Tentative Rulings for May 3, 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.

20CECG00418 ***Justin Adamo v. Clark Pest Control Inc*. is continued to Thursday, May 5, 2022 at 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Regional Certified Registered Nurse Anesthetist Partners v. Juve***
Superior Court Case No. 21CECG02397

Hearing Date: May 3, 2022 (Dept. 501)

Motion: Defendant/Cross-Complainant Oracle Anesthesia, Inc.'s Petition to Compel Arbitration of Cross-Complaint or, in the Alternative, to Stay the Action

Tentative Ruling:

To grant defendant/cross-complainant Oracle Anesthesia, Inc.'s petition to compel arbitration of its cross-claims against Regional Anesthesia Associates (RAA) and Community Regional Anesthesia Medical Group, Inc. (CRAMG). (Code Civ. Proc. § 1281.2.) To stay the civil action on the cross-claims until the resolution of the arbitration. (Code Civ. Proc. § 1281.4.)

If there is a timely request for oral argument, such argument will be conducted on May 4, 2022, at 3:30 p.m.

Explanation:

Pursuant to California Code of Civil Procedure section 1281.2,

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Cal. Civ. Proc. Code § 1281.2.)

Also, under Code of Civil Procedure section 1290, "The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed." (Code Civ. Proc., § 1290.)

"California courts traditionally have maintained a strong preference for arbitration as a speedy and inexpensive method of dispute resolution. To this end, 'arbitration

agreements should be liberally construed', with 'doubts concerning the scope of arbitrable issues [being] resolved in favor of arbitration [citations].'" (*Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal. App. 3d 1095, 1098, internal citations omitted.)

"This strong policy has resulted in the general rule that arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. [Citation.]' [Citations.] [¶] It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute.'" (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1062.)

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement - either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see § 1281.2, subds. (a), (b)) - that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996)14 Cal. 4th 394, 413.) Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute, and general principles of California contract law guide the court in making this determination. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534.)

In the present case, there is an agreement to arbitrate all disputes arising out of the partnership agreement between plaintiff RCRNA and defendant Oracle Anesthesia. (Partnership Agreement, ¶ 16-G.) The clause is very broad, as it requires arbitration of any controversy or claim arising out of or relating to the partnership agreement or any breach thereof, or the validity or scope of the agreement. (*Ibid*.) Thus, it clearly encompasses the dispute between the parties regarding the alleged breach of the partnership agreement. Also, while RAA is not a signatory to the agreement, it has not disputed that its claims are covered by the arbitration clause. Indeed, plaintiffs RCRNA and RAA have stipulated to arbitrate all of their claims against defendants.

Oracle has now filed its cross-complaint against RAA and another entity, CRAMG, which arises out of the same general facts and disputes under the RCRNA partnership agreement as the original complaint. The cross-complaint alleges that the RCRNA partnership is actually a sham designed to avoid certain tax liabilities under AB-5, and that the anesthetist "partners" of RCRNA were not given any meaningful voting rights or control over the partnership. Oracle also alleges that the RCRNA partners were underpaid and unfairly assessed with expenses of the cross-defendants, and were denied access to financial records of the partnership. Oracle has alleged claims for conversion, accounting and goods and services rendered, which all relate to the alleged abuse of the partnership agreement by RAA and CRAMG. Therefore, the court finds that an agreement to arbitrate the present dispute exists and is enforceable. Also, the arbitration clause in the RCRNA partnership agreement covers the claims in the cross-complaint.

Furthermore, while CRAMG was not a signatory to the RCRNA partnership agreement, "[t]here are circumstances in which nonsignatories to an agreement containing an arbitration clause can be compelled to arbitrate under that agreement. As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.'" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513, internal citations omitted.)

"Under this principle [of equitable estoppel], a nonsignatory 'is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause. [Citations.]' [¶] 'But [case law] consistently requires a *direct* benefit under *the contract containing an arbitration clause* before a reluctant party can be forced into arbitration. [Citations.]' For example, a nonsignatory to a contract was compelled to arbitrate where it received the direct benefits under the contract of a lower insurance rate and the right to sail under the flag of France… A common theme in these cases is that the party seeking relief was suing on the contract itself, not a statute or some other basis outside the contract." (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1070-1071, internal citations omitted, italics in original.)

Here, Oracle alleges that CRAMG knowingly sought benefits under the RCRNA partnership agreement. Oracle points out that CRAMG entered into a "payor" arrangement with RCRNA in which RCRNA was to provide anesthesia services to CRAMG in certain practice locations, and CRAMG would pay RCRNA for its services. (RCRNA Partnership Agreement, Attachment B, at pp. 19-20.) RAA was also a "payor" that entered into a professional services arrangement with RCRNA. (*Id*. at p. 20.) In its cross-complaint, Oracle has alleged that CRAMG and RAA misappropriated money owed to RCRNA's partners under the terms of the partnership agreement. CRAMG and RAA have not opposed the petition or offered any evidence to rebut Oracle's claim that they are bound by the arbitration clause. Thus, it does appear that CRAMG and RAA knowingly sought benefits of the RCRNA partnership agreement, and thus they are estopped from claiming that they are not bound by the arbitration clause.

Oracle has also alleged that RAA and CRAMG are alter egos of each other, as they failed to observe corporate formalities, comingled assets, and were undercapitalized. (Cross-Complaint, ¶¶ 34-43.) Therefore, Oracle claims that RAA and CRAMG are essentially one entity. RAA and CRAMG have not filed any opposition to the petition, so they apparently do not dispute that they are alter egos of each other, at least for the purpose of being compelled to arbitrate the cross-claims. Since RAA has already stipulated to arbitration, and since CRAMG is an alter ego of RAA, CRAMG will be compelled to arbitration as well.

Finally, Oracle argues that CRAMG should be ordered to arbitration as it is a third party beneficiary of the RCRNA partnership agreement. Again, CRAMG was a "payor" under Attachment B of the partnership agreement, and accepted services from the partners of RCRNA. As such, Oracle contends that CRAMG is a third party beneficiary of the contract, and is bound by the arbitration clause in the contract. CRAMG has not opposed the petition or submitted any evidence that would tend to rebut Oracle's showing here. As a result, the court intends to find that CRAMG was a third party beneficiary of the agreement and is bound by the arbitration clause.

Consequently, the court intends to order CRAMG and RAA to arbitrate the cross-claims of Oracle. Furthermore, the court will stay the pending civil action on the cross-claims until the arbitration has been resolved. (Code Civ. Proc. § 1281.4.)

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 4/28/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In re Kayden Andrade***
Superior Court Case No. 22CECG00897

Hearing Date: May 3, 2022 (Dept. 501)

Motion: Hearing on Expedited Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Orders to be signed, as corrected. No appearances necessary.

If there is a timely request for oral argument, such argument will be conducted on May 4, 2022, at 3:30 p.m.

Explanation:

The Order Approving Compromise will be corrected to delete the word "Revised" in the title and to correctly reflect that a hearing was held, with the date and time. The Order to Deposit will be corrected to include the hearing information and also to correct the minor's birthdate to reflect what was stated in the Petition (including on the attached medical records).

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 (Judge's initials) on 4/28/2022 (Date).

(27)

Tentative Ruling

Re: ***Hall v. FUSD Employee Health Care Plan***
Superior Court Case No. 20CECG00607

Hearing Date: May 3, 2022 (Dept. 501)

Motion: Defendant's Demurrer to the Third Amended Complaint

Tentative Ruling:

To sustain defendant's demurrer, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) Defendant shall submit a judgment of dismissal within five days of the clerk's service of this minute order.

If there is a timely request for oral argument, such argument will be conducted on May 4, 2022, at 3:30 p.m.

Explanation:

Demurrer

A party may file a general demurrer on claims that "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e); *Estate of Moss* (2012) 204 Cal.App.4th 521, 535 ["'A demurrer can be utilized where the complaint itself is incomplete ….' [Citations.]"].) Although in ruling on a demurrer the complaint is liberally construed, "[t]he courts … will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Furthermore, conclusory allegations asserted in a complaint are insufficient to withstand a general demurrer. (*Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 189.)

First Cause of Action

As an initial matter, although defendant contends there is no nexus between the payment of funds by the Hall Trust and defendant's health plan obligations owed to the plan participant (Dem. at p. 7:5-6), plaintiffs allege that it was the plan participant who received services (TAC, ¶¶8-12), that all conditions precedent had been performed (TAC ¶21), and that the Hall Trust paid $103,382, of which only half has been reimbursed. (TAC ¶ 25.) Consequently, there is a causal connection between the money supplied by the trust and the reimbursable expenditures allowed by the plan. Nevertheless, the breach of contract cause of action is inadequate on other grounds.

In essence, plaintiffs allege JET I.C.U. received payment (albeit described as "partial") from defendant for services provided to the participant, and that defendant's agents have acknowledged and agreed the subject health plan covered medical transportation services in general. As plaintiffs themselves describe it, the Third Amended Complaint "concerns only the *rate* of payment rendered by defendants and/or their agent(s) to JET I.C.U., and not JET I.C.U.'s *right* to receive payment from defendants and/or their agent(s)." (TAC, ¶ 20.)

Plaintiffs allege the appropriate rate is JET I.C.U.'s usual and customary rate or 100% of Usual, Customary and Reasonable Charges, and, at least as it concerns the trust plaintiff, defendant breached its obligations owed under the plan because defendant did not pay 100% of the amount billed by JET I.C.U. Plaintiffs allege that JET I.C.U. did not have a pre-negotiated contract with defendant, nor was it part of defendant's network, and that no usual, customary, and reasonable charges have been established for the unique services provided to the plan participant. (TAC, ¶¶ 13, 18.)

Plaintiffs' opposition relies *on Storek & Storek, Inc. v. Citibank Real Estate, Inc.* (2002) 100 Cal.App.4th 44 (*Storek*) for the proposition that defendant's payment determination was required to be objectively reasonable, which is a test unsuitable for demurrer. *Storek*, however, is procedurally and substantively inapposite because it addressed an incorrect jury instruction concerning good faith, i.e. did not arise from a demurrer or other pleadings challenge, and arose from a commercial transaction, not additional reimbursement for services pursuant to an insurance policy. (*Id*. at pp. 60, 62.)

Closer on point is *Orthopedic Specialists of Southern California v. Public Employees' Retirement System* (2014) 228 Cal.App.4th 644 (*OSSC*). There an out-of-network provider sued to recover the difference between the customary and usual rates for non-emergency serviced provided to plan participants verse the amount actually paid by the plan. The Court of Appeal affirmed the trial court's sustaining the plan's demurrer without leave to amend holding that a plan's agreement to pay a non-emergent out-of-network provider did not obligate the plan to pay the provider's usual and customary rates. (*Id*. at p. 647.)

In particular, the Court of Appeal in *OSSC, supra,* 228 Cal.App.4th 644 rejected the provider's argument that the plan's payments were "unfair," and held that the plan's determination of the appropriate amount to pay an out-of-network non-emergent provider furthered an overall policy of encouraging in-network treatment. (*Id*. at p. 648.) Furthermore, although *OSSC* involved providers suing a plan, the Court of Appeal's affirmation of the plan's discretion of non-emergent out-of-network payment amounts applies here, where a participant and provider are similarly alleging inadequate reimbursement.

Accordingly, although the Third Amended Complaint alleges the existence of agreement to reimburse JET I.C.U.'s transportation services, it does not allege an agreement by defendant to pay whatever amounts were eventually billed. Rather, upon judicially noticeable facts, defendant retained the ability to determine the appropriate amount, which is an acceptable arrangement. (*OSSC, supra,* 228 Cal.App.4th 644.) Therefore, as it relates to the trust plaintiff, the "partial" payment alleged in the Third Amended Complaint is inadequate to establish a breach of the subject health plan, and

thus the demurrer is sustained. (See *Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 830 [the "essential" elements of breach of contract are: "[1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff."].)

Second thru Fourth Causes of Action

"Persons dealing with a public agency are presumed to know the law with respect to any agency's authority to contract." (*Katsura v. San Buenaventura* (2007) 155 Cal.App.4th 104, 109-110.) Furthermore, "[i]t is settled that 'a private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations.' [Citations.]" (*Fairview Valley Fire, Inc. v. Department of Forestry & Fire Protection* (2015) 233 Cal.App.4th 1262, 1271 (*Fairview*).)

In *Fairview, supra,* 233 Cal.App.4th 1262 a private fire equipment contractor on a public agency's list of approved vendors was dispatched to a wildfire, despite the contractor's suspension. Upon arriving at the fire, the incident manager refused to hire the contractor because of its suspension. The contractor sued the public agency, in part, for payment for its response to the wildfire. The court of appeal affirmed the trial court's sustaining the public agencies' demurrer without leave to amend holding that the contractor's suspension voided any existing contract and that the agencies' public entity status precluded implied contract liability. (*Id*. at p. 1271.)

In essence, "a private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations." (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 830; *OSSC, supra,* 228 Cal.App.4th 644, 649 [implied contract theories are ineffective to enforce oral promises of public entities]; see also *Los Angeles Equestrian Center, Inc. v. City of Los Angeles* (1993) 17 Cal.App.4th 432, 449.)

The Third Amended Complaint alleges that JET I.C.U. provided services to the plan participant pursuant to a "pre-authorization" issued by defendant. (TAC, ¶¶ 11-12.) Defendant relies, in part, on the reasoning and holding of *OSSC*, supra, 228 Cal.App.4th 644, which plaintiffs' opposition does not attempt to distinguish. This court has already determined that defendant is a public entity, and plaintiffs' third amended complaint re-alleges that defendant is a "governmental plan" purposed with providing benefits to a public school district, i.e. an entity possessing governmental purposes and powers traditionally satisfying the definitions in Government Code section 811.2. (See *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.* (9th Cir. 2014) 766 F.3d 1002, 1012 [convention center held a public entity because it was formed for governmental purposes and vested with governmental powers]; TAC, ¶ 4 [alleging that defendant is purposed with providing benefits to current and retired public school employees].) Consequently, the implied contract theories do not allow for recovery against defendant due to its public entity status.

Furthermore, even if JET I.C.U. could pursue its implied contract claims, like the trust plaintiff, it is still subject to defendant's discretionary payment determinations. (*OSSC, supra,* 228 Cal.App.4th at p. 649.) Therefore, plaintiffs' implied contract theories will not support recovery of reimbursement payments they believe are too low.

Leave to Amend

"The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; see also *McClintock v. West, supra,* 219 Cal.App.4th at p. 556 [demurrer properly sustained without leave to amend where plaintiff did not argue that leave to amend was warranted].)

Plaintiffs do request leave for further amendment, nor do they claim additional facts exist which could satisfy the elements of each asserted cause of action. Furthermore, "[i]n response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action." (Code Civ. Proc., § 430.41, subd. (e).) Plaintiffs have not made the required offer.

Therefore, defendant's demurrer is sustained, without leave to amend.

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 4/29/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Lemons v. First American Title Company, et al.***
Superior Court Case No. 20CECG01868

Hearing Date: May 3, 2022 (Dept. 501)

Motion: Defendants' Demurrer and Motion to Strike Portions of Plaintiff's First Amended Complaint

Tentative Ruling:

To overrule the demurrer as to the first and second causes of actions, but sustain the demurrer to the third cause of action, with leave to amend, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

To grant, with leave to amend, defendants' motion to strike the prayer for attorney's fees under the tort of another doctrine, on page 11, lines 2-4.

To deny defendants' motion to strike the prayer for attorney's fees qua attorney's fees, on page 10, line 27.

To deny defendants' motion to strike the portions of the First Amended Complaint as it pertains to punitive damages, specifically paragraphs 31 and 36, and the prayer on page 10, lines 23 and 26.

Plaintiff is granted 20 days' leave to file a Second Amended Complaint. The time to file a Second Amended Complaint will run from service by the clerk of the minute order. All new allegations in a Second Amended Complaint are to be set in **boldface** type.

If there is a timely request for oral argument, such argument will be conducted on May 4, 2022, at 3:30 p.m.

Explanation:

Demurrer:

- Demurrer as to the Entire First Amended Complaint:

Defendants demur to each cause of action, contending that they are precluded from liability under Probate Code, section 18100, because the First Amended Complaint ("FAC") fails to state facts sufficient to establish that defendants had actual knowledge that Janice had no power to convey the subject property.

Probate Code, section 18100 provides:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them: [¶] (a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise. [¶] (b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

(Probate Code, § 18100.)

Defendants argue the scope of Probate Code section 18100 protects a third party involved with a person who is *not* a trustee, so long as the third party acts in good faith and without actual knowledge of the person's non-trustee status. Defendants also analogize the circumstances here to Probate Code, section 18102—which protects an innocent third party who transacts with a "former trustee without knowledge that the person is no longer a trustee[;]" (Prob. Code, § 18102.) to show that that statute is intended to protect all innocent third parties dealing with persons without authority to act on behalf of a trust.

On the other hand, plaintiff contends that the statute's application is limited to shield only those who have, in fact, dealt with an actual trustee. The plain language of the statute tends to support plaintiff's contention. While Section 18100, subdivision (b) provides that a third person need not inquire whether a trustee has the power to act, nowhere does the statute indicate that a third person need not inquire whether a person is, in fact, a trustee. Section 18100 "protects third parties in *all transactions with trustees where both the existence of the trust and the status of the trustees are known*, and the third parties rely in good faith on the trustees' representations of the scope of their authority." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1116 [emphasis added].)

Since defendants have not provided any authority to show that Section 18100 is applicable where no trustee is involved, the court finds Section 18100 to be inapplicable to the case at bar.

Even if defendants qualified as protected third persons within the meaning of Section 18100, since defendants are alleged to have actual knowledge that Janice was not in fact, the successor trustee of the Bypass Trust, defendants lose this protection. (Prob. Code, § 18100.) Although defendants claim to have had no knowledge that Janice's representation—that she was the successor trustee, was false, and that they relied on the Affidavit of Change and Affidavit of Death in facilitating the transaction, the issue at the demurrer stage is only whether the complaint has pled sufficient facts establishing that defendants had the requisite knowledge. Here, plaintiffs allege that defendants had constructive and actual notice that Janice was not, in fact, the successor trustee. (FAC, ¶ 24, 25, 26, subd. a-g; Exh. 6-8.) The court finds Section 18100 to

be inapplicable to the instant case, and even if it were applicable, the FAC alleges sufficient facts showing that defendants had actual knowledge that Janice did not have the authority to act on behalf of the trust. Therefore, the court intends to overrule the demurrer to each cause of action as it pertains to Probate Code, section 18100.

Demurrer to Plaintiff's First Cause of Action—Negligence:

Defendants demur to the negligence claim, contending that the FAC fails to state a cause of action because defendants did not owe a duty of due care to plaintiff as a matter of law.

The elements of a negligence claim are: "a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

Here, the FAC alleges that defendants owed "a duty of care to not effectuate an unlawful transfer of the Subject Property…" (FAC, ¶ 28.) However, defendants argue that an escrow holder owes duties only to the parties to the escrow, not to third parties, and absent clear evidence of fraud, any such duties are limited to the strict compliance with the instructions of its principals. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 715-716 ("*Summit*").) Since the allegations of the FAC clearly establish that plaintiff is neither a party to the escrow nor defendants' principal, defendants contend that they owed no duty to plaintiff as a matter of law.

Although the California Supreme Court in *Summit* ultimately declined "to depart from the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions[,]" the court came to this conclusion by applying the six-factor test set forth by *Biakanja v. Irving* (1958) 49 Cal.2d 647 to the facts of that particular case. (*Ibid.*) Under the *Biakanja* test, "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.)

The fact that such a test exists is conclusive that such liability, and accordingly, duty, by escrow holders to third parties may exist, at least, in certain limited circumstances. Thus, the defendants' assertion, that escrow holders owe no duty to third parties to the escrow as a matter of law is inapposite to the law. The fact that no California case has yet to determine that an escrow holder *is liable to a* third party plaintiff has no bearing on the fact that the test is to be applied to consider such liability. (*Summit*, 715-716; *Alereza v. Chicago Title Co.* (2016) 6 Cal.App.5th 551, 560-562.) Defendants rely on *Fed. Deposit Ins. Corp. v. Commerce Land & Title, Inc.* (C.D. Cal. 2012) 2012 WL 13008444 at 3* ("*Fed. Deposit*"), to argue that applying the *Biakanja* factors to determine if an escrow holder owes a duty to a third party is unnecessary in light of the California Supreme Court's holding in *Summit*, and that "post-*Summit*, courts have generally not considered it necessary to undertake this test with respect to each and every case

involving escrow liability to a stranger to the escrow…" (*Fed. Deposit*, fn. 4 referring to *Gateway Bank, FSC v. Ticor Title Co. of Cal.*, No. A121398, 2009 WL 4190455 at *14 (Cal. Ct. App. Nov. 25, 2009).) Notably, *Fed. Deposit*, a federal case not reported in the Federal Supplement, came to this conclusion by referring to an *unpublished* California case. Thus, the court does not find this argument to be persuasive, as the *Biakanja* factors was applied in *Summit* by the California Supreme Court and has been applied in such cases even post-*Summit*. (*Alereza v. Chicago Title Co.* (2016) 6 Cal.App.5th 551, 560-562.)

Here, the FAC alleges: (1) the transaction was intended to affect plaintiff's legal ownership of the Subject Property (FAC, ¶ 28); (2) it was foreseeable and certain that the transaction would transfer title of the Subject Property from plaintiff (FAC, ¶ 28); and (3) defendants' conduct was directly connected to the injury suffered, in that it divested plaintiff of ownership of the subject property (FAC, ¶ 22-23). The moral blame attached to the defendants' conduct is sufficiently established by plaintiff's allegations that despite having constructive and actual knowledge that Janice was not the successor trustee and had no authority to transfer the subject property (FAC, ¶ 24, 25, 26, subd. a-g; Exh. 6-8), and defendants helped to facilitate the unlawful transfer (FAC, ¶ 21-22). Additionally, these alleged facts are also sufficient to show that public policy would support imposing a duty of care in this case. Thus, plaintiff has alleged sufficient facts to establish a duty under the *Biakanja* test and, accordingly, to state a claim, and the court intends to overrule the demurrer to the first cause of action.

Additionally, plaintiffs also argue that defendants are presumed to be liable for negligence for failure to comply with the Escrow Law, codified under Financial Code, section 17000, *et seq.* However, the Escrow Law applies only to independent escrow agents, and not to title insurance companies, underwritten escrow companies or controlled escrow companies. (Fin. Code, § 17006, subd. (a).) Here, defendants are referenced as a title insurance company in the FAC, (FAC, Exh. 9); therefore, the statutes are inapplicable.

Demurrer to Plaintiff's Second Cause of Action—Slander of Title:

The elements of the tort of slander of title are "(1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss." (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030 [citations omitted].)

At issue is only whether defendants' publications were privileged. Defendants argue that their publications, the recordation of the Affidavit of Change, Affidavit of Death and Grant Deed, were protected by the qualified common interest privilege pursuant to Civil Code section 47, subdivision (c).

"In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civil Code, § 47, subd. (c).) This privilege is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably

calculated to protect or further that interest." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118. [internal citations omitted].)

Defendants argue that they stand in a position in relation to *the person interested* that would afford them a reasonable ground for supposing the motive for the recording of the Affidavits and Grant Deed to be innocent, since they relied on Janice's representation that she was, in fact, the successor trustee. (Memo., 13:18-22.) Notably, defendants are silent on the issue of whether Janice qualifies as such an interested person, as to afford defendants protection under the qualified common interest statute. Additionally, it is undisputed that defendants are not such interested persons.

"Ordinarily[,] privilege must be specially pleaded by the defendant, and the burden of proving it is on him. But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case…" (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630-631 [internal citations omitted brackets added].) Given that the FAC alleges that Janice was not an interested person to the subject property (FAC, ¶ 14, 15, 19), and that defendants had constructive and actual notice of this fact (FAC, ¶ 24, 25, 26, subd. a-g; Exh. 6-8), defendants have not met their burden of proving the existence of the qualified common interest privilege here.

Moreover, even if the defendants' communications were protected by the qualified privilege, plaintiff has pled sufficient facts to establish malice, which overcomes a privilege. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630-631.) "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff [o]r by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413 [internal citations omitted, brackets added].)

Since the FAC alleges that defendants had constructive and actual notice that Janice was not the successor trustee and that she lacked the authority to act on behalf of the Bypass Trust (FAC, ¶ 24, 25, 26, subd. a-g; Exh. 6-8.), plaintiff has sufficiently alleged that defendants lacked the reasonable ground to believe the truth of their publications and therefore acted in reckless disregard of her rights. While defendants contend that they reasonably believed Janice's representation that she was the successor trustee, because she executed the Affidavit of Change and Affidavit of Death under penalty of perjury (FAC, Exh. 6-7); these arguments are inappropriately made on demurrer. For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 963, 966-967.)

Thus, the court intends to overrule the demurrer to the second cause of action.

Demurrer to Plaintiff's Third Cause of Action—Tort of Another:

The general rule is that "[i]n the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney." (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 647 [brackets added]; Code Civ. Proc., § 1021.) However, "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310 [internal citations omitted, brackets added].) This exception is a narrowly-defined theory of recovery, limited to cases where the plaintiff is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620.)

As a preliminary matter, attorney fees may be recoverable as an item of tort damages under the "tort of another" or "third party tort" doctrine (hereinafter, the "tort of another doctrine"). Attorney's fees incurred by the client in instituting or defending an action as a direct result of the opposing party's tortious conduct should be included as *an element of the cause of action*. (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310; See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817; Edmon & Curtis, Cal. Prac. Guide: Civ. Proc. Before Trial (TRG 2021) § 6:275.3.) However, so long as the damage which was caused by the incurring of attorney's fees is properly pleaded, or the issue is thoroughly understood by counsel and by the court and no prejudice has resulted to defendant from a failure to allege, the error may be disregarded. (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 648.)

Here, while plaintiff has alleged the tort of another doctrine as a separate cause of action, by virtue of defendants' demurrer and moving papers, it is clear that it is understood by defendants that plaintiff is seeking to recover her attorneys' fees and other expenditures incurred in the actions: *In the Matter of the Ballantyne Family Trust Separate Property Bypass Trust*, Superior Court of California, County of Tulare, Case No. 049136 and *Cheri B. Lemons, etc., v. Janice P. Ballantyne, et al.*, Superior Court of California, County of Fresno, Case No. 19CECG00924. Thus, the court intends to disregard the error in the pleading in its ruling.

Defendants argue that the tort of another doctrine is inapplicable here, because the complaint fails to allege facts giving rise to a tort claim against them. However, as explained above, plaintiff has sufficient alleged facts giving rise to a tort claim against defendants.

Defendants also contend that plaintiff is not entitled to recover attorney's fees from defendants incurred in her suit(s) against Janice and Kristine, because the tort of another doctrine does not apply to the situation where a plaintiff's suit against the third parties—i.e., Janice and Kristine arises from her damage by the tortious conduct of the third parties themselves. The doctrine also does not apply when one tortfeasor defendant induced other defendants to participate in the injury-producing event. (*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1337-1342.) Defendants argue that plaintiff is not entitled to "pick and choose which of several tortfeasors should absorb the costs of

[her] litigating with other tortfeasors." (Memo., 14:27-28; 15:1-2; *Gorman v. Tassajara Dev. Corp.* (2009) 178 Cal.App.4th 44, 78.) Here, while Janice and Kristine are not named in the instant action, it is clear by the face of the complaint that plaintiff is alleging that defendants, Janice and Kristine have participated some tortious conduct that led to plaintiffs' damages, i.e., the wrongful divesture of the subject property. Moreover, that defendants conspired with, acted in concert with, and/or aided and abetted Janice and Kristine in doing the wrongful act. (FAC, ¶ 5.) Thus, by virtue of the allegations in the FAC, it does not appear that the tort of another doctrine applies to the circumstances here.

Plaintiff does not dispute this contention; however, she argues that the issue is inappropriate to raise on demurrer, and that the court should not decide on the issue without holding, at least, an evidentiary hearing. In general, it is appropriate to challenge improper claims for damages, i.e.—unauthorized attorney fees claims, in the pleading stage. (Edmon & Curtis, Cal. Prac. Guide: Civ. Proc. Before Trial (TRG 2021) § 7:182, 7:182.) Although this is often raised by motion to strike, since plaintiffs have erroneously pled the claim for attorneys' fees as a separate cause of action, the demurrer in this instance is appropriate. Since plaintiff provides no authority establishing that attorneys' fees sought under the tort of another doctrine cannot be challenged at the pleading stage and as explained above, the tort of another doctrine is inapplicable here, the court intends to sustain the demurrer, with leave to amend.

Motion to Strike:

- Attorney's Fees:

Defendants move to strike the prayers for both the attorney's fees under the tort of another doctrine (FAC, 11:2-4.) and the attorney's fees qua attorney's fees, i.e., those attributable to the bringing of the instant action itself. (FAC, 10:27.) As previously discussed above, the tort of another doctrine is inapplicable. Accordingly, the court intends to grant the motion to strike the prayer for attorney's fees pertaining to the tort of another doctrine. However, despite including a request to strike the attorney's fees qua attorney's fees prayer in their notice of motion, defendants fail to provide any reasoning or authority to support this request. Therefore, the court intends to deny defendants' request to strike the prayer for attorney's fees qua attorney's fees.

- Punitive Damages:

Defendants move to strike the allegations regarding punitive damages from several paragraphs of the FAC, as well as the prayers for punitive damages. They contend that there are insufficient facts alleged in the FAC that would tend to show that they acted with the malice, fraud or oppression necessary to support a prayer for punitive damages. (Civil Code, § 3294.) On the other hand, plaintiff argues that the allegations support a claim for punitive damages, as there are sufficient facts alleged establishing that defendants acted with malice.

In order to recover punitive damages, plaintiffs must plead specific facts to support allegations of malice, oppression or fraud. (Civil Code, § 3294; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) "[¶] (1) 'Malice' means conduct which is intended

by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c).)

Despicable conduct is "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. Such conduct has been described as having the character of outrage frequently associated with crime. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 [internal citations omitted, brackets in original omitted].) Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Ibid*. [internal citations omitted].)

Here, plaintiffs have alleged that defendants conspired with, acted in concert with, and/or aided and abetted Janice (FAC, ¶ 5), who was not an interested person to the subject property (FAC, ¶ 14, 15, 19), to unlawfully effectuate a transfer of the subject property to Kristine in exchange for $10 (FAC, ¶ 16). Further, that the subject property was valued in excess of $250,000 (FAC, ¶ 17), and that defendants had constructive and actual notice that Janice was neither the lawful owner of the subject property nor a successor trustee to the Bypass Trust, and that Janice had no authority to act on behalf of the trust or transfer the subject property (FAC, ¶ 24, 25, 26, subd. a-g; 31, Exh. 6-8). The FAC also alleges defendants recorded affidavits effectuating a change in trustee from plaintiff to Janice, of the Bypass Trust. (FAC, ¶ 20, 21.) Plaintiff alleges that defendants were guilty of oppression, fraud and malice when they engaged in the subject conduct. (FAC, ¶ 31, 36.)

At a minimum, the conduct alleged indicates a conscious disregard for plaintiffs' rights giving rise to malice. It is without question that an ordinary decent person would be outraged to discover that his property were unlawfully transferred to another without his consent. The same is true for a trustor or trustee to discover that a party that is a stranger to the trust has facilitated a change in trustee. Here, by knowingly facilitating the unlawful transfer of the subject property and recording the affidavits for the unlawful change of trustee, defendants' alleged conduct rises to levels of extreme indifference to plaintiff's rights. As such, the FAC alleges sufficient facts to support an allegation of malice and plaintiff's requests for punitive damages are sufficiently pled.

Thus, the court intends to deny defendants' requests to strike the portions of the FAC as it pertains to punitive damages.

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 4/29/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Cardamon, et al. v. The Dominion Courtyard Villas, et al.***
Superior Court Case No. 16CECG01918

Hearing Date: May 3, 2022 (Dept. 501)

Motion: Motion to Compel Further Production of Documents

Tentative Ruling:

To deny.

If there is a timely request for oral argument, such argument will be conducted on May 4, 2022, at 3:30 p.m.

Explanation:

Plaintiffs seek to compel further production of documents regarding yearly financial statements for defendants, comprising of nine apartment complexes, two limited liability companies and two limited partnerships.

On August 2, 2021, plaintiffs filed their first motion to compel further production of financial documents. On October 13, 2021, the court denied the motion without prejudice due to a lack of showing of relevance. Plaintiffs now bring the present second motion to compel further production.

Plaintiffs incorrectly conclude this court earlier denied plaintiffs' motion owing to a failure to include a separate statement. The October 13, 2021, order proceeded to the merits despite the lack of a separate statement. On those merits, this court found that plaintiffs failed to carry their burden to demonstrate the relevance of the sought after information, which is foundational to seeking disclosure. (*Greyhound Corp v. Super. Ct.* (1961) 56 Cal.2d 355, 378-379; Code Civ. Proc. § 2031.310, subd. (b)(1).)

As with the prior motion, plaintiffs again cite no basis upon which the present motion is made. Plaintiffs appear to move under the Civil Discovery Act under Code of Civil Procedure section 2016.010 et seq. (*Compare*, *e.g.*, Civ. Code § 3295.) Specifically, plaintiffs appear to move to compel a further response to Request for Production of Documents, Set Two, Number 22, which seeks from all defendants, "yearly financial statements for 2015-2019, including profit and loss statements, that reflect the components of the total overhead expenses incurred by each of YOUR apartment complexes." (Declaration of Mark Schallert, ¶ 2, and Exhibit A thereto.) As such, the court once again considers the motion under Code of Civil Procedure section 2031.310.

Plaintiffs represent that defendants have produced over 2,000 files reflecting security-deposit charges deducted by class members' refunds. (Schallert Decl., ¶ 10.) Though plaintiffs submit none of that production for which the court would evaluate whether further responses are warranted, it is undisputed that the production in response

did not provide annual financial statements as requested. Therefore, the court reviews the arguments in turn.

Aside from the representation that non-responsive documents have been produced, plaintiffs' argument and evidence has not materially changed. Plaintiffs again assert that further production is warranted to the extent defendants attempt to justify the surcharge and plaintiffs need to be able to rebut that claim "by presenting a complete picture and the limited line items that defendants want to use." As before, plaintiffs present foundational facts that defendants' deposition testimony refers to but does not explain how defendants cover the costs of wear and tear, thus sparking the basis for plaintiffs' request for yearly financial statements. Plaintiffs again fail to demonstrate the relevancy of such information. According to plaintiffs, such wear and tear cannot be funded by security deposits as a matter of law. (Civ. Code § 1950.5, subd. (b)(2). Thus, on plaintiffs' class action, seeking to recover the administrative fee of up to forty percent of costs deducted from security deposits, plaintiffs demonstrate no relevancy of defendants' annual financial condition. Information regarding how defendants funded the alleged shortfall from the security deposits compared to the expenses incurred has no bearing on plaintiffs' claims.

As before, plaintiffs perceive that defendants will make a "reasonableness" defense as to why the administrative fee is valid. As before, plaintiffs themselves argue that as a matter of law, the statute regarding security deposits only permits three items, and reasonableness is not a relevant consideration. (Civ. Code § 1950.5, subd. (g)(2)(A)-(C).) Thus, even where defendants allege incurring yearly losses on the security deposit, such comments, according to plaintiffs, are immaterial. In other words, plaintiffs seek information to rebut a reasonableness argument that has not been made, and which plaintiffs contend is not the legal standard, and would be excluded from consideration. To the extent such argument might have merit insofar as the administrative fee, plaintiffs concede that such information has been produced. (Schallert Decl., ¶¶ 8, 10.)

Next, plaintiffs again assert that a change in policy, reducing the administrative fee from 40 percent to 10 percent must be explained, and defendants' financial records are required to evaluate the change in policy as it pertained to net revenues. For the same reasons as stated above, plaintiffs do not sufficiently demonstrate why net revenues are relevant.

Finally, plaintiffs assert that further production is necessary because, despite the production of over 2,000 files, plaintiffs require summary documents reflecting total revenues and total expenses, including the overhead expenses that are purportedly paid by the administrative fee. In other words, plaintiffs again seek net revenues without explanation as to why such information is relevant.

The purpose of denying the prior motion without prejudice was because plaintiffs failed to make a sufficient evidentiary showing of relevance. As plaintiffs presented an inferred defense that one day might materialize, plaintiffs demonstrated a possibility in the future, under different circumstances, with which they may seek to compel production of financial documents. Having reviewed the renewed motion, the court finds no changes in circumstance that would warrant further production. Plaintiffs contend both that the information they seek is irrelevant to defendants' defense, and that the

information is material in the event that defendants make such a defense. Plaintiffs fail to demonstrate that the further discovery requested is reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017.010.) The motion to compel further production is denied. (*Greyhound*, *supra*, 56 Cal.2d at pp. 378-379; Code Civ. Proc. § 2031.310, subd. (b)(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: DTT on 5/1/2022.
(Judge's initials) (Date)