

Tentative Rulings for June 21, 2022
Department 503

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).)

21CECG01741 *Hughes, et al. v. Dycora Transitional Health Fresno LLC, et al.* in Department 503.

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

20CECG02692 *Chicago Title Company v. 3441 South Health Fresno* is continued to Tuesday, July 26, 2022 at 3:30 p.m. in Department 503

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Tentative Ruling

Re: **Cen-Cal Refrigeration, Inc. v. Maple Venture, LLC**
Superior Court Case No. 20CECG01342

Hearing Date: June 21, 2022 (Dept. 503)
In the event oral argument is timely requested, it will be heard at 4:00 p.m. on June 21, 2022 in Dept. 503.

Motion: Demurrer of Engineered Structures, Inc. ("ESI") and Adam Bancroft to Plaintiffs' Third Amended Complaint

Tentative Ruling:

To overrule the general demurrers to the second and third causes of action. To sustain the special demurrer to the fourth cause of action with leave to amend. To sustain the general demurrers to the sixth through eighth and tenth causes of action with leave to amend. A fourth amended complaint shall be filed and served within 10 days of the clerk's service of this order.

Explanation:

" 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Second Cause of Action – Open Book Account

A claim for an open book account is not available when there is an express contract, unless the parties agreed to treat the contract as an open book account. (*Eloquence Corp. v. Home Consignment Center* (2020) 49 Cal.App.5th 655, 665.) Because the third amended complaint fails to allege that the parties agreed to treat the contract between them as an open book account, defendants claim that the cause of action fails to allege facts sufficient to state a claim.

However, pleading "alternative factual allegations relying on alternative legal theories" has long been deemed permissible under both the common and statutory law. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 598.) The second cause of action is adequately stated, and the general demurrer is overruled.

Third Cause of Action – Account Stated

Defendants contend that the third cause of action for account stated is deficient for failing to allege that the parties agreed to an account stated in a specific, liquidated amount. Paragraph 33 of the third amended complaint alleges that ESI "became indebted to Cen-Cal" for an account stated and "then and there agreed to pay that amount." Paragraph 34 alleged that the account stated has been partially paid, but "at

least of \$616,306.18" remains owing. The cause of action is adequately alleged and the general demurrer is overruled.

Fourth Cause of Action – Oral Contract

Defendants demur to the fourth cause of action on the grounds it is uncertain. Defendants assert that they cannot identify the alleged oral contracts, nor can they determine whether they are pled in the alternative to claims concerning the written contracts.

A demurrer for uncertainty may be sustained when the complaint is drafted in a manner that the defendant cannot reasonably respond, e.g., the defendant cannot determine what issues must be admitted or denied, or what causes of action are directed against the defendant. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.) Demurrers for uncertainty are appropriately overruled where "ambiguities can reasonably be clarified under modern rules of discovery." (*Ibid.*)

Plaintiffs argue that the change orders to the written contract are the oral contracts at issue in the fourth cause of action. However, paragraph 20 of the third amended complaint alleges that ESI and Cen-Cal entered into a written subcontract which was "followed by one or more change orders" that were "incorporated into" the written contract. Nothing in the fourth cause of action (paragraphs 35-43 of the third amended complaint) indicates that the oral contracts were change orders. The oral contracts are simply described as contracts for "goods, materials, equipment and services." This is uncertain. Defendants cannot reasonably be expected to know what to admit or deny in connection with the fourth cause of action as currently pled. The special demurrer to the fourth cause of action is sustained with leave to amend.

Sixth Cause of Action – Fraud

The elements of a fraud cause of action based on a false promise are: (1) a promise by the defendant, (2) made without an intent to perform, and (3) made with the intent to induce reliance by the plaintiff, followed by (4) reasonable reliance by the plaintiff that results in (5) injury to the plaintiff. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The plaintiff must allege with particularity " ' facts which show how, when, where, to whom, and by what means the representations were tendered.' " (*Id.*, at p. 645.) Against a corporate defendant, the pleading must allege the name of the person who made the representation, his or her authority to speak, to whom he or she spoke, and how the representation was communicated. (*Tarmann v. State Farm Mutual Automobile Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

The third amended complaint only alleges that Adam Bancroft and Evan Evans, officers of ESI who were the project manager and managing supervisor, "made statements and representations" to Steve Carillo, the owner of Cen-Cal, "and others" "regarding ESI's desire to use, keep, and pay Cen-Cal as the HVC subcontractor on for the Project," while knowing they were false. (TAC at ¶¶ 6, 7, 51, 54.) This falls short of specifying the content of the statements, as well as the "how, when, where, to whom, and by what means the representations were tendered." Accordingly, the general demurrer is sustained as to the sixth cause of action, with leave to amend.

Seventh Cause of Action – Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: “ ‘ (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.” ’ ” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) “ ‘Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.’ ” (*Ibid.*) Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.)

Plaintiffs have not met this pleading standard. Defendants stating that “Cen-Cal was incompetent and did not know ‘what the fuck it was doing’” (TAC, ¶ 60) is not outrageous. Vulgar work critiques, while disappointing and unrefined, are reasonably commonplace in today's workplaces. Moreover, the statement does not relate to the individual plaintiffs at all, and it is difficult to understand how it could cause them any distress. Likewise, defendants defacing “Cen-Cal's property” and drawing “on the walls” (TAC, ¶ 61) is not outrageous. Graffiti has been a fact of urban life since at least Roman times. These allegations are not improved by adding that the second round of graffiti included a “lewd image of male genitalia.” (TAC, ¶ 62.) Plaintiffs are adult construction workers, a crude image of a penis on a jobsite cannot be said to exceed what can be tolerated in a civilized society. While the allegation that defendants called “plaintiffs and its employees racial slurs” and attributed “derogatory false behavior” toward them is more promising, it is nonspecific and fails to shock the conscience. Accordingly, the general demurrer is sustained as to the seventh cause of action, with leave to amend.

Eighth Cause of Action – Harassment

The eighth cause of action, brought by the individual plaintiffs is entitled harassment, and seeks to recover damages for emotional distress caused by ESI's culture of racial discrimination. (TAC, ¶¶ 69-70.) The cause of action also alleges that plaintiffs suffered emotional distress from “visual harassment” caused by the genitalia graffiti.

“Visual harassment” is not a tort. Racial harassment is. (Gov. Code, § 12940, subd. (j).) To prevail on a cause of action for harassment under the Fair Employment and Housing Act (“FEHA”), a plaintiff must prove that the plaintiff was subjected to harassment, such as epithets, derogatory comments, slurs, physical harassment, or other abusive conduct; the harassment was based on a protected characteristic, such as race; and the harassing conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a hostile or abusive work environment. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) In a FEHA action, it is the plaintiff's burden to plead and prove timely exhaustion of administrative remedies. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345.) Here, plaintiffs have not done so. Accordingly, the general demurrer is sustained as to the eighth cause of action, with leave to amend.

Conduct violating the Unfair Competition Law ("UCL") includes "any unlawful, unfair or fraudulent business act or practice" By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) The facts supporting the statutory elements of the violation must be stated with reasonable particularity. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

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.

Issued By: KAG on 6/16/2022.
(Judge's initials) (Date)