

Tentative Rulings for October 7, 2021
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).)

20CECG02607 *Genevieve Audelo v. OMNI Women's Health Med. Grp., Inc.* (Dept. 501)

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

20CECG01735 *California Farm Management, Inc. v. Bazan Vineyard Management, LLC*, is continued to Thursday, October 14, 2021, at 3:30 p.m. in Dept. 501

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Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Pena v. Conrad***
Superior Court Case No. 20CECG01679

Hearing Date: October 7, 2021 (Dept. 501.)

Motion: Defendant North Cal Cleaning Company's Demurrer to Second Amended Complaint or, Alternatively, to First Amended Complaint

Tentative Ruling:

To take off calendar for failure to comply with Code of Civil Procedure section 430.41, subdivision (a). The parties are ordered to meet and confer as set forth in the statute and, if needed, schedule a new hearing date for the demurrer.

To strike, sua sponte, the Second Amended Complaint filed on February 9, 2021. (Code Civ. Proc., § 436, subd. (b).)

Explanation:

Meet and Confer. Before filing a demurrer, the demurring party "*shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer[.]*" (Code Civ. Proc., § 430.41, subd. (a), emphasis added; see also Judicial Council form CIV-140.) Where the parties are unable to sufficiently meet and confer five or more days prior to the date the responsive pleading is due, a 30-day extension is automatically granted upon the filing by the demurring party of a declaration stating that a good faith effort was made to meet and confer, but that the parties were nonetheless unable to do so. (Code Civ. Proc., § 430.41, subd. (a)(2); see also Judicial Council form CIV-141.)

In this case, counsel for moving party emailed plaintiff's counsel regarding defendant's grounds for the instant motion and advised plaintiff's counsel to call or respond to the email if he wished to discuss the matter further. When plaintiff's counsel failed to respond in any manner, defendant filed the instant demurrer. Defendant's meet and confer efforts fall well short of the statutory requirement to meet and confer in person or by telephone. Accordingly, the hearing is taken off calendar, and the parties are ordered to meet and confer pursuant to the statute and, if necessary, calendar a new hearing date for a demurrer.

Strike Pleading. The right to amend under Code of Civil Procedure section 472 is limited to the original complaint; there is no right to amend (without leave of court) an amended complaint. (*Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 578-579; see also *Hodges v. County of Placer* (2019) 41 Cal.App.5th 537, 544.) The court's January 27, 2021, Order sustaining the demurrer to the Complaint with leave to amend authorized the filing of a First Amended Complaint. Plaintiff exercised that right when he filed the First

Amended Complaint on February 8, 2021. Since the Second Amended Complaint was filed without leave of court, it is stricken sua sponte. (Code Civ. Proc., § 436, subd. (b).)

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** 10/4/2021.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: **Sameer v. Khera**
Superior Court Case No. 14CECG03709

Hearing Date: October 7, 2021 (Dept. 501)

Motion: by Defendants Lenore Schreiber, Susan Bennett, Lewis Becker, and Bennett & Becker Inc. for an Order Requiring Plaintiff to Furnish Security after Being Deemed a Vexatious Litigant

(Note: plaintiff's motion for permission to conduct limited discovery, and defendants' anti-SLAPP and demurrer motions, with defendant Sameer Khera's joinders thereto, are trailing the security motion, with further orders to issue about the hearing dates on these motions depending on the ruling on the security motion.)

Tentative Ruling:

To continue all motions to Thursday, October 28, 2021, at 3:30 p.m. in Department 501. Plaintiff must e-file her opposition papers, with original signatures, no later than October 15, 2021.

No hearing will be held on this date (October 7, 2021), as it is unnecessary. If a party calls to request a hearing, that request will be denied. The parties may call and request a hearing when a Tentative Ruling on the merits is published.

Explanation:

Plaintiff's opposition to the security motion was not e-filed, but instead was rejected by the clerk because it was not dated and signed, and the papers were labeled "court's copy." It was clear from the reply brief that plaintiff had served defendants with the opposition. Therefore, the court will give plaintiff an opportunity to reattempt filing her opposition.

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 10/4/2021.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Allen v. State of California, et al.***
Superior Court Case No. 19CECG02117

Hearing Date: October 7, 2021 (Dept. 501)

Motions: Demurrer/Motion to Strike Second Amended Complaint by defendants State of California, Sherri Jones, Brandon Price, Emi Komaki, Sara Arad, David Mwangi, Virginia Greer, Robert Withrow, Karen Reed, Francis Rich, Brian Martinez, Maudisa Meroe, Luis Garcia, Christopher Lee, Humberto Renteria, Jordan Edwards, Nesson M. Fantone, and Ambrocio Hernandez

by Defendants to Strike

Tentative Ruling:

To grant defendants' motion to strike the first, second, third and fifth causes of action of the Second Amended Complaint ("SAC"). To deny the motion to strike punitive damage allegations. (Code Civ. Proc., § 436, subd. (a), (b).)

To sustain the demurrer to the SAC's fourth cause of action, without leave to amend, only as to defendants Sherri Jones, Brandon Price, Emi Komaki, Sara Arad, David Mwangi, Virginia Greer, Robert Withrow, Karen Reed, Francis Rich, Brian Martinez, Maudisa Meroe, Luis Garcia, Christopher Lee, Humberto Renteria, Jordan Edwards, Nesson M. Fantone, and Ambrocio Hernandez. To overrule the demurrer to the SAC as to State of California. (Code Civ. Proc., § 430.10, subd. (d), (e).) State of California shall file its answer to the SAC within 10 days of service of the order by the clerk.

To deny the motion to strike the punitive damage allegations.

Oral argument for this matter is set for October 21, 2021, at 3:30 p.m., in Department 501. Plaintiff is ordered to appear via CourtCall.

Explanation:

Defendants' Motion to Strike

A defendant may move to strike a pleading or allegations from a pleading in two situations: (a) the allegation is "irrelevant, false, or improper" or "superfluous" or "abusive" and (b) where the "pleading was not drawn in conformity with the laws of the state or a court rule." (Code Civ. Proc. § 436, subd. (a), (b).)

The court sustained the demurrer to the First Amended Complaint as to all causes of action, and granted leave to amend as to the fourth cause of action only. The SAC

re-alleges all causes of action, including those as to which leave to amend was denied. The SAC was not drawn in conformity with the court's order granting leave to amend. All causes of action but the fourth shall be stricken.

Defendants also move to strike punitive damages allegations on the ground that under Government Code section 818 state entities and state officials acting in their official capacities are immune to an award of punitive damages.

If only some sentences or phrases are sought to be stricken, these must be quoted verbatim in the notice of motion. This does not apply where the motion to strike is directed to the entire pleading, or to some paragraph, count or cause of action therein. (Cal. Rules of Court, rule 3.1322.) Here, however, the moving papers never identify any particular allegation or paragraph to be stricken. They merely reference "the allegations concerning punitive damages against" the individual defendants. (NOM 2:17; MPA 3:22-23.) Without ever referencing the specific paragraphs or allegations at issue, this is just too vague. This aspect of the motion to strike is denied because the moving papers never specify what they move to strike.

Defendants' Demurrer

State of California and the individual defendants demur to the entire SAC (all that is left is the fourth cause of action) pursuant to Code of Civil Procedure section 430.10(d) [defect or misjoinder of parties] and (e) [state facts sufficient to constitute a cause of action] on the ground that under the IPA claims are authorized only against public agencies. The demurrer is brought on the ground that the State and the individual defendants are not proper defendants to a claim under the Information Practices Act, which imposes duties only on public agencies. (See Civil Code §§ 1798.18, 1798.45, subd. (b)&(c), and 1798.48.)

The court agrees that the individual defendants are not proper defendants to this cause of action. In his opposition plaintiff does not contend otherwise. Instead, plaintiff seeks leave to amend to add a cause of action for "breach of warranty of agency" against defendants Garcia, Harbour-Logan, Meroe, Nuez and Rispolio, because they are independent contractors acting within the scope of their agency. Civil Code section 2343 provides:

AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;
2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,
3. When his acts are wrongful in their nature.

Parts 1 and 2 do not apply here. The only possibly applicable part is 3. Defendants contend that a cause of action under Civil Code section 2343 "applies to contract and tort claims arising out of business negotiations." They cite to *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 458, but the case does not hold that the statute applies only in the context of business negotiations. It does provide, however, that "[c]ase law has equated

'wrongful' with tortious." (*Id.* at p. 458.) Plaintiff has identified no tortious conduct by these defendants, and in fact the tort claims have all been dismissed by way of earlier attacks on the pleadings. Plaintiff does not dispute, and appears to concede, that the statutory duties imposed by the IPA apply only to state agencies, not employees or contractors. Plaintiff identifies no wrongful conduct that would make a "breach of warranty of agency" claim viable against defendants Garcia, Harbour-Logan, Meroe, Nuvez and Rispolio.

Moreover, this theory fails because it contradicts allegations made in the SAC. Plaintiff admitted in his SAC that these individual defendants are employees of the Department of State Hospitals, and not independent contractors. (SAC ¶¶ 16-17, 21, 23, 30.)

As the reply contends, the demurrer should be sustained without leave to amend because based on "the nature of the [complaint's] defects and [the plaintiffs] previous unsuccessful attempts to plead," it is improbable that plaintiff can state a cause of action. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 534.) Plaintiff has failed to meet his burden of showing "in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Rosberg v. Bank of America, NA.* (2013) 219 Cal.App.4th 1481, 1491.)

As for viability of the claim against the State, *State of California v. Superior Court* (1974) 12 Cal.3d 237, 255, hints that one should seek relief from the particular agency and its employees, but because a commission and its members were the only ones who could reverse a decision. A bar on suing the state does not appear in the case. *People ex. Rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060 concerns discovery. It held that one cannot demand that the "State" produce documents from each and every agency that is part of it. (*Id.* at p. 1078.)

That does not show that the state cannot be a defendant though. *Templo v. State* (2018) 24 Cal.App.5th 730 (rev. denied) has a good discussion of cases wherein demurrers were sustained because the improper state entity or an individual were sued. It relied on the specific facts alleged to determine what agency was the proper one, and held that a particular agency (the Judicial Council) was the proper defendant. It determined the proper entity by discerning what arm of the state had a direct institutional interest necessary to defend the action. It cited another case finding that it is the level of interest in the final outcome that determines the proper defendant, *Serrano v. Priest* (1976) 18 Cal.3d 728. There, the defendants claimed that the Governor and the Legislature were indispensable parties. The Court noted that might be so – depending on the interest and how direct it was. "The fact that in the reapportionment context the Legislature and its members may also be considered proper parties stems from the direct institutional interest of those parties in the determination." (*Id.* at p. 752.) Generally, however, the Governor or Legislature were not proper parties.

In *Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1437, a landlord sued the city for a declaration it could increase the rents and joined the tenants as co-defendants. The court held this was a misjoinder, because the facts alleged did not seek relief against the tenants. Here, plaintiff wants orders that the State do or refrain from certain conduct, and compel its agents to do the same. Because the State does not

conclusively show that it is an improper defendant, at this stage the demurrer on this ground should be overruled.

Motion to Strike

On calendar for October 7, 2021 are a demurrer and motion to strike filed by defendants directed at the SAC. A second motion to strike is also on calendar, but the court cannot identify any second motion to strike having been filed in this case.

In the event this third hearing was intended to be for plaintiff's demurrer to the Department of State Hospitals' answer to the SAC, the demurrer is overruled for two reasons. First, plaintiff never filed any notice that the demurrer would be heard on this date. (Cal. Rules of Court, rule 3.1320(c).) Second, the demurrer is clearly untimely. Under Code of Civil Procedure section 430.40, subdivision (b), "[a] party who has filed a complaint or cross-complaint may, within 10 days after service of the answer to his pleading, demurrer to the answer." (Code Civ. Proc., § 430.40, subd. (b).) The DSH filed and served its Answer to the SAC on 11/2/20. Plaintiff filed his demurrer to the Answer on 1/15/21, well beyond the 10 day deadline.

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** 10/4/2021 .
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Johnny Payne v. Platinum Roadlines, Inc.***
Superior Court No. 21CECG01118

Hearing Date: October 7, 2021 (Dept. 501)

Motions (x2): Application to Appear Pro Hac Vice re: Daniel Graves

Application to Appear Pro Hac Vice re: William McLain

Tentative Ruling:

To grant both applications.

Explanation:

California Rules of Court, rule 9.40, sets forth the requirements for eligibility to be admitted pro hac vice in this state. If such requirements are met, the decision whether to admit or deny the application is a discretionary decision.

Attorneys Daniel Graves and William McLain meet all the mandatory provisions of rule 9.40, and this court exercises discretion to admit them for this case.

Pursuant to California Rules of Court, rule 391(a), and Code of Civil Procedure section 1019.5, subd. (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 10/6/2021.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: **Avila v. Moua**
Superior Court Case No. 19CECG01398

Hearing Date: October 7, 2021 (Dept. 501)

Motion: by Defendant to compel responses to form interrogatories-general (set one), special interrogatories (set one), and request for production (set one), and, request for monetary sanctions

Tentative Ruling:

The court notes that the moving party only paid for 1 motion, even though 3 motions are scheduled, and the moving papers consisted of a minimum of 3 motions combined into one set of papers. In the future the moving party must reserve the proper number of motions. Moving party shall pay an additional filing fee of \$120.00 to be due and payable to the court clerk within 30 days of service of the minute order by the clerk. (Gov. Code § 70617, subd. (a).)

To grant the moving party's motion to compel responses to the Form Interrogatories-general (set one), Special Interrogatories (set one), and Request for Production of Documents (set one).

To grant monetary sanctions in the amount of \$430.

Plaintiff's verified responses (without objections) to the interrogatories and request for production are due 20 days from the date of the order. Defendant's counsel shall be paid the sanctions amount within 30 days of the date of this order.

Explanation:

Interrogatories

Form Interrogatories-General, Set One and Special Interrogatories, Set One, were served on plaintiff on September 25, 2020. (Aharonian, Decl., ¶ 2.) No responses have been received. (Aharonian, Decl., ¶ 10.) The motion to compel the initial responses to the form and special interrogatories is granted. (Code Civ. Proc., §§ 2030.260, subd. (a), 2030.290, subd. (b).)

Requests for Production

Requests for Production of Documents, Set One were likewise served on plaintiff by mail on February 4, 2021. (Aharonian, Decl., ¶ 2.) No responses have been received. (Aharonian, Decl., ¶ 10.) The motion to compel the production of documents is granted. (Code Civ. Proc., § 2031.300, subd. (b).)

Sanctions

The moving party's supporting declaration sets forth the attorney's hourly fee and time spent preparing the motions. (see Aharonian, Decl. ¶ 11.) Monetary sanctions are granted in the amount requested of \$430. (Code Civ. Proc., §§ 2030.300, subd. (d) and 2031.300, subd. (c); see also Cal. Rules of Court, rule 3.1348(a) [even "[w]here a responding party provides the requested discovery after the motion to compel was filed, the court is authorized to award sanctions."].)

Plaintiff's Opposition

Plaintiff's late filed opposition (see Code Civ. Proc., § 1005, subd. (b)), contends that partial responses have been provided and asserts that plaintiff is undergoing financial and emotional hardships such that imposition of monetary sanctions would be unjust. However, none of these circumstances are supported by a declaration. (See Cal. Rules of Court, rule 3.1306(a) ["Evidence received at a law and motion hearing must be by declaration"].) Consequently, the claims made in plaintiff's opposition are not persuasive of a different result.

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** 10/6/2021.
(Judge's initials) (Date)