Tentative Rulings for December 20, 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).)

22CECG01631 ***McDaniel v. Nioguez*** **(Dept. 503)** ***at 10:00 a.m.*** **(special time)**

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(03)

Tentative Ruling

Re: ***Hidalgo v. Yepes***
Superior Court Case No. 20CECG02561

Hearing Date: December 20, 2022 (Dept. 503)

Motion: By Defendants Adrian Yepes and Jorge Contreras for Summary Judgment, or in the Alternative Summary Adjudication

Tentative Ruling:

To grant defendants Adrian Yepes and Jorge Contreras' motion for summary judgment of plaintiff's entire complaint. (Code Civ. Proc., § 437c.) Defendants shall submit a proposed judgment consistent with this court's order within 10 days of the date of this order.

Explanation:

Plaintiff has alleged that defendants are liable because they failed to take reasonable steps to prevent her son, decedent Matthew Gonzalez, from committing suicide while he was in custody at the Fresno County Jail. She alleges that defendants should have realized that decedent was depressed and suicidal because he asked for a spiritual advisor to absolve him of his sins before he died, that he made statements in letters to plaintiff and his girlfriend which strongly implied that he was going to take his own life, and that he made statements on the phone to plaintiff that "I can't take it here anymore," that "I need to talk to somebody," and that "you don't know what I'm going through." He also allegedly told plaintiff that he was going to talk to someone at the jail about his feelings. Plaintiff alleges that these statements should have placed Officer Yepes, who was the floor officer in the area of the jail where decedent was housed, on notice that decedent was contemplating suicide, and that he should have taken measures to prevent him from taking his life. In addition, plaintiff alleges that Officer Contreras was negligent because, after plaintiff made these statements, Officer Contreras assigned him to a single-inmate cell, which made him more depressed and made it easier to kill himself.

Plaintiff's claims for general negligence and wrongful death both require a showing that defendants owed decedent a duty of care, that they breached their duty, and that the breach was a proximate cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.) With regard to the claims against Officer Contreras, defendant has presented evidence showing that he did not assign decedent to a single-inmate cell before his suicide. While Officer Contreras did conduct a housing classification review for decedent in August of 2019, he did not change decedent's housing status. (Defendants' Statement of Undisputed Material Facts ("UMF"), Issue 2, Nos. 4-17.) Decedent had been housed in a two-inmate cell since May of 2019, and Contreras did not reclassify him to another cell after the classification review in August of 2019. (Defendants' UMF, Issue 2, Nos. 8, 9, 15, 16.) Decedent remained in a two-inmate

cell at the time of his death. (Defendants' UMF, Issue 2, No. 9, 15, 16, 17.) Indeed, plaintiff herself admitted when she was interviewed by detectives after her son's death that he had been housed with another inmate at the time of his death. (Defendants' UMF, Issue 2, No. 17.) Officer Contreras was also unaware of any statements by decedent that he wanted to see a spiritual advisor. (Defendants' UMF, Issue 2, No. 14.)

Thus, Officer Contreras has submitted sufficient evidence to meet his burden of showing that he did not breach any duty of care that he might have owed toward plaintiff's decedent. The evidence shows that he did not move decedent to a single-inmate cell, which directly contradicts the sole allegation of the complaint against him. As a result, he cannot be held liable for decedent's death, as the evidence shows that he did nothing to breach any duty that he may have owed to decedent. Plaintiff has failed to submit any evidence that would tend to raise a triable issue of material fact as to her claims against Officer Contreras, and she has filed a notice of non-opposition as to Officer Contreras' motion. Therefore, the court grants summary judgment as to both causes of action against Officer Contreras.

The court also grants the motion for summary judgment brought by Officer Yepes. As discussed above, plaintiff's claims against Officer Yepes allege that he was negligent because he knew or should have known that decedent was depressed and suicidal based on the fact that (1) decedent requested to speak with a spiritual advisor to absolve him of his sins before he died, (2) decedent made statements in letters to his mother and girlfriend that strongly implied that he was depressed and suicidal, (3) that he told his mother that he "can't take it here anymore" and that he was going to talk with someone at the jail about his feelings. Plaintiff alleges that Officer Yepes was assigned to inspect inmate mail as well as being the floor officer in the area of the jail where decedent was housed, so he should have been aware of decedent's statements and taken reasonable steps to prevent him from harming himself.

However, Officer Yepes has presented evidence that shows that he was not aware of any statements or conduct by decedent that would have placed him on notice that he was depressed and suicidal. Officer Yepes was assigned to review inmate mail, but he only searched the mail for contraband as well as looking for certain keywords such as "murder," "suicide," "escape," and "death." (Defendants' UMF, Issue 1, Nos. 4, 12, 13.) He does not read inmate mail unless it contains those keywords. (Defendants' UMF, Issue 1, No. 13.) He admits that he reviewed the letters from decedent to his mother and girlfriend, but he did not read them other than to check for the keywords. (Defendants' UMF, Issue 1, Nos. 12-15.) The letters did not contain any of the keywords that he searches for, so he did not read the content of the letters closely. (Defendants' UMF, Issue 1, Nos. 12, 13, 16.) Thus, he had no knowledge that the letters contained any statements that might have placed him on notice of decedent's suicidal state of mind. (Defendants' UMF, Issue 1, No. 17.)[1]

[1] Also, the letters contained no explicit references to suicide or death, or obvious threats by decedent to harm himself or anyone else. (Defendants' Statement of Evidence, Tab 5, Caine Decl., Ex. C.) As such, there is no evidence indicating that Officer Yepes had any reason to suspect that decedent was likely to commit suicide based on his cursory review of the letters.

Nor was Officer Yepes under any mandatory duty to read the contents of inmates' mail for statements that might imply an inmate is contemplating suicide. The Fresno County Sheriff's Office policies and procedures regarding inspection of inmate mail only indicate that jail employees "may" read or inspect mail, not that they are required to do so. (Defendants' UMF, Issue 1, No. 6, citing Fresno Sheriff's Office Jail Division Policies and Procedures No. E-120, FSO 354, 361, 365-366.) Plaintiff was unable to cite to any jail policy that required defendant to read the inmates' mail. (Defendants' UMF, Issue 1, No. 3.) The language of the jail's policy regarding inspection of inmate mail is clearly permissive rather than mandatory, as it only states that staff "may" read or inspect inmate mail. Since defendant had no mandatory duty to read inmates' mail, his failure to read decedent's letters closely and discover that they contained statements that implied he was going to commit suicide does not constitute a breach of any duty he owed to decedent.

Plaintiff argues that the issue of the standard of care here can only be established through expert testimony, and Officer Yepes has not presented any such expert testimony to support his motion so the motion must be denied. However, plaintiff has not cited to any authorities that state that expert testimony is required to establish the standard of care owed by a correctional officer to an inmate. Nor does it appear that expert testimony is required here. The present case presents the relatively simple issue of whether a correctional officer is required to read inmates' mail closely or take other affirmative steps to learn whether inmates are contemplating committing suicide. The Fresno Sheriff's Office policies and procedures are simple and clearly worded, so there is no reason that the court cannot make a determination of the applicable standard of care and whether it has been breached without having to resort to expert testimony.

Also, to the extent that plaintiff alleges that decedent made verbal statements to Officer Yepes that indicated that he was depressed or suicidal, such as asking for a spiritual advisor so that he could be absolved of his sins before he died, Officer Yepes has denied that decedent made any statements to him regarding suicidal ideations or stating that he was depressed. (Defendants' UMF, Issue 1, Nos. 23, 24, Yepes Decl., ¶ 4.) Officer Yepes also denies that he ever observed decedent crying, refusing to eat or socialize, sleeping excessively, or making any statements regarding suicidal feelings. (*Ibid*.) Plaintiff herself admitted that, as far as she knew, decedent had not spoken to anyone at the jail, including mental health services, about his feelings. (Defendants' UMF, Issue 1, No. 20.) While plaintiff has alleged that decedent told her over the phone that he "can't take it in here anymore," that "I need to talk to somebody," and "you don't know what I'm going through," there is no evidence that he made similar statements to Officer Yepes or anyone else at the jail. Officer Yepes has denied that he had any knowledge that plaintiff was depressed or suicidal. Thus, Officer Yepes has met his burden of presenting evidence showing that he had no reason to believe that decedent was depressed and might be planning to commit suicide.

Under Government Code section 845.6, a public employee is not liable for failing to obtain medical care for prisoners, except where the employee knows or has reason to know that the prisoner is in need of immediate medical attention and he or she fails to take reasonable action to summon such medical care. (Gov. Code, § 845.6.) "Liability under section 845.6 is limited to serious and obvious medical conditions requiring immediate care. [¶] The 1963 Law Revision Commission comment to section 845.6 states:

'This section limits the duty to provide medical care for prisoners to cases where there is *actual or constructive knowledge* that the prisoner is in need of *immediate* medical care.'" (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 841, internal citations omitted, emphasis in original.)

Here, as discussed above, Officer Yepes has denied that he had any knowledge that decedent was depressed or suicidal. He did not closely read the letters that decedent wrote to his mother and girlfriend, as they contained no explicit references to suicide, death, or harm to himself or another. He also did not hear decedent make any verbal statements about being depressed or suicidal, nor did he observe any behavior that might indicate that decedent was depressed, such as crying, refusal to socialize with others, excessive sleeping, or refusal to eat. Therefore, Officer Yepes has met his burden of showing that he had no duty to summon medical care for decedent, as he had no actual or constructive knowledge that decedent might have a serious medical or mental health condition that required immediate treatment.

In her opposition, plaintiff argues that there is at least a triable issue of material fact with regard to whether Officer Yepes was on notice of decedent's depression and that he might attempt to take his own life, as he started sleeping through most of the day in the last couple of days before he committed suicide and he made statements that implied he was going to take his life in his letters to plaintiff and his girlfriend. Decedent's roommate told the investigating detectives that decedent had been sleeping through most of the day in the days before the suicide, which was a change from his usual behavior. (Plaintiff's Ex. 7, Interview Transcript with Christopher Valdez, FSO 672-674.)[2] Plaintiff contends that Officer Yepes should have known that sleeping all day was a sign of depression and potential suicidal tendencies, especially since he had been trained to know the signs that an inmate might be planning suicide. (Yepes Decl., ¶ 3.) Plaintiff also notes that Officer Yepes was the floor officer for decedent's area of the jail, so he should have been aware of the changes in decedent's mood and behavior. As a result, plaintiff concludes that Officer Yepes was negligent in failing to take reasonable steps to obtain medical help for decedent. (Exhibit 3 to Plaintiff's Statement of Evidence, Yepes Depo., pp. 15:15-25; 16:1-2; 16:21-25; 18:25; 19:3-25.)

However, regardless of whether decedent was sleeping most of the day before he took his own life, there is no evidence that Officer Yepes was aware of this fact and thus had a duty to report decedent's behavior and obtain medical help for him. The evidence only indicates that decedent's roommate Christopher Valdez knew that decedent was sleeping most of the day and seemed depressed. There is no indication that Valdez ever reported decedent's behavior to Officer Yepes or anyone else at the jail before decedent committed suicide. Officer Yepes himself denies that he ever saw decedent sleeping excessively or exhibiting other signs of depression. (Yepes Decl., ¶ 4.)

[2] The court notes that this exhibit was allegedly filed "under seal" by plaintiff's counsel, but he did not obtain an order to seal the document, so it was filed in the court's computer docket without being sealed. Plaintiff's counsel apparently relied on the protective order signed by the court, which provides that confidential documents are to be filed under seal in accordance with California Rules of Court 2.550 and 2.551. However, this order still required counsel to obtain a separate order sealing the documents as provided in the Rules of Court. (See January 11, 2021 Protective Order.) Since counsel never obtained such an order, the documents have been placed in the open public file.

Also, the fact that Officer Yepes was the floor officer in the area of the jail where decedent was housed does not show that he was aware of decedent's excessive sleeping, as there is no evidence that floor officers monitor their inmates' sleep habits. Thus, the fact that decedent was sleeping most of the day did not impose a duty on Officer Yepes to obtain medical care for him, as there is no evidence that Officer Yepes had any actual or constructive knowledge of the fact that he was sleeping excessively.

Also, to the extent that plaintiff relies on the statements decedent made in his letters that implied that he was depressed and suicidal, as discussed above, Officer Yepes has stated that he did not read the letters other than to check them for contraband and certain key words. (*Id*. at ¶¶ 7-13.) The letters themselves do not contain any explicit references to depression or suicide, and at most they imply that decedent might be depressed without stating that he planned to take his own life. (Defendants' Evidence, Tab 5, Caine Decl., Ex. C.)

Plaintiff has also argued that the Fresno Sheriff's Office policy regarding inmate mail defines "contraband" to include not only physical items like drugs or weapons, but also "[a]ny matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence[,]" and "Information which would present a clear and present danger of violence and/or physical harm to persons in or outside of the facility." (Defendants' Statement of Evidence, Ex. A, Fresno Sheriff's Office Jail Division Policies and Procedures, No. E-120, FSO 0359, ¶ IV B 1, 6.) Plaintiff argues that Officer Yepes breached his duty to look for "contraband" because he did not check decedent's mail for statements that indicated that he planned to commit suicide, and thus he is liable for failing to report that decedent was depressed and might take his own life.

However, although the Sheriff's Office's definition of "contraband" is broad and includes information that might present a threat of violence or physical harm to persons inside or outside of the jail, the statements in decedent's letters did not include any explicit threats of violence or harm to anyone. (Defendants' Evidence, Tab 5, Ex. C to Caine Decl.) The letters do indicate that decedent was upset about the possible breakup of his relationship with his girlfriend, but he does not make any explicit threats to harm himself or anyone else. Therefore, it does not appear that the letters would constitute "contraband" even under the Sheriff's Office's broad definition of that term.

As a result, plaintiff has failed to raise a triable issue of material fact with regard to whether Officer Yepes breached any duty of care that he may have owed to decedent, and he cannot be held liable for decedent's death. Therefore, the court grants summary judgment in favor of Officer Yepes.

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 12/15/2022 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Le v. Hart***
Superior Court Case No. 20CECG02912

Hearing Date: December 20, 2022 (Dept. 503)

Motion: By Plaintiffs to Set Aside Dismissal

Tentative Ruling:

To deny the motion to set aside dismissal. (Code Civ. Proc., § 473, subd. (b).) This denial is without prejudice to any subsequent motion to set aside the dismissal based upon the equitable powers of the court.

Explanation:

"[T]he 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 … resulting … 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." (Code Civ. Proc., § 473, subd. (b).) Relief pursuant to Code of Civil Procedure section 473, subdivision (b) is mandatory where the dismissal was solely caused by the attorney, i.e., the party did not contribute to the dismissal in any way. (See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248; *Todd v. Thrifty Corp*. (1995) 34 Cal.App.4th 986, 991.) Relief must be granted even where the default resulted from inexcusable neglect by the attorney. (*Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 897.) "Public policy dictates that disposition on the merits be favored over judicial efficiency." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392.)

In the present case, as required under Code of Civil Procedure section 473, subdivision (b), attorney Cary Pham specifically admits that the failure to appear at the case management conference and the hearing on the order to show case regarding that failure to appear resulted from his own error. (Pham Decl., ¶¶ 3-5.)

However, this motion comes approximately 19 months after the entry of dismissal from which relief is sought. The statute states that an application for mandatory relief must be made "no more than six months after entry of judgment." (Code Civ. Proc., § 473, subd. (b).) "The six-month limit is mandatory; a court has no authority to grant relief under section 473, subdivision (b), unless an application is made within the six-month period." (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 340.) Although this application is made two months after plaintiffs' new counsel discovered the dismissal, the court lacks jurisdiction to grant it.

Where relief is sought more than six months after the entry of dismissal, the motion is directed to the court's inherent equitable power to set aside a judgment on the ground

of extrinsic fraud or mistake. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 576-578; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300; *Bae v. T.D. Service Co.* (2016) 245 Cal.App.4th 89, 97.) The terms "extrinsic fraud or mistake" are given a broad interpretation and cover almost any circumstance by which a party has been deprived of a fair hearing. There need be no actual fraud or mistake in the strict sense. (*Marriage of Park* (1980) 27 Cal.3d 337, 342; *Sporn v. Home Depot USA, Inc.*, *supra,* 126 Cal.App.4th at p. 1300 [requires evidence "that the papers were lost, stolen, forwarded to the wrong person or eaten by the dog"]; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1233.)

With regard to extrinsic mistake in particular, the term is broadly applied to cover situations in which circumstances extrinsic to the litigation have cost a party a hearing on the merits. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) These are usually cases of excusable neglect by the defendant or the defendant's attorney in failing to appear and present a defense: "If such neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief is present, and is often called 'extrinsic mistake.'" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) Relief will be denied, however, if the complaining party's negligence permitted the mistake to occur. (*Kulchar v. Kulchar, supra*, 1 Cal.3d at p. 473; *Manson, Iver & York v. Black*, *supra,* 176 Cal.App.4th at p. 47; see also Wilson v. Wilson (1942) 55 Cal.App.2d 421.)

Nevertheless, there are three essential requirements to obtain relief. The party seeking relief must show: (1) a meritorious case; (2) a satisfactory excuse for not presenting a defense to the original action; and (3) diligence in seeking to set aside the default once it was discovered. (*Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 982; *Sporn v. Home Depot USA, Inc.*, *supra,* 126 Cal.App.4th at p. 1301.) This rule applies equally where the motion is to vacate an order of dismissal. (*Aldrich v. San Fernando Valley Lumber Co*. (1985) 170 Cal.App.3d 725, 738.)

The requirement of diligence is "inextricably intertwined with prejudice" to the plaintiff. (*Rappleyea v. Campbell*, *supra,* 8 Cal.4th at pp. 983-984; *Lee v. An* (2008) 168 Cal.App.4th 558, 566 [relief denied where defendant waited more than 2 years after discovering default judgment to seek relief].) It goes without saying then, that beyond the six-month period in which relief can be obtained under Code of Civil Procedure section 473, subdivision (b), "there is a strong public policy in favor of the finality of judgments and only in exceptional cases should relief be granted." (*Rappleyea v. Campbell*, *supra,* 8 Cal.4th at p. 982.)

The evidence presented in this motion demonstrates that, after filing the complaint, plaintiffs' prior counsel took no other actions on behalf of his clients to prosecute the case. Counsel's admitted "mistake, inadvertence, and excusable neglect" in failing to appear at the case management conference and subsequent hearing on the order to show cause are sufficient to demonstrate why the case was not pursued. (Pham Decl., ¶ 5.) However, there is insufficient evidence to demonstrate the merits of the case and diligence on the part of plaintiffs to seek relief.

The complaint was filed on behalf of plaintiffs Be Thi Le and Tru Vang Dang on October 1, 2020. Counsel's declaration represents that Tru Vang Dang passed away on

November 6, 2018 for reasons unrelated to the accident. (Burchfield Decl., ¶ 3.) The complaint in this action was filed *after* plaintiff Tru Vang Dang had passed away, but makes no mention of this fact. The deceased plaintiff does not have capacity to sue, and there is no merit to decedent's case as pled in the complaint.

Plaintiff Be Thi Le appears to have been diligent in filing this motion once the dismissal was discovered; however, "[t]he client's own negligence in following up and pursuing his case is also scrutinized, even in cases of positive misconduct on the part of the attorney." (*Aldrich v. San Fernando Valley Lumber Co., supra*, 170 Cal.App.3d at 739.) There is no evidence of what efforts, if any, plaintiff Be Thi Le may have undertaken to inquire with Mr. Pham regarding the status of the case in the 17 months between the dismissal and plaintiff's learning of it in September 2022.

Over four years have passed since the motor vehicle accident described in the complaint occurred. It is unknown if defendants were ever made aware of the lawsuit filed against them, but it is reasonable to assume that, since the statute of limitations has long passed, defendants will be prejudiced in the revival of this action. Memories fade and evidence can be destroyed. Additionally, the statute of limitations having passed offered repose to defendants as potential litigants. Evidence that defendants have not been prejudiced should be presented in any future motion for equitable relief.

Although the court lacks jurisdiction to grant the motion on the statutory basis as presented here, the denial is without prejudice to plaintiffs seeking relief under the court's inherent equitable power.

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 12/19/2022 .
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***Martin v. Atwal***
Superior Court Case No. 19CECG04621

Hearing Date: December 20, 2022 (Dept. 503)

Motion: To Substitute Richard Martin, Jr. as Plaintiff Decedent Richard Martin, Sr.'s Successor in Interest

Tentative Ruling:

To grant the motion to substitute Richard Martin, Jr. as plaintiff decedent Richard Martin Sr.'s successor in interest. (Code Civ. Proc., § 377.31.)

Explanation:

"Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (Code Civ. Proc., § 377.20, subd. (a).) Also, "[a] pending action or proceeding does not abate by the death of a party if the cause of action survives." (Code Civ. Proc., § 377.21.)

However, in order to prosecute the claims, another person must be substituted into the action in place of the deceased plaintiff. "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." (Code Civ. Proc., § 377.31.) "For the purposes of this chapter, 'decedent's successor in interest' means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action." (Code Civ. Proc., § 377.11.)

In this case, Richard Martin, Jr. asserts that he is decedent plaintiff Richard Martin, Sr.'s "successor in interest" and thus should be allowed to substitute into the action in place of decedent. Under Code of Civil Procedure section 377.32,

> (a) The person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedent's successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury under the laws of this state stating all of the following:
>
> (1) The decedent's name.
>
> (2) The date and place of the decedent's death.

(3) "No proceeding is now pending in California for administration of the decedent's estate."

(4) If the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest.

(5) Either of the following, as appropriate, with facts in support thereof:

(A) "The affiant or declarant is the decedent's successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) and succeeds to the decedent's interest in the action or proceeding."

(B) "The affiant or declarant is authorized to act on behalf of the decedent's successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) with respect to the decedent's interest in the action or proceeding."

(6) "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding."

(7) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(Code Civ. Proc., § 377.32.)

Here, decedent plaintiff's son, Richard Martin, Jr., has submitted a declaration pursuant to Code of Civil Procedure section 377.32.

Sufficiency of Richard Martin, Jr.'s Declaration

In opposition to the instant motion, defendants argue that the Martin declaration fails for two reasons: (1) it does not definitively establish that Richard Martin, Jr. is the successor in interest because the declaration is silent as to whether Richard Martin, Jr. is decedent's *only* child; and (2) the attached copy of decedent's death certificate is legally insufficient because it is a photograph of the death certificate. Neither of these arguments is persuasive.

First, there is no evidence that Richard Martin, Sr. has any other children or heirs, and, in any case, there is no legal authority requiring that all successors in interest join in

a survival action. Defendants cite to no case supporting this argument. The provision in Code of Civil Procedure section 377.32, subdivision (b), providing for the possibility of more than one person executing the required declaration, does not mandate that all possible successors in interest are *required* to join in the action. Defendants' argument that the instant motion should be denied because of the risk that later disputes may arise between unknown other potential successors and defendants is also unfounded. Defendants cite to no authority to support their contention that they can somehow be held liable multiple times for the violations alleged in the operative first amended complaint. To the contrary, "a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264.) Rather, it is a claim that "belonged to the decedent before death but, by statute, survives that event." (*Ibid*.) Accordingly, as noted in the reply brief, defendants' risks, exposure, and liability bear no logical relationship to the number of heirs Richard Martin, Sr. has or to whether they are all joined in this action.

Second, with respect to the copy of the death certificate attached to the Martin declaration, the court finds that the declaration's attached .pdf file (converted from a photograph of a certified copy of decedent's death certificate) is sufficient to meet the statutory requirements of Code of Civil Procedure section 377.32, subdivision (c). Defendants assert that the attachment "does not comply with … Evidence Code section 1520 (the Best Evidence Rule), or Evidence Code section 1521 (the Secondary Evidence Rule)." (Defendants' Opposition, pp. 5:27–6:1.) However, as noted in the reply brief, the best evidence rule was repealed and replaced by the secondary evidence rule in 1998. (See *People v. Goldsmith* (2014) 59 cal.4th 258, 269.) Under the secondary evidence rule, the content of a writing may be proved by otherwise admissible secondary evidence, and secondary evidence shall be excluded if the court determines either: "(1) [a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion[;] [or] [¶] (2) [a]dmission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a).) Defendants have made no argument as to why either of the two exceptions apply here, and the court finds that neither exception applies.

In sum, the court concludes that the declaration submitted by decedent plaintiff's son, Richard Martin, Jr., complies with the requirements of Code of Civil Procedure section 377.32.

Plaintiff's Private Attorneys General Act ("PAGA") Claim

Defendants further oppose the present motion on the ground that plaintiff's PAGA claim abated as a result of plaintiff's death and cannot be continued by his son. Defendants argue that the motion must be denied "as to the PAGA claim, which must be dismissed." (Defendants' Opposition, p. 8:14.) However, the statute under which the present motion is brought does not empower the court to dismiss any causes of action.

The court recognizes that Code of Civil Procedure section 377.31 allows for a decedent's successor in interest to continue "a pending action or proceeding that does not abate …." (Code Civ. Proc., § 377.31.) The court also recognizes that the question of whether plaintiff's PAGA claim survives is vigorously contested. However, this motion is not the appropriate proceeding for this debate, and the court declines to make a finding on the issue at this time. The operative first amended complaint includes eight other

causes of action in addition to the PAGA claim. Defendants do not contend that any of the other eight causes of action abate. Therefore, there is no question that, even if the PAGA cause of action does not survive, the pending action as a whole remains.

Defendants cannot use their opposition to this motion as an instrument to dismiss the PAGA cause of action. Instead, they must bring their own affirmative motion for a determination of the issue.[1]

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 12/19/2022 .
(Judge's initials) (Date)

[1] Likewise, to the extent that plaintiff argues that a settlement agreement has been reached in this case, a separate motion must be brought to seek enforcement of the purported settlement agreement. The court makes no finding on the question of whether or not an enforceable settlement agreement was reached prior to Richard Martin, Sr.'s death.

(24)

Tentative Ruling

Re: ***Southwest Jet Fuel Co. vs. California Department of Tax and Fee Administration***
Superior Court Case No. 22CECG01224

Hearing Date: December 20, 2022 (Dept. 503)

Motion: Defendant California Department of Tax and Fee Administration's Demurrer to Complaint

Tentative Ruling:

To take off calendar as moot, due to plaintiff's filing of a first amended complaint on October 3, 2022. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054.) Any challenges to the amended pleading must be raised by new motion(s).

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 12/19/2022 .
(Judge's initials) (Date)