

Tentative Rulings for November 28, 2023
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).) *The above rule also applies to cases listed in this "must appear" section.*

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

21CECG00475	<i>Irene Heetebry v. Ken Baker</i> is continued to Thursday, January 25, 2024, at 3:30 p.m. in Department 502
-------------	---

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re: **Tony Buchanon v. Jack Stonhaus**
Superior Court Case No. 22CECG02186

Hearing Date: November 28, 2023 (Dept. 502)

Motion: Defendant's Demurrer to First Amended Complaint

****If timely requested, oral argument will be heard on Tuesday, December 5, 2023, at 3:30 p.m. in Department 502****

Tentative Ruling:

To sustain defendant's demurrer to the entire first amended complaint, without leave to amend, for failure to state facts sufficient to constitute a cause of action.

Explanation:

"A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995, citation omitted.) A demurrer based on the statute of limitations is properly brought as a general demurrer for failure to state facts sufficient to constitute a cause of action even though the section 430 does not mention the statute of limitation as a ground for demurrer. (*Bell v. Bank of Cal.* (1908) 153 Cal. 234, 245; *Bank of America Nat. Trust & Savings Ass'n. v. Ames* (1936) 18 Cal.App.2d 311, 314.)

Here, plaintiff has alleged a claim for personal injury, so the applicable statute of limitations is two years. (Code Civ. Proc., § 335.1.) Plaintiff alleges that he was injured in an auto accident that occurred on December 16, 2019. (FAC, ¶¶ 5, 14, 34.) Therefore, the plaintiff's claim accrued on December 16, 2019, and he would normally have had to file his complaint by no later than December 16, 2021. He did not file his complaint until July 19, 2022, so his complaint would appear to be barred by the statute of limitations.

However, plaintiff alleges in his first amended complaint that the statute of limitations was tolled by Emergency rule 9, as well as Code of Civil Procedure sections 351, 352.1, and 356. (FAC, ¶ 31.) Yet it does not appear that any of the cited sections apply here. Also, while Emergency rule 9 does apply, it does not prevent plaintiff's claim from being time-barred.

Code of Civil Procedure section 351 provides that, "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action."

First, the Ninth Circuit Court of Appeals has found that section 351 is unconstitutional, since it forces a person engaged in interstate commerce to remain in California for several years in order to avoid indefinitely tolling the statute of limitations for

claims against him or her. (*Abramson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990).) Also, even if section 351 is constitutional, there are no facts alleged in the FAC that would tend to show that defendant was absent from the state of California at any time after the claim accrued, so section 351 does not toll the running of the statute of limitations.

Section 352.1 provides that, "If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335), is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years." Again, the FAC alleges no facts showing that the plaintiff was imprisoned at any time after the claim accrued, so section 352.1 does not apply here or toll the statute of limitations.

Section 356 states, "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Here, there are no facts alleged in the FAC that would tend to show that the filing of the action was stayed by an injunction or statutory prohibition, so section 356 does not apply or toll the statute of limitations.

On the other hand, California Rules of Court, Emergency rule 9(a), does apply and does toll the statute of limitations on plaintiff's claim. Emergency rule 9(a) provides for tolling of the statute of limitations in civil cases as a result of the Covid-19 pandemic. "In response to the COVID-19 pandemic, the Judicial Council adopted a series of emergency rules effective April 6, 2020." (*People v. Financial Casualty & Surety, Inc.* (2021) 73 Cal.App.5th 33, 38–39, footnote omitted.) "As amended, Emergency rule 9 reads: '(a) Tolling statutes of limitations over 180 days[.] Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020.'" (*Ibid*, paragraph breaks and emphasis omitted.) "In addition to revising the substance of Emergency rule 9, the amendment also added an Advisory Committee Comment explaining the intent of the rule. This comment explains that the rule 'is intended to apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil cause of action,' which 'includes special proceedings.'" (*Ibid*.)

Several California appellate courts have held " '[t]he plainly intended meaning of Emergency rule 9 is that statutes of limitation and repose for pleadings commencing civil causes of action ... are temporarily tolled.'" (*Committee for Sound Water & Land Development v. City of Seaside* (2022) 79 Cal.App.5th 389, 403; see also *People v. Financial Casualty & Surety, Inc.* (2021) 73 Cal.App.5th 33, 42.) " 'A tolling provision suspends the running of a limitations period.' In other words, 'the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.' " (*Committee, supra*, 79 Cal.App.5th at p. 403.)

As discussed above, here plaintiff's claim for personal injuries accrued on the date of the accident, December 16, 2019, and thus normally the statute on his claim would have run two years later, on December 16, 2021. (Code Civ. Proc., § 335.1.) However, Emergency rule 9(a) tolled the deadline for filing plaintiff's complaint from April 6, 2020 to

Nor does there appear to be any way for plaintiff to amend his complaint to cure the defect, as he has admitted that the accident occurred on December 16, 2019. Plaintiff has not filed any opposition or made any effort to explain how his claim is not time-barred or how he could amend his complaint to avoid the statutory bar. Therefore, the court intends to sustain the demurrer to the entire first amended complaint, without leave to amend.

Tentative Ruling

5

Tentative Ruling

****If timely requested, oral argument will be heard on Tuesday, December 5, 2023, at 3:30 p.m. in Department 502****

Issued By: KCK on 11/27/23
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: **MCM Wood, Inc. v. Valley Surgical Specialist Medical Group, Inc.**
Superior Court Case No. 23CECG02165

Hearing Date: November 28, 2023 (Dept. 502)

Motion: By Defendants Valley Surgical Specialist Medical Group, Inc. and
Community Health Partners to Strike Plaintiff's Prayer for Attorneys'
Fees

****If timely requested, oral argument will be heard on Tuesday, December 5,
2023, at 3:30p.m. in Department 502****

Tentative Ruling:

To deny. Defendants shall file responsive pleadings within twenty (20) days from the date of this order.

Explanation:

A "contract may impliedly as well as expressly permit [] recovery" of attorneys' fees. (*Citizens Suburban Co. v. Rosemont Development Co.* (1966) 244 Cal.App.2d 666, 683 (*Citizens*)). However, "[a]ttorney fees cannot be allowed a successful litigant without pleading and proof that there is a contract provision for them[]" (*Ibid*), and a demand for judgment not supported by allegations constitutes an immaterial and irrelevant matter subject to a motion to strike. (Code Civ. Proc., §§ 431.10, subd. (b), 436.)

When determining a pleadings challenge such as a motion to strike, the court is guided by the principle that pleadings are to be construed "liberally ... with a view to substantial justice..." (Code Civ. Proc., § 452.) In addition, "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1636.)

Here, the subject attorneys' fees provision is premised on collection costs associated with past due invoices, and the recovery of past due invoices is a specific allegation in the body of the complaint. (See Complaint, ¶ 26.) Defendants rely on *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1626 (*Ripley*) and *Citizens, supra*, 244 Cal.App.2d at p. 683 for the proposition that the word "costs" cannot be interpreted to include "attorneys' fees." However, those cases are inapposite because *Ripley* focused solely on statutorily excluded fees and *Citizens, supra*, 244 Cal.App.2d at p. 683, did not specifically exclude or prohibit attorneys' fees from a costs award. Furthermore, although *Citizens* tangentially noted the general concept that attorneys' fees "usually" are not included in a "costs" only award, its ultimate affirmance the fees award rested on qualifying language coupled to the word "costs" (i.e. "costs and expenses"), which is materially similar to the language in plaintiff's complaint here (i.e., "all collection costs").

Accordingly, plaintiff's interpretation of the subject contract's "all collection costs" provision does not resort in an absurdity and is thus sufficient to support its demand for attorneys' fees and costs – at least at the pleading stage. Therefore, defendants' motion is 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: KCK **on** 11/27/23
(Judge's initials) (Date)