C.A.4th 133, 155, 53 C.R.2d 336; *Atascadero v. Merrill Lynch* (1998) 68 C.A.4th 445, 481 [fraudulent intent is element that distinguishes fraud from actionable negligent misrepresentation and from nonactionable innocent misrepresentation]. Save for the first element perhaps, plaintiff has not pled these elements.

Furthermore, defendant's position that plaintiff's remedy remains with the probate court and, hence, any civil claim concerning the not yet approved accounting would be unripe or premature at this point is well taken³. If plaintiff determined to address the issues with the accounting in the related probate matter, she would be required to provide notice to all interested persons, beneficiaries, and third party bona fide purchasers for value.

Plaintiff's First Amended Complaint was verified by plaintiff, as was the First and Final Account in the related probate case. These verifications appear to be in direct conflict, as one supports the account and the other attacks the account.

The general and special demurrers are sustained with leave to amend.

Motion to Strike:

Defendant moves to strike the entire First Amended Complaint, on the basis of judicial estoppel (conflicting verifications by plaintiff). Defendant cites *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175 in this regard. *Bucur*, which involved a jury trial, provides:

“The doctrine of judicial estoppel precludes a party from taking inconsistent positions in judicial or quasi-judicial proceedings.” (*Claxton v. Waters* (2004) 34 Cal.4th 367, 379.) “ ‘Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court....’ ” (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 175, quoting *Teledyne Industries, Inc. v. N.L.R.B.* (6th Cir.1990) 911 F.2d 1214, 1218.) “Because of its harsh consequences, the doctrine should be applied with caution and limited to egregious circumstances.” (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132.)

³ Plaintiff was removed as probate administrator and letters issued to the public administrator on October 12, 2023. The first and final account notes have not been cleared and the accounting has not yet been approved.

The instant matter is at the pleading stage. The court declines to apply the doctrine of judicial estoppel. Rather, the court views the First Amended Complaint as a 'sham pleading' as a result of the conflicting verifications. (*Ricard v. Grobstein, Goldman, Stevenson, Siegel, Levine, & Mangel* (1992) 6 Cal.App.4 th 157, 162.) [appellants acknowledge that the present suit was filed solely to circumvent the court's prior adverse ruling]. Plaintiff was free to file a petition in probate court to address the perceived deficiencies with the accounting, but plaintiff chose to file a civil complaint at odds with her verification of the accounting.

Code of Civil Procedure section 436 provides: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading; (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

Thus, the motion to strike is granted with leave to amend, as the defect may be cured with a new and different pleading.

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** 11/14/2023.
(Judge's initials) (Date)