

Tentative Rulings for March 9, 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).)

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

09CECG00933 *Wash v. Wash*, is continued to Wednesday, March 30, 2022, at 3:30 p.m., in Dept. 403

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Tentative Ruling

Re: **Arriet v. Dunlop D.M.D., et al.**
Superior Court Case No. 20CECG01155

Hearing Date: March 9, 2022 (Dept. 501)

Motion: Plaintiff's Motion for Leave to Amend

Tentative Ruling:

To grant. (Code Civ. Proc., § 473.) The proposed amended pleading shall be filed within five days of service by the clerk.

Explanation:

Plaintiff seeks leave to amend the Complaint to add a cause of action for Intentional Misrepresentation – Concealment.

“The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... ” (Code Civ. Proc., § 473, subd. (a)(1).) The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.)

Cal. Rules of Court, Rule 3.1324 provides that a motion to amend must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rules of Court, Rule 3.1324(a).)

These requirements are satisfied, as plaintiff provides the proposed amended pleading and describes the proposed additions.

In moving to amend a pleading, the moving party must file a declaration that specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324(b).)

In moving to amend a pleading, the moving party must file a declaration that specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324(b).)

The moving papers demonstrate that facts giving rise to the addition of the fraud cause of action were discovered recently in the course of preparing to oppose

defendants' summary judgment motion. The amendment is based on discovery of references to a January 29, 2019, CBCT scan taken by Dr. Dunlop, which he allegedly hid and did not produce in discovery. In fact, despite defendants' counsel's representations that any missing scans would be produced, it appears that the scan still has not been produced.

The opposition contends that (a) the statute of limitations has run on this cause of action (Guzé Decl., ¶ 2); (b) there in fact is no CBCT scan in this case that demonstrates "where the nerve was damaged; the scan relied on by Dr. Needle confirmed that the implant did not reach the end of the sulcus, which it would have needed to do to injure the nerve" (Guzé Decl., ¶ 3; Needle Decl. 6:9-11; Dunlop Depo. 36:11-19); (c) defense counsel contacted plaintiff's counsel in several occasions to provide any missing records and to correct the misinterpretation that forms the basis for plaintiff's motion to amend, but those efforts were ignored (Guzé Decl., ¶¶ 4, 5); and (d) defendants would be prejudiced if the court grants leave to amend (Guzé Decl., ¶ 6).

Regarding the statute of limitations defense, leave to amend may be denied where the pleading is deficient as a matter of law and the defect could not be cured by further appropriate amendment. (*California Cas. Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230 [proposed amendment barred by statute of limitations and no basis for "relation back"].)

For an amended complaint to relate back to the original complaint, it must:

- be based on the "same general set of facts" as the original; and
- seek recovery against the same defendants for the "same injuries"; and
- refer to the "same incident"—i.e., the "same accident" caused by the "same offending instrumentality." (*Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 150; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409; see *Pointe San Diego Residential Comm., L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277 ["in applying the relation-back analysis, courts should consider the strong policy in this state that cases should be decided on their merits" (internal quotes omitted)].)

Amendments alleging a new theory of liability against the defendant relate back to the original complaint, so long as based on the same set facts previously alleged. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199-1200.)

This amendment relates back to the original Complaint. It is based on the same *general* set of facts, the injury is the same, and the incident is the same. Some particulars going to elements of a cause of action for fraud are a bit different, but the relation back test is satisfied.

Regarding defendants second argument, they contend that "courts have discretion to deny leave where the proposed amendment relies on erroneous facts. (See, e.g., *Hahn v. Mirda* (2007) 147 CA4th 740, 751; see also *Vallejo Develop. Co. v. Beck Develop. Co.* (1994) 24 CA4th 929, 946; *State of Calif. ex rel. Metz v. CCC Information Services Inc.* (2007) 149 CA4th 402, 412)."

Defendants imply that leave to amend is properly denied where defendants contend that the factual basis for the amendment is mistaken. These cases stand for no

