

Tentative Rulings for November 3, 2021
Department 403

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).)

21CECG03050 *Community Hospitals of Central California v. Sante Health Systems, Inc.* (Dept. 403)

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(03)

Tentative Ruling

Re: ***Pentamerous, LLC v. Priest***
Superior Court Case No. 21CECG02205

Hearing Date: November 3, 2021 (Dept. 403)

Motion: Defendant Barnett's Motion to Expunge Lis Pendens

Tentative Ruling:

To continue the hearing on the motion to expunge lis pendens to February 2, 2022 at 3:30 p.m. in Department 403 of the Fresno Superior Court to give the parties time to conduct discovery into the issue of whether plaintiff has a reasonable likelihood of prevailing on its real property claims. (Code Civ. Proc. § 405.30; 405.32.) Plaintiff shall file and serve its sur-reply by the close of business on January 19, 2022. Defendant Barnett shall file and serve her response by the close of business on January 26, 2022.

Explanation:

Under Code of Civil Procedure section 405.30, any party, or any nonparty with an interest in real property affected by a lis pendens, can move to expunge the lis pendens at any time after the notice of pendency of action has been recorded. (Code Civ. Proc. § 405.30.) "Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice. The claimant shall have the burden of proof under Sections 405.31 and 405.32." (*Ibid.*)

"[T]he court shall order the notice expunged if the court finds that the pleading on which the notice is based does not contain a real property claim." (Code Civ. Proc., § 405.31.) In addition, "the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc., § 405.32.)

"'Real property claim' means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility." (Code Civ. Proc., § 405.4.)

"Section 405.30 allows the property owner to remove an improperly recorded lis pendens by bringing a motion to expunge. There are several statutory bases for expungement of a lis pendens, including the claim at issue here: claimant's pleadings, on which the lis pendens is based, do not contain a real property claim. [Citation.] Unlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim. [Citation.]" (*Kirkeby v. Superior Court of Orange County* (2004) 33 Cal.4th 642, 647.)

In ruling on a motion to expunge under CCP § 405.31, the court must engage in a “demurrer-like” analysis to determine whether or not the complaint sets forth a “real property claim.” (*Id.* at p. 650.) Thus, the court should consider only the specific claim as pled to determine whether it is a real property claim, not any other extrinsic evidence or facts. (*Ibid.*) This is in contrast to a motion to expunge under CCP § 405.32, which requires an evidentiary hearing on the probability that the plaintiff will be able to establish a valid real property claim. (*BGJ Associates, LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 957.)

“Case law has determined that certain types of actions clearly do, or clearly do not, affect title or possession. At one extreme, ‘[a] buyer’s action for specific performance of a real property purchase and sale agreement is a classic example of an action in which a *lis pendens* is both appropriate and necessary.’ At the other extreme, an action for money only, even if it relates in some way to specific real property, will not support a *lis pendens*.” (*Id.* at p. 967, internal citations omitted.)

On the other hand, a motion to expunge under section 405.32 requires an evidentiary hearing on the probability that the plaintiff will be able to establish a valid real property claim. (*Id.* at p. 957.) “‘Probable validity,’ with respect to a real property claim, means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim.” (Code Civ. Proc., § 405.3.)

In the present case, defendant Barnett has moved to expunge the *lis pendens* under both sections 405.31 and 405.32. In other words, she argues both that the complaint fails to state a real property claim, and also that plaintiff has no reasonable probability of prevailing on its claims. However, to the extent that Barnett argues that the complaint does not state a real property claim, her contention is clearly incorrect.

Plaintiff’s first amended complaint alleges claims for specific performance of the alleged real property purchase agreement, as well as quiet title with regard to the subject properties. Plaintiff’s claims are the classic type of real property claims that will support the issuance of a *lis pendens*. (*BGJ Associates, supra*, at p. 967.) Plaintiff’s claims clearly seek to affect title to parcels of real property, as he seeks to compel performance of the property sale agreement and quiet title to the properties, as well as preventing defendants from selling the properties to anyone else. Barnett’s arguments in support of her motion all rely on extrinsic evidence, including her claim that she is the sole trustee of the Trust that owns the properties, that she has the recorded deeds to the properties, and that she did not authorize Priest to sell the properties. However, the court may not consider such extrinsic evidence when ruling on a motion under section 405.31. (*Id.* at pp. 957-958.) Instead, its review is limited to whether the allegations of the complaint state a real property claim. (*Ibid.*) Here, the FAC clearly states real property claims. As a result, the court will not grant the motion to expunge to the extent that defendant seeks relief under section 405.31.

Next, defendant Barnett argues that the *lis pendens* should be expunged under section 405.32, since plaintiff has no reasonable probability of prevailing on its real property claims. “Unlike other motions, the burden is on the party opposing the motion to expunge - i.e., the claimant-plaintiff - to establish the probable validity of the underlying claim. The claimant-plaintiff must establish the probable validity of the claim

by a preponderance of the evidence." (*Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319, internal citations omitted.)

Here, Barnett alleges that Priest was not authorized to sell the property, that she does not know Priest, that the Virginia Shubin Barnett Living Trust and Virginia Barnett Last Will and Testament are forged documents, and that the property is actually owned by the Shubin Family Trust of 1989, of which she is the sole trustee. (Barnett decl., ¶ 2-20.) She has submitted copies of the recorded grant deeds and probate order stating that the Shubin Family Trust is the sole owner of the properties. (Exhibits A – L to Barnett decl.) She alleges that she never sold the properties to plaintiff, and she did not authorize the sale. (*Id.* at ¶ 22.) In addition, she believes that Mr. Priest must have broken into the property and pretended to live there, as the property has been vacant, abandoned, and boarded up for years. (*Id.* at ¶¶ 20, 21.) She has never met Tony Priest or plaintiff. (*Id.* at ¶¶ 23, 24.) Therefore, she concludes that plaintiff has no reasonable probability of prevailing on its real property claims.

In opposition¹ to the motion to expunge, plaintiff's representative, Ruben Mireles, alleges that he went to the property in March of 2021 and negotiated with Tony Priest for the purchase of the property. (Mireles decl., ¶¶ 13-20.) He claims that Priest stated that he was the successor trustee of the Virginia Shubin Barnett Living Trust, and that he produced a copy of the Trust documents showing that he was the trustee of the Trust. (*Id.* at ¶¶ 16-17.) Priest told him that he was authorized by Ms. Barnett to manage the properties, and to sell them to avoid losing them at auction for failure to pay property taxes. (*Id.* at ¶ 18.) Priest claimed that he had not seen or heard from Ms. Barnett in years, and that he believed she might be dead or incapacitated. (*Id.* at ¶ 15.)

The parties then negotiated an agreement for plaintiff to purchase one of the parcels for \$250,000, with the right to purchase the other parcels at a fixed price of \$12,500 per acre. (*Id.* at ¶ 20.) About \$130,000 of the purchase price would go to pay off the unpaid taxes and tax liens on the properties, and the remaining \$120,000 would go to the Barnett Trust over five years. (*Id.* at ¶ 21.) Plaintiff did in fact pay over \$97,000 to Priest to pay off the unpaid property taxes, and plaintiff watched Priest deliver the check to the Fresno County Tax Collector. (*Id.* at ¶¶ 22, 23.) The properties were then withdrawn from the defaulted properties auction. (*Id.* at ¶ 24.) Mireles also alleges that he has continued to make payments on behalf of plaintiff on the balance due on the agreement. (*Ibid.*)

Also, Mireles claims that the windows and doors on the property were not boarded up during any of his many visits to see Priest, that Priest was always present when Mireles visited him at the property, and that the property had electricity and utilities each time he visited. (*Id.* at ¶¶ 27, 28.)

¹ Defendant objects to the opposition and requests that the court refuse to consider it, since the opposition is over 15 pages long and plaintiff did not request or obtain leave of court to file a brief over the page limit. (Cal. Rules of Court, Rule 3.1113.) However, "[t]he page limit does not include the caption page ... the table of contents, the table of authorities, or the proof of service." (Cal. Rules of Court, Rule 3.1113(d).) Here, the opposition brief is only 15 pages long when the caption page, table of authorities, and table of contents are disregarded. Therefore, the brief does not exceed the page limit under Rule 3.1113, and the court will not disregard the opposition.

Mr. Priest has also submitted his own declaration in support of plaintiff's opposition, in which he states that he has known the Shubin family for many years, and that he has known Virginia Barnett for at least 20 years. (Priest decl., ¶ 4.) He claims that he has been legally residing at the main residence on the property for years, and that he has never unlawfully occupied the residence. (*Id.* at ¶ 5.) He claims that Virginia has given him permission to live there. (*Ibid.*) He states that there is working power and water at the residence, and the windows are not boarded. (*Id.* at ¶ 6.) He denies breaking into the property, stealing documents, or stealing other personal items from the property. (*Id.* at ¶ 7.)

Priest also states that Virginia Barnett gave him authority to deal with the tenants on the property and maintain the property. (*Id.* at ¶ 8.) In exchange for dealing with the properties, Barnett allowed him to live in the residence for free. (*Ibid.*) He claims that he is the acting trustee of the Barnett Living Trust, and that the Trust is valid and not fraudulent or forged. (*Id.* at ¶ 9.) Also, the will is not fraudulent. (*Ibid.*) He claims that he was authorized to convey the property on behalf of the Trust. (*Id.* at ¶ 10.)

Priest alleges that the seven of the eight parcels owned by the Trust were in danger of being auctioned off for unpaid taxes. (*Id.* at ¶ 13.) Three other parcels owned by the Trust had already been sold for unpaid taxes. (*Id.* at ¶ 12.) In order to save the parcels from being sold at auction, Priest entered into a purchase agreement with plaintiff for the sale of the properties. (*Id.* at ¶ 14.) The agreement provided that the tax delinquencies would be paid off, and the remaining \$120,000 would go to the Trust. (*Ibid.*) Priest also alleges that plaintiff performed its duties under the contract and paid off the property taxes, as well as making payments of \$2,000 per month to the Trust. (*Id.* at ¶ 15.) As a result, the properties are no longer listed as defaulted properties that are subject to being sold at auction, as they otherwise would have been. (*Id.* at ¶ 16.) Priest also denies that he has personally profited from the agreement, and claims that the proceeds from the sale went to the Fresno County Tax Collector and to the Trust. (*Id.* at ¶ 17.)

However, Barnett has submitted evidence on reply that indicates that Mireles and Priest may be lying about key elements of their story. For example, Mireles and Priest both claim that the main residence on the property was never boarded up, and that there was always power and water there. Yet according to Barnett's evidence, the residence has been abandoned for ten years, is boarded up, and has been the subject of numerous break-ins over the years. The photos submitted with the reply seem to support Barnett's version, as the photos clearly show that the property is boarded up, the electrical meter has been tampered with, apparently for illegal power delivery, and the property is secured behind a chain-link construction fence with barbed wire on top. (Exhibits A and B to Bennett Reply decl.) While the photos were taken on October 22, 2021, months after the parties negotiated the alleged purchase contract in March of 2021, the photos appear to show that the property has been vacant and boarded up for years. In the photos, there are old and weathered boards on the windows, and the yard has copious amounts of trash and an abandoned car in it, as well as overgrown trees and dead grass. Thus, the photos seem to show that the property has been abandoned and used by unauthorized people for a very long time. This casts serious doubt on the statements of Mireles and Priest regarding the circumstances of the alleged agreement.

In addition, Barnett has submitted evidence showing that Priest has multiple recent felony convictions, which also tends to undermine his credibility. (Evidence Code § 788: evidence of prior felony convictions may be used to attack the credibility of a witness.) The documents attached to the request for judicial notice show that Priest was charged in October of 2018 with unlawful taking of a vehicle, receiving stolen property (a motor vehicle), and driving with a suspended license. (Reply Request for Judicial Notice, Exhibit A.) Priest pled nolo contendere to a charge of unlawful taking of a vehicle in December of 2018, and was given a suspended sentence of three years and placed on formal probation. (Exhibit B to Request for Judicial Notice.) An abstract of judgment also indicates that Priest has prior felony convictions in August of 2017 for manufacturing, transporting, giving or selling an assault weapon and possession of ammunition by a prohibited person. (Exhibit C to Request for Judicial Notice.) Also, on July 27, 2021, the Fresno Superior Court issued a bench warrant out for Priest's arrest for charges of assault with a deadly weapon, grand theft auto, unlawful taking of a vehicle, and buying and receiving a stolen vehicle or equipment. (Exhibit E to Request for Judicial Notice.) His mug shot also seems to match his driver's license photo. (Compare Exhibit D to Request for Judicial Notice with Exhibit D to First Amended Complaint, p. 46.)

Given Priest's prior history of felony convictions, there are serious questions about his credibility, and the court is inclined to disregard his entire declaration. Without Priest's testimony, plaintiff will have a much more difficult time proving his claims, especially since only Priest appears to have personal knowledge of the alleged Barnett Living Trust that supposedly gave him the authority to sell the properties to plaintiff.

It is also notable that plaintiff has no recorded grant deed or other evidence of title that would tend to establish its claim of ownership in the property. Plaintiff only has a copy of the agreement that Mireles signed with Priest, but it is not clear that Priest had any authority to execute the agreement. Indeed, even if the alleged Barnett Living Trust is valid, Priest was only a successor trustee under the Trust. (Exhibit B to Complaint, Trust, p. 2.) Virginia Barnett was the original trustee. Thus, Priest only had authority to act on behalf of the Trust if Barnett was dead or incapacitated. The evidence clearly shows that Barnett is still alive and capable of representing the Trust, so it appears that Priest lacked authority to sell the property to plaintiff, even if the Barnett Living Trust is valid.

Barnett, on the other hand, has submitted copies of the recorded grant deeds and probate order that support her claim to be the owner of the properties through the Shubin Family Trust. Since Barnett holds title on behalf of the Shubin Trust, she is presumed to be the rightful owner of the properties unless there is clear and convincing evidence to the contrary. (Evidence Code § 662.) None of plaintiff's evidence appears to be sufficient to rebut this presumption, particularly in light of the credibility issues with the declarations of Priest and Mireles.

On the other hand, much of the evidence that undermines plaintiff's witnesses' credibility has been submitted by Barnett on reply, and plaintiff has not had a chance to respond to it. It is possible that plaintiff might be able to make a stronger showing that it is likely to prevail if it is given a continuance so that it may conduct discovery into its claims. In particular, plaintiff needs to be able to investigate Priest and his claim that he is the trustee of the Barnett Living Trust, which relates directly to plaintiff's claim that Priest had the authority to sell the properties. Plaintiff may also need to depose several

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Tentative Ruling

Re: **Miller v. Baker et al.**
Superior Court Case No. 21CECG00475

Hearing Date: November 3, 2021 (Dept. 403)

Motion: by Defendant to tax costs on appeal

Tentative Ruling:

To grant in part and tax costs in the amount of \$957.50.

Explanation:

On December 7, 2020, the Fifth District Court of Appeals issued remittitur following appeal of a judgment, and awarded, among other things, appellate costs to plaintiff. Plaintiff filed a memorandum of costs on April 8, 2021, seeking \$2,030.81 in costs. Defendant now seeks to tax those costs on two grounds: that plaintiff is not a prevailing party within the meaning of Code of Civil Procedure section 1032 and California Rules of Court Rule 3.1700; and that the costs claimed are disallowed.

Though defendant argues that plaintiff is not the prevailing party within the meaning of Code of Civil Procedure section 1032, section 1032 does not control. (See *Stratton v. Beck* (2018) 30 Cal.App.5th 901, 909-910.) Rather, the right to recover costs on appeal is governed by Code of Civil Procedure section 1034, and California Rules of Court, Rule 8.278. (Code Civ. Proc. § 1034, subd. (b).) Rule 8.278 provides, in pertinent part: "(a)(1) Except as provided in this rule, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal... [¶] (2) ...The prevailing party is the appellant if the court reverses the judgment in its entirety."

Here, the Fifth District Court of Appeals reversed the previous order granting summary judgment in favor of defendant in its entirety. As such, the appellant, plaintiff, is the prevailing party. (Cal. Rules of Court, Rule 8.278(a)(2).) Thus, plaintiff is entitled to costs on appeal. (*Id.*, Rule 8.278(a)(1).)

A party may file and serve a motion to tax costs on appeal in the manner required by California Rule of Court, Rule 3.1700. (Cal. Rules of Court, Rule 8.278(c)(2).) The court finds that defendant has properly raised objections to the memorandum of costs. (*Id.*, Rule 3.1700(b).)

The right to recover costs depends on four conditions: (1) there must be a valid judgment awarding costs to the party claiming them; (2) the item must be one allowed by rule or statute; (3) the amount claimed must have been actually incurred; and (4) the amount claimed must be reasonable. (*Wilson v. Board of Retirement* (1959) 176 Cal.App.2d 320, 323.) Based on the above, the first condition is satisfied.

