

Tentative Rulings for March 23, 2022
Department 501

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.

16CECG03557 *Lowe v. Happy Yu, LLC* is continued to Wednesday, April 13, 2022 at 3:30 p.m. in Dept. 501

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(03)

Tentative Ruling

Re: ***Sterling National Bank v. Awesome Charters and Tours***
Superior Court Case No. 21CECG02398

Hearing Date: March 23, 2022 (Dept. 501)

Motion: Plaintiff's Motion to Strike Defendants' Answer

Plaintiff's Application for Writ of Possession

Tentative Ruling:

To grant plaintiff's motion to strike the answer filed by defendants, as it has been improperly filed. (Code Civ. Proc. §§ 435, 436.) To grant leave to amend the answer. Defendants shall serve and file their first amended answer within ten days of the date of service of this order. The amended answer must be verified, it must contain the contact information of the filing party or attorney as required under Rule of Court 2.111, and defendant Awesome Charters and Tours must appear through an attorney licensed in the State of California.

To grant plaintiff's application for a writ of possession for the collateral, namely the 2013 MCI J4500 Motorcoach, VIN 2MG3JMB A0DW066459. To grant plaintiff's request for a turnover order under Code of Civil Procedure section 412.070, requiring defendant to transfer possession of the collateral to plaintiff.

Explanation:

Motion to Strike Answer: Plaintiff has moved to strike defendants' answer on the grounds that it has been improperly filed. It does appear that the answer was improperly filed for several reasons, and thus it should be stricken.

First, the answer is not verified, even though plaintiff's complaint was verified. Under Code of Civil Procedure section 446, subdivision (a), "When the complaint is verified, the answer shall be verified." (Code Civ. Proc., § 446, subd. (a).) "Where a complaint is verified, as it was here, the answer also must be verified, with some exceptions not applicable here. If an answer is not sufficiently verified in such a case, it may be stricken out, or judgment on the pleadings may be ordered." (*French v. Smith Booth Usher Co.* (1942) 56 Cal.App.2d 23, 29, internal citations omitted.) Therefore, the defendants' answer was improperly filed without a verification, which is sufficient reason on its own to warrant striking it.

Also, the answer fails to comply with California Rules of Court, Rule 2.111, which requires the first page of a pleading to include the name, office or mailing address, telephone number, fax number, and email address of the attorney or party who is filing the pleading. (Cal. Rules of Court, Rule 2.111(1).) Here, the answer was apparently filed by defendant Ramiro Morales on behalf of defendant Awesome Charters and Tours, and perhaps on his own behalf as well. However, he does not provide his name, address,

phone number, fax number or email address anywhere on the answer, as he is required to do by the Rules of Court. Therefore, the answer has been improperly filed and is subject to being stricken.

Furthermore, to the extent that defendant Morales seeks to file the answer on behalf of Awesome Charters, the answer is improperly filed because Morales is apparently not a licensed attorney and thus he cannot appear on behalf of Awesome Charters, which is a limited liability company. An LLC is a separate legal entity which shares characteristics of a corporation and a partnership. (Corp. Code § 17001, *et seq.*) Like a corporation, an LLC cannot appear on its own behalf, or through its officers, directors, or employees. It must appear through a licensed attorney. (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.) “[A] corporation, as an artificial entity created by law, can only act in its affairs through its natural person agents and representatives. If the corporate agent who would likely appear on behalf of the corporation in court proceedings, e.g., an officer or director, is not an attorney, that person would be engaged in the unlicensed practice of law.” (*Id.* at p. 1146, citing *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730.) The same rule applies in cases where LLCs or partnerships attempt to appear in pro per through non-lawyer officers, directors, or partners. (*D-Beam Ltd. Partnership v. Roller Derby Skates, Inc.* (2004) 366 F.3d 972, 973-974.)

Here, Awesome Charters is an LLC and therefore must appear through counsel. Although he has not included his name, address, and other contact information on the face of the answer, as discussed above, it appears that Mr. Morales is attempting to make an appearance on behalf of Awesome Charters. Yet there is no evidence that Mr. Morales is an attorney, and he may not represent the LLC simply because he may be an officer, director, or agent of the LLC. While he can appear in pro per to defend himself, he cannot appear on behalf of the LLC. Therefore, the court intends to strike the answer to the extent that it is an appearance by Awesome Charters as an unrepresented LLC.

However, the court intends to grant leave to amend the answer, as it is possible that the defendants may be able to cure the defects in their answer if they are given a chance to do so. In particular, Awesome Charters must appear through an attorney licensed to practice law in California. Also, the attorneys or parties who are filing the answer should be listed in the caption of the answer with their full contact information as required by Rule of Court 2.111. The answer must also be verified, as the complaint is verified. In addition, the answer should clearly state which parties are answering, as the current answer is ambiguous as to whether it has been filed on behalf of Awesome Charters, Morales, or both. Finally, defendants must serve their answer on plaintiff as well as filing it with the court.

Application for Writ of Possession: Under Code of Civil Procedure section 512.010,

(a) Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this chapter for a writ of possession by filing a written application for the writ with the court in which the action is brought.

(b) The application shall be executed under oath and shall include all of the following:

(1) A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument shall be attached.

(2) A showing that the property is wrongfully detained by the defendant, of the manner in which the defendant came into possession of the property, and, according to the best knowledge, information, and belief of the plaintiff, of the reason for the detention.

(3) A particular description of the property and a statement of its value.

(4) A statement, according to the best knowledge, information, and belief of the plaintiff, of the location of the property and, if the property, or some part of it, is within a private place which may have to be entered to take possession, a showing that there is probable cause to believe that such property is located there.

(5) A statement that the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.

(c) The requirements of subdivision (b) may be satisfied by one or more affidavits filed with the application.

The court shall issue the writ if it finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ have been satisfied. (Code Civ. Proc. §§ 512.040(b); 515.060(a)(1).) The plaintiff must also satisfy the requirements for posting an undertaking under Code of Civil Procedure section 515.010 in order to obtain the writ of possession. (Code Civ. Proc. § 512.060(a)(2).)

Under section 515.010, the court shall not issue a writ of possession until the plaintiff has filed an undertaking with the court, unless the exception under section 515.010(b) applies. (Code Civ. Proc. § 515.010(a).) The undertaking shall be in an amount of not less than twice the value of the defendant's interest in the property or in a greater amount. (*Ibid.*) However, if the court finds that the defendant has no interest in the property, the court shall waive the requirement of the undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of section 515.020(b). (Code Civ. Proc. § 515.010(b).)

Here, plaintiff has satisfied the basic requirements for issuance of a writ of possession. It appears that plaintiff's claim is probably valid, since it has submitted evidence that defendant has defaulted on the terms of the vehicle loan by failing to make monthly payments. (Lopez decl., ¶¶ 21-25.) Plaintiff has also submitted a copy of the installment sale agreement. (Exhibit A to Lopez decl.) The agreement provides that plaintiff's predecessor in interest has a security interest in the tour bus as collateral for the loan, and plaintiff later was assigned the security interest along with the other rights under the installment contract. (Lopez decl., ¶¶ 11-12.) Plaintiff has perfected its security interest by being listed as the lienholder on the certificate of title. (*Id.* at ¶ 13.) Thus, since

defendant has defaulted, plaintiff has the right to take immediate possession of the bus as collateral under the terms of the loan. (*Id.* at ¶ 27.)

In addition, plaintiff has submitted evidence that defendant has wrongfully retained the property by refusing to return it to plaintiff after he defaulted, and despite demands for the property's return. (*Id.* at ¶ 28.) Moreover, Morales guaranteed the prompt payment of all amounts due on the loan by Awesome Charters. (*Id.* at ¶ 29.) Morales is believed to be in sole possession of the bus, but he has failed and refused to return it to plaintiff. (*Id.* at ¶¶ 37-38.) Morales came into possession of the bus by virtue of the purchase transaction. Plaintiff has also provided a description of the tour bus, including its VIN, and has stated the estimated fair market value of the bus. (*Id.* at ¶ 8.) Furthermore, plaintiff has stated that it believes that the bus is currently located at defendant's business address, which is 648 N. Monte Avenue in Fresno. (*Id.* at ¶ 43.) However, the collateral is easily moved. (*Id.* at ¶ 44.) Plaintiff is concerned that defendant may not be properly maintaining the bus, and that it may suffer damage through lack of proper maintenance. (*Id.* at ¶¶ 47.)

Plaintiff also states that the bus has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution against the property of plaintiff. (Application for Writ, ¶ 8 a.) Therefore, the court intends to find that plaintiff has satisfied the requirements for obtaining a writ of possession for the car, and thus it will issue the writ.

Also, the court will not require plaintiff to post a bond in order to obtain the writ, since plaintiff's evidence shows that defendant has no equity in the bus, as he still owes over \$238,000 on the loan, and the bus itself is only estimated to be worth approximately \$175,000. (Lopez decl., ¶¶ 40-41.) Therefore, the court will waive the requirement for plaintiff to post a bond before obtaining the writ. (Code Civ. Proc. § 515.010(b).)

Finally, the court intends to grant the request for a "turnover order" that requires defendant to turn over the bus to plaintiff and to cooperate in plaintiff's efforts to recover the bus. Under Code of Civil Procedure section 512.070, the court may, upon granting an order for possession of the collateral, also issue an order directing defendant to transfer possession of the collateral to the plaintiff. The order shall also contain a notice that failure to comply with the order may subject defendant to being held in contempt of court.

Here, such a turnover order is warranted, as defendant has refused to turn over the bus, and may attempt to move or conceal it in order to frustrate plaintiff's right to repossess it. Granting the turnover order may motivate defendant to cooperate with plaintiff and turn over the bus without further need for court intervention. Therefore, the court intends to grant the turnover order as well as the writ of possession.

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** 3/21/2022 .
(Judge's initials) (Date)