

Tentative Rulings for February 3, 2022
Department 403

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).)

21CECG01895 *Dominguez v. Leonardo* (Dept. 403)

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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(03)

Tentative Ruling

Re: **Cano v. Rios**
Superior Court Case No. 16CECG01796 (lead case,
consolidated with case no. 18CECG00980)

Hearing Date: February 3, 2022 (Dept. 403)

Motion: Plaintiff State Farm Insurance Company's Motion to Deem
Requests for Admissions to be Admitted, and for Monetary
Sanctions

Tentative Ruling:

To deny State Farm's motion to deem defendants to have admitted the truth of the matters in the requests for admissions, set one, and the request for monetary sanctions against defendants. (Code Civ. Proc. § 2033.280.) The discovery cutoff dates and discovery motion cutoff dates had already run before the discovery requests were served, so plaintiff's motion is untimely and must be denied. (Code Civ. Proc. § 2024.020.)

Explanation:

Under Code of Civil Procedure section 2033.280,

If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply:

(a) The party to whom the requests for admission are directed waives any objection to the requests, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010).

...

(b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(c) The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion.

Here, plaintiff State Farm served defendants with requests for admissions, set one, on July 20, 2021. (Anderson decl., ¶ 1.) Service was by mail. (*Ibid.*) Therefore, defendants' responses were due no later than 35 days after the requests were served.

However, defendants never served responses, and as of the date the motion was filed they still had not served any responses.

Thus, defendants would normally be subject to an order deeming them to have admitted the truth of the matters in the requests for admissions, as well as being deemed to have waived all objections to the requests, including any claim of privilege or work product, and they would also be subject to sanctions against them for their refusal to participate in the discovery process. (Code Civ. Proc. § 2033.280.) However, in the present case, the discovery cutoff and motion dates ran before the plaintiff served the requests for admissions on defendants, so plaintiff cannot now move to have the requests be deemed admitted.

Under Code of Civil Procedure section 2024.020, subdivision (a), "Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." Also, "[e]xcept as provided in Section 2024.050, a continuance or postponement of the trial date does not operate to reopen discovery proceedings." (Code Civ. Proc., § 2024.020, subd. (b).) However, under section 2024.050, on motion of any party, the court may grant leave to complete discovery closer to the initial trial date, or to reopen discovery after a new trial date has been set. (Code Civ. Proc. § 2024.050, subd. (a).)

Here, the trial was originally set for May 26, 2020. The court then took the trial off calendar on March 26, 2020 and set a new trial setting conference on May 12, 2020 due to the Covid-19 pandemic shutdown of the courts. (See Minute Order of March 26, 2020.) The trial setting conference was then continued to June 8, 2020. (Minute Order of April 30, 2020.) On June 8, 2020, the trial was reset for April 26, 2021, with discovery cutoff dates to run from the new trial date. (Minute Order of June 8, 2020.)

On April 23, 2021, the parties agreed to continue the trial date for six months, and the court granted their request. (Minute Order of April 23, 2021.) The trial was thus continued again, this time to October 25, 2021. (*Ibid.*) However, the court's minute order did not specify whether the discovery cutoff was also being extended based on the new trial date, so the discovery cutoff and motion cutoff dates continued to be based on the April 26, 2021 trial date. (*Ibid.*)

Finally, on August 26, 2021, State Farm filed an ex parte application for another trial continuance. The court granted the application and continued the trial date to March 28, 2022. Again, however, the minute order did not state that the discovery cutoff was being continued based on the continued trial date. (Minute Order of August 26, 2021.) The ex parte application did state that one of the reasons that the trial needed to be continued was due to the fact that the parties had not yet completed discovery, but plaintiff never specifically requested an extension of the discovery cutoff date, and the court never expressly granted such an extension. (*Ibid.*)

Therefore, the discovery cutoff date expired on March 29, 2021 based on the April 26, 2021 trial date, and the motion cutoff expired on April 12, 2021. While the court could have granted an extension of the discovery cutoff and motion dates when it granted the

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Tentative Ruling

Re: ***Volvo Financial Services v. Singh, et al.***
Superior Court Case No. 18CECG02535

Hearing Date: February 03, 2022 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To grant. The Court intends to sign the proposed judgment, but will strike the provision on item 6(a)(2) pertaining to the daily interest rate, specifically “(\$125.83/day after Feb 3, 2022)”.

Explanation:

Post-judgment Interest:

“When a final judgment is entered, all causes of action arising from the same obligation are merged into the judgment and all alternative remedies to enforce that obligation extinguished [sic] by the judgment granting one of those remedies. The creditor cannot thereafter enforce the original obligation, because the judgment creates a new debt or liability, distinct from the original claim or demand, and this new liability is not merely evidence of the creditor's claim, but is thereafter the substance of the claim itself ... In other words, the ... judgment extinguishes the contractual rights and remedies previously extant, substituting in their place only such rights as attach to a judgment. (*Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 301-302 [emphasis in original; internal quotes and brackets omitted].)

“Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.” (Code Civ. Proc., § 685.010, subd. (a).) The “[p]rincipal amount of the judgment” means the total amount of the judgment as entered or as last renewed, together with the costs thereafter added to the judgment...” (Code Civ. Proc., § 680.300 [brackets added].)

Here, plaintiff requests for a post-judgment interest provision—“(\$125.83/day after Feb 3, 2022)”¹, that is not in conformity with California law. Upon entry of judgment, plaintiff's then-existing contractual rights and remedies are extinguished; thus, a provision requiring the interest, *after* judgment, to accrue according to contractual obligations existing *prior* to the entry of judgment cannot be sustained.

¹ January 11, 2022 Proposed Judgment, Item 6, subd. (a)(2).

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Tentative Ruling

Re: ***Friedland v. Zinkin Development Company, Ltd.***
Superior Court Case No. 19CECG01665

Hearing Date: February 3, 2022 (Dept. 403)

Motion: By Defendant Otis Elevator Company for Summary Judgment
or, in the Alternative, Summary Adjudication

Tentative Ruling:

As set forth below: to overrule plaintiffs' objections to the declaration of Eric Henning, to overrule moving defendants' objections to the declaration of plaintiff Steve Friedland, and to overrule moving defendants' objections to the declaration of Robert Offerman, paragraphs 1, 2, 8, 9, and 15. All other objections are overruled pursuant to Code of Civil Procedure, section 437c, subdivision (a).

To deny moving defendants' motion for summary judgment. (Code Civ. Proc., § 437c, subd. (c).)

To grant moving defendants' motion for summary adjudication as it relates to the second and third causes of action. (Code Civ. Proc., § 437c, subd. (f).) The motion is denied as it relates to the first and fourth causes of action. The prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment/adjudication ruling.

Explanation:

Burden on Summary Judgment/Adjudication

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Furthermore, "[t]o avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and

speculation.” (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) In essence, if the party opposing summary judgment relies on inferences, those inferences must be “reasonably deducible” from the evidence. (*Joseph E. Di Loreto, Inc. v. O’Neill* (1991) 1 Cal.App.4th 149, 161.)

“Only when the inferences are indisputable may the court decide the issues as a matter of law.... An issue of fact becomes one of law only when ‘the undisputed facts leave no room for a reasonable difference of opinion.’” (*Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 937.) A court will liberally construe the evidentiary submissions of a party opposing summary judgment, but will strictly scrutinize the moving party’s own evidence, “in order to resolve any evidentiary doubts or ambiguities in plaintiff’s favor.” (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) However, “[c]ourts liberally construe declarations submitted in opposition to summary adjudication only to the extent the declarations are admissible.” (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 57.) Finally, “an issue of fact can only be created by a conflict of evidence.” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) “It is not created by speculation or conjecture.” (*Ibid.*)

The moving party here – defendant Otis Elevator Company (“Otis”) – seeks summary judgment, or alternatively, summary adjudication of each of plaintiffs’ causes of action. As discussed below, Otis’ motion does not dispose of plaintiffs’ negligence claims and thus summary judgment and summary adjudication of causes of action one and four is improper. In contrast, summary adjudication of causes of action two and three is proper because Otis’ evidence sufficiently shows that its relationship to the subject elevator was that as servicer, and not owner/operator as required for premises and common carrier liability.

First and Fourth Causes of Action

Otis relies on *Pfingst v. Mayer* (1949) 93 Cal.App.2d 265 (*Pfingst*) for its contention that there is no evidence of negligence because it performed its obligations under the maintenance agreement. (Motion, at pp. 5:5-6, 6:9-12.) Otis presents the declaration of its general manager, Eric Henning, which attaches Otis’ underlying “maintenance agreement” for “full preventative maintenance service” as well as various service records². (See Henning Decl. Ex. A, pg. 1; Ex B.) The maintenance agreement includes a dedicated “safety and environment” section describing multiple tests and requiring “periodic[] examin[ation] of safety devices.” Otis also asserts plaintiff Steve Friedland’s special interrogatory responses which stated that he was unaware of documents indicating Otis’ alleged negligence. (See Biernat, Decl. Ex. 3.)

² Plaintiff objects to Mr. Henning’s declaration contending it lacks relevancy, personal knowledge and authenticity. These objections are overruled because Mr. Henning’s declaration states that he has been in the position since 2016, and is familiar with and has personal knowledge of Otis’ business, which includes the preventative maintenance, repair, service, and modernization of elevators for various customers to whom Otis has maintenance agreements, including in the geographic area that includes [the subject elevator].” (*Id.* at ¶3.) Therefore, Mr. Henning’s declaration provides sufficient foundation to establish his personal knowledge and authenticity of the underlying service agreement.

In *Phingst* the trial court granted a nonsuit in favor of the servicer, who had contracted to “grease and oil the machine [elevator] regularly, make minor adjustments, and furnish minor supplies.” (*Pfingst, supra*, 93 Cal.App.2d at p. 270.) The servicer had also proposed to make the elevator in “perfect running condition” through “complete service, including the repair and replacement of worn-out parts,” but this more comprehensive service was “refused.” (*Id.* at pp. 270, 272.) The trial court’s nonsuit was affirmed because there was no evidence that work under the service contract had been performed negligently. (*Id.* at p. 272.)

Unlike the service agreement in *Pfingst*, which the court repeatedly described as “minor,” here the maintenance agreement presented by Otis requires “full preventative maintenance service.” The use of the term “full” is thus distinguishable from the service contract in *Pfingst* where the plaintiff had specifically “refused” comprehensive service. Furthermore, Otis’ maintenance agreement includes a dedicated “safety and environment” section requiring periodic examination of safety devices, which is also distinct from the service contract in *Pfingst* which only required furnishing minor supplies and make minor adjustments.

In addition, to the extent plaintiffs’ “factually devoid” discovery responses to two interrogatories are sufficient to shift the burden (see *Andrews v. Foster Wheeler* (2006) 138 Cal.App.4th 96, 106), plaintiffs’ opposing evidence reasonably demonstrates that, although equipped with a sensor, the elevator continued to close despite the obstruction. The physically injured party, plaintiff Steve Friedland, has provided a declaration describing the entire incident and the relevant events – including the doors’ closure despite the location of his shoe. Such factors are thus within his personal knowledge.³ In addition, Robert Offerman opines that the doors should have retracted once detecting the obstruction.⁴ (Offerman, Decl., ¶ 10.)

In addition, unlike *Bozzi v. Nordstrom* (2010) 186 Cal.App.4th 755, 764 (*Bozzi*), where the moving defendant asserted the opinion of an engineer with 46 years’ experience, here Otis’ motion presents no such expert evidence. Furthermore, the opposing expert opinion found “conclusive and speculative” in *Bozzi* attempted to find a defect within the complicated braking mechanisms of an escalator – without any review of the subject escalator itself. In contrast, Mr. Offerman reviewed a photograph of the elevator and sensor and described their relatively straight forward operation.

The inference raised in plaintiffs’ evidence is that the elevator was allowed to remain in service despite inoperable systems impliedly contemplated under the “full” service required of the maintenance agreement. Furthermore, whether Otis satisfied “reasonable care” under its contractual obligations or otherwise, such determination is reserved for “the trier of fact who decides what the facts are and what reasonable care means within those facts.” (*Coyle v. Historic Mission Inn Corporation* (2018) 24 Cal.App.5th 627, 640 [summary judgment improper where the moving party’s evidence

³ Otis’ objection to the declaration by Steve Friedland should be overruled. (*In re Nelson’s Estate* (1964) 227 Cal.App.2d 42, 47.)

⁴ Robert Offerman’s declaration describes his certification as a Qualified Elevator Inspector and 30 years’ experience with Otis elevators. Accordingly, Otis’ objection to the declaration by Robert Offerman ¶ 10 should be overruled. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 763.)

