Tentative Rulings for May 18, 2022
Department 502

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).)

21CECG02455 ***Pounds v. Lea [Last Name Unknown]*** **(originally set in DEPT. 403, but moved to DEPT. 502)**

21CECG001658 ***Zavala v. Pacific Grain & Foods, LLC*** **(originally set in DEPT. 403, but moved to DEPT. 502)**

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

21CECG02504 ***Ana Lee v. Lazy Dog Restaurants, LLC*** **is continued to Thursday, June 16, 2022 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

(20) **Tentative Ruling**

Re: ***Hernandez v. Navarro***
Superior Court Case No. 21CECG02514

Hearing Date: May 18, 2022 (Dept. 502)

Motion: Demurrer to Complaint

Tentative Ruling:

To sustain the demurrers to second and fourth causes of action with leave to amend. To overrule the demurrers to the Complaint as a whole, and to the first and third causes of action. (Code Civ. Proc., § 430.10, subd. (e).) Plaintiffs may file an amended complaint within 10 days of service of the order by the clerk. All new allegations shall be in **boldface** type.

Explanation:

Demurrer to Complaint

Initially, defendants demur to the entire Complaint on the ground that plaintiffs fail to state a cause of action against Maria Navarro because the alter-ego allegations are insufficient.

> "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415, 125 Cal.Rptr.3d 56 [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its business decisions was not sufficient for alter ego liability]; cf. *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235, 166 Cal.Rptr.3d 864 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].)

(*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 696.)

Here, as far as the alter-ego allegations go, plaintiffs merely allege on information and belief that "Defendants MARIA TERESA NAVARRO, and ASOCIADOS NAVARRO INC., which is wholly owned and operated by MARIA TERESA NAVARRO, are alter egos of one another and operate in concert with uniformity of interest and ownership." (Complaint ¶ 3.) If alter-ego theory were the sole basis for suing Maria Navarro, this is insufficient. Even "[a]n allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415.)

But the Complaint also identifies both Navarro and the corporation Asociados Navarro Inc. as doing business as La Casa de Ceramica. (Complaint ¶ 2.) It was La Casa de Ceramica that allegedly contracted with plaintiffs. La Casa de Ceramica is not identified as a corporation or a separate entity, but as a dba. Also supporting the allegation that Navarro was doing business as La Casa de Ceramica, plaintiffs attach as Exhibit D to the Complaint a letter from defense counsel Alaina Ybarra stating she represents "La Casa de Ceramica and/or Maria Teresa Chavez Navarro" relative to the dispute. Later in the letter Ybarra references "my client," in the singular. (Complaint ¶¶ 22, 61 and Ex. D.) While the court does not consider this any sort of binding admission, in light of the fact that the Complaint alleges that La Casa de Ceramica is a dba of Navarro, the Complaint as against Navarro does not depend on the alter-ego allegations.

First Cause of Action

Business and Professions Code section 7031, subd. (b) provides that a homeowner shall "recover all compensation paid to [an] unlicensed contractor for performance of any act or contract." The term "all compensation paid" includes all compensation paid to the unlicensed contractor and does not allow reductions or offsets for the value of material or services provided.

Plaintiffs allege that neither La Casa de Ceramica nor its principles (Navarro and Asociados Navarro Inc.) were licensed, and accordingly seeks to recover all compensation paid to them for the residential construction project.

Defendants do not attack the cause of action as a whole, but contend that because the contract (Complaint Ex. B) is addressed to and signed only by Enrique Rodriguez, he is the only party who can sue. In other words, defendants argue that Janet Hernandez lacks standing.

However, this is not a contract claim. Business and Professions Code section 7031, subdivision (b), states "… **a person who utilizes** the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor **for performance of any act** or contract." (Emphasis added.) Thus, a claim for disgorgement under subdivision (b) does not require a contract.

Even if Hernandez was not a proper or formal party to the construction agreement, the Complaint as a whole alleges that "the Homeowners" (defined as both Hernandez and Rodriguez) engaged La Casa de Ceramica to perform the construction work, paid La Casa de Ceramica to do the work for Homeowners. (Complaint ¶¶ 10-31, 32, 38.) And though Rodriguez is the only homeowner to have signed the contract, on one of the invoices there is a reference to "janet" in the "bill to" field:

INVOICE

BILL TO
Enrrique Rodriguez
31945 pennyroyal ln
prather ca 559 3627967 janet
559 836-1516

(See Complaint Ex. C, 2nd page.) This reference lends support to the allegation that both Homeowners, including Janet Rodriguez, utilized the services of La Casa de Ceramica.

That is sufficient to state a cause of action under subdivision (d) of Business and Professions Code section 7031.

Second Cause of Action

The second cause of action for breach of contract alleges that "Homeowners" entered into the residential construction agreement attached as Exhibit B. (Complaint ¶ 49.) The cause of action is for breach of written contract, and on the homeowner side the only signatory to the contract is Ramirez. Hernandez is not mentioned in it.

A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co.* v. *Security Pacific Business Center* (1990) 222 Cal.App.3d 1371, 1387; 4 Witkin, Cal. Procedure (5th ed. 2010) Pleading § 515.) One who is not a party to a contract has no right to enforce it unless she is an intended third party beneficiary of the contract. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 130.)

While a demurrer admits as true all facts properly alleged in the complaint (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967), facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint (*Moran v. Prime Healthcare Mgmt., Inc.* (2016) 3 Cal.App.5th 1131, 1145-1146). Exhibit B is the contract, and Hernandez is not a party to it. Only Rodriguez is referenced in the contract, and only he signed it.

As the moving papers point out, there are no allegations of agency or third-party beneficiary status for Hernandez. The demurrer will be sustained with leave to amend, as plaintiffs may be able to amend the Complaint to add such allegations (at least third-party beneficiary) to make Hernandez a proper plaintiff to this cause of action.

Third Cause of Action

This cause of action again alleges that Homeowners entered into the residential construction agreement, and that the work was negligently performed. (See Complaint ¶¶ 71-87.)

The elements of negligence are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

The sole argument in support of the demurrer is that "the complaint fails to allege facts that MARIA TERESA NAVARRO, as an individual agreed to the terms of the contract." (MPA 4:8-9.)

However, as discussed above, La Casa de Ceramica, the contracting party identified on the contract, is alleged to be a dba of Navarro. The demurrer should be overruled for the same reason as the demurrer to the Complaint as a whole, discussed above.

Fourth Cause of Action

This cause of action for fraud repeats the allegations of each of the preceding causes of action. As pertaining to the fraud claim, plaintiffs allege, "At the time of entering into the Agreement, La Casa de Ceramica assured the Plaintiffs that it was competent and experienced, and possessed the requisite skills, knowledge and training to complete the work which was the subject of the Agreement." (Complaint ¶ 95.)

A cause of action for intentional misrepresentation must allege: (1)That the defendant represented to the plaintiff that an important fact was true; (2) That defendant's representation was false; (3) That the defendant knew that the representation was false when he or she made it made it; (4) That the defendant intended that the plaintiff rely on the representation; (5) That the plaintiff reasonably relied on defendant's representation; (6) That the plaintiff was harmed; and (7) That the plaintiff's reliance on defendant's representation was a substantial factor in causing his or her harm. (*1-1900 CACI 1900.)*

The rule is that fraud must be specifically pleaded. Thus, general pleading of the legal conclusion of "fraud" is insufficient, the facts constituting the fraud must be alleged; and every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect. (5 Witkin, Cal. Procedure (4th ed. 1997) "Pleading," § 669, pp. 125-127.) The reason for the specific pleading requirement is so that defendant will be able to answer the charge.

"The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

Here the representations were allegedly made by La Casa de Ceramica, which is alleged to be a dba of both Navarro and the corporation Asociados Navarro, Inc. Plaintiffs must allege the specificity specified in *Tarmann*. In particular plaintiffs must allege who made the allegedly false representations and when. Absent those specifics, the cause of action is deficient.

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: RTM on 5/17/2022 .
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Rocha v. County of Fresno***
Superior Court Case No. 20CECG01193

Hearing Date: May 18, 2022 (Dept. 502)

Motion: Defendant County of Fresno's Motion for Summary Judgment, or in the Alternative Summary Adjudication

Tentative Ruling:

To continue the motion for summary judgment/adjudication to Wednesday, June 8, 2022 at 3:30 p.m. in Department 502. To order plaintiff's counsel to file the complete declaration of Daniel Rocha, signed under penalty of perjury, as well as the exhibits to the declaration, within five days of the date of service of this order. No other briefing shall be submitted by the parties.

Explanation:

While plaintiff's counsel has attached what appears to be a copy of plaintiff's declaration to his "Statement of Facts", the declaration is not signed under penalty of perjury by plaintiff, so it is not admissible evidence that would support his opposition. Also, although plaintiff's counsel has submitted a list of exhibits and plaintiff's unsigned declaration refers to a number of documents that have allegedly been attached as exhibits to his declaration, no such exhibits have been submitted to the court. Therefore, at this time the court does not have sufficient evidence before it to make a determination as to whether plaintiff has raised any triable issues of material fact.

Therefore, the court intends to continue the matter to June 8, 2022 and order plaintiff's counsel to file a complete declaration signed by plaintiff under penalty of perjury within five days of this order. Also, plaintiff's counsel shall submit the documents referenced in his declaration. No other briefing shall be filed by the parties.

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: RTM on 5/17/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Smith v. The City of Fresno***
Superior Court Case No. 21CECG02584

Hearing Date: May 18, 2022 (Dept. 502)

Motion: By Defendant to Declare Plaintiff a Vexatious Litigant

Tentative Ruling:

To grant. (Code Civ. Proc., § 391, subd. (b).) Since plaintiff has voluntarily dismissed this matter, the issue of furnishing security is not considered.

Plaintiff Candace Smith is ordered to obtain leave of the presiding judge prior to filing any new litigation in the courts of this state in propria persona. (Code Civ. Proc., § 391.7.)

Explanation:

"The vexatious litigant statutes were created to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempt to relitigate issues previously determined against them." (*Goodrich v. Sierra Vista Regional Medical Center* (2016) 246 Cal.App.4th 1260, 1265.) The statutes were intended to "address the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the court." (*Ibid*.)

If the court finds a plaintiff to be a vexatious litigant and finds that there is no reasonable probability plaintiff will prevail against the moving defendant, the court can require him or her to furnish security to cover the reasonable costs, including attorneys' fees, incurred in defending against the vexatious litigation. (Code Civ. Proc., § 391, subd. (c), 391.1. 391.3.) If the security is not furnished as ordered, the action will be dismissed as to the moving defendant. (*Id*., § 391.4.) The court may also, on its own motion or at moving party's request, enter a prefiling order prohibiting the vexatious litigant from filing any new litigation in this state in propria persona without first obtaining leave of court where the litigation is proposed to be filed. (*Id*., § 391.7.) Defendant's motion here seeks all three forms of relief: (1) that plaintiff Candace Smith be found to be a vexatious litigant; (2) that she be made to furnish security to be allowed to continue prosecuting this action or face dismissal of it; and (3) that a prefiling order be entered.

There are four separate bases given in Code of Civil Procedure, section 391, subdivision (b) for designating a self-representing plaintiff to be a vexatious litigant. Plaintiff's litigation conduct must fall within at least one of the four definitions outlined in the statute, and the court may not blend or augment portions of each definition. (*Holcomb v. U.S. Bank Nat. Assn.*, (2005) 129 Cal.App.4th 1494, 1501.) Here, relief is sought

under the applicable definition set forth under Code of Civil Procedure, section 391, subdivision (b)(1).

Code of Civil Procedure, Section 391, subdivision (b)(1):

Under section 391, subdivision (b), "'[v]exatious litigant'" means a person who does any of the following: [¶] (1) [i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." (Code Civ. Proc., § 391, subd. (b)(1) [brackets added].) A litigation is finally determined adversely to a plaintiff if he or she does not prevail, including voluntary dismissals. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779.)

Defendant requests the court take judicial notice[1] of at least five proceedings commenced within the previous seven years by plaintiff Candace Smith and subsequently dismissed for a multitude of reasons, including failure to litigate, failure to appear, non-payment of filing fees, etc. Accordingly, on this basis alone, plaintiff Candace Smith must be found to be a vexatious litigant.

Furnishing Security:

Since plaintiff has already voluntarily dismissed the action, there is no reasonable probability that plaintiff will prevail in this case. However, for that same reason, requiring plaintiff to furnish security in this action is not necessary.

Prefiling Order:

The vexatious litigant statutes also authorize the court to enter a prefiling order which prohibits a vexatious litigant from filing new actions in propria persona without first obtaining leave of the presiding judge or justice. (Code Civ. Proc., § 391.7, subd. (a).) As demonstrated above, the court finds that a prefiling order is sensible and necessary in order to prevent plaintiff from filing further frivolous actions in propria persona.

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: RTM on 5/17/2022.
(Judge's initials) (Date)

[1] The court grants defendants' request to take judicial notice. The court may take judicial notice of the records or files of any court of record under Evidence code, section 452, subdivision (d). (Evid. Code, § 452, subd. (d).)

(34)

Tentative Ruling

Re: ***Lawson v. Sunrise Medical (US) LLC***
Superior Court Case No. 21CECG02434

Hearing Date: May 18, 2022 (Dept. 502)

Motion: Defendants Motion to Dismiss for Forum Non Conveniens

Tentative Ruling:

To deny the motion dismiss for Forum Non Conveniens. (Code Civ. Proc. § 410.30)

Explanation:

Forum non conveniens, codified in California at Code of Civil Procedure section 410.30, is "an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley Inc*. (1991) 54 Cal.3d 744, 751 (*Stangvik*).) The availability of a suitable alternative forum for the action is critical. As noted by the United States Supreme Court: "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." (*Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 506–507, italics omitted.)

In assessing a forum non conveniens motion the trial court looks first to whether the alternative forum is a suitable place for trial. If it is then the court looks to the private interests of the litigants and the public interest in keeping the case in California. (*Stangvik, supra,* 54 Cal.3d 744, 751.)

Suitability of Utah

As a general matter, a forum is suitable "if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citation.] '[A] forum is suitable where an action "can be brought," although not necessarily won.' [Citation.]" (*Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1036–1037.)

Defendant contends Utah is a suitable forum for this action primarily because plaintiff, her treating doctors, and former defendant Numotion who sold the wheelchair at issue are located in Utah. Defendant indicates the two year statute of limitations has not passed for plaintiff to file this action in Utah and that it will submit to jurisdiction in Utah.

Defendant's contacts with Utah are minimal. It ships its products to retailers like Numotion for sale to consumers but has no presence in Utah. Defendant is not registered to do business in Utah. Whether Utah has jurisdiction over defendant is questionable. In contrast, defendant's principal place of business is located in Fresno, California (Dwork Decl. ¶ 18-21, Exhs. 9-12.) The Superior Court of California in Fresno County has jurisdiction

over defendant and the ability to enforce a judgment against it. Defendant represents in its Reply that it will submit to jurisdiction in Utah. Given that representation, Utah can fairly be called a suitable forum.

Private Interests of Litigants and Public Interest Factors

> "In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]"

(*Stangvik, supra,* 54 Cal.3d 744, 751.)

Defendant contends the private interests of litigants are better served in Utah based on the location of plaintiff's witnesses, medical treatment providers and the Numotion witnesses. It also contends that "[t]o the extent plaintiff claims that numerous witnesses from Sunrise's Fresno manufacturing facility will need to be deposed, Sunrise respectfully submits that as a party, a Utah court will have the ability to evaluate the need for such discovery." (MPA 13:25-28.)

In order to prove her products liability claims against defendant, plaintiff is tasked with proving not only her injury but also that a defect in the manufacture or design of the product caused the injury while being used in a reasonably foreseeable way. (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560.) Defendant's arguments address witnesses to support the injury but minimize the need to make its Fresno-based witnesses available to plaintiff. Plaintiff's need for records and depositions from defendant's witnesses in the Fresno location are equally important to prove plaintiff's claims. Plaintiff represents in her opposition that witnesses will be produced by plaintiff's counsel for depositions, that she will authorize the release of her medical records and assist in coordinating depositions of her medical treatment providers suggests there is no advantage to moving the action to a Utah court. Defendant's position that the court can "evaluate the need" for discovery of California-based witnesses in support of the product defect suggests it anticipates requiring subpoenas and potentially motions to compel. If the action is filed in Utah this discovery is made significantly more difficult for plaintiff by defendant's posture that the court will "evaluate the need" for such discovery of these now out-of-state witnesses. This weighs in favor of the action remaining in California.

The public interest factors appear to weigh equally. A Utah jury would be interested in making whole one of its residents. A California jury can also desire to hold a

Fresno-based company accountable for the products coming out of its community. Defendant's position that the dismissal of this action would avoid overburdening the local court by citing *Stangvik* is not an accurate comparison. In *Stangvik*, there were 235 lawsuits pending in California relating to the product at issue creating the burden on the court. (*Stangvik, supra*, 54 Cal.3d 744, 759.) This single action against the defendant is not akin to the burden on the courts considered in *Stangvik*.

Defendant argues that Utah law applies and to task a California jury with interpreting and applying Utah law is senseless. (MPA 14:1-4, 25-26.) Defendant cites *Chen v. Los Angeles Truck Centers, LLC* (2019) 7 Cal.5th 862, 867, to support the choice of law argument. Immediately following the portion of Chen quoted by defendant is the following: " 'As the forum state, California will apply its own law "unless a party litigant timely invokes the law of a foreign state.'" (Ibid., quoting *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.) Unless defendant, a California-based company intends to motion the court to have Utah law apply in this action, California law will apply.

Having evaluated the private interests of the litigants and public interests, the factors weigh in favor of the case remaining in Superior Court of California, Fresno County.

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: RTM on 5/17/2022.
(Judge's initials) (Date)