

**Tentative Rulings for September 23, 2021**  
**Department 503**

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**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).)**

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

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**(Tentative Rulings begin at the next page)**

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## **Tentative Rulings for Department 503**

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(03)

**Tentative Ruling**

Re: ***Zarcone v. Floyd Johnston Construction***  
Superior Court Case No. 19CECG00051

Hearing Date: September 23, 2021 (Dept. 503)

Motion: Defendant Aladdin's Carpet, Inc., dba Service Master  
Advanced's Motion for Summary Judgment, or in the  
Alternative Summary Adjudication

**Tentative Ruling:**

To deny defendant Aladdin's Carpet, Inc., dba Service Master Advanced's ("Alladdin's Carpet") motion for summary judgment, and in the alternative motion for summary adjudication of issues. (Code Civ. Proc., § 437c.) To deem Aladdin's motion for summary adjudication of the eighth cause of action to be a motion for judgment on the pleadings, and to grant the motion without leave to amend for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438.)

**Explanation:**

Plaintiffs have sued Aladdin's Carpet for negligence and negligent infliction of emotional distress after their property was stolen from a storage container placed on their property during the cleanup of the property by Aladdin's Carpet. Aladdin's Carpet has moved for summary adjudication of the negligence claims, contending that it cannot be held liable for the criminal conduct of the third party who broke into the container and stole plaintiffs' property, that plaintiffs stored money and guns in the storage container against the explicit instructions of Aladdin's Carpet, and that plaintiffs were the only ones with access to the keys for the locks to the storage containers. In other words, Aladdin's Carpet contends that it did not breach any duty it owed to plaintiffs, and that it did not cause the loss of plaintiffs' property.

"In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, internal citations omitted.) "The absence of any one of these three elements is fatal to a negligence claim. Accordingly, if the plaintiff cannot establish that the defendant owed the plaintiff a duty, the action must be dismissed." (*Gilmer v. Ellington* (2008) 159 Cal.App.4th 190, 195, internal citation omitted.) Likewise, the plaintiff must prove that the defendant caused his or her injuries. (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1205.) However, causation is generally a factual question for the jury to decide, unless the facts regarding causation are undisputed. (*Ibid.*)

Here, Aladdin's Carpet's motion relies almost entirely on the declaration of its employee, Ali Amireh, to show that it did not breach any duty toward plaintiffs or cause their damages. Yet, many of the statements in Amireh's declaration lack foundation and do not appear to be based on personal knowledge. Other statements are apparently based on hearsay. For example, Amireh claims in his declaration that plaintiffs' home

was flooded due to “faulty construction work on a nearby canal by Floyd Johnston Construction.” (Amireh Decl., ¶ 5.) However, Amireh does not appear to have any personal knowledge of this fact, and it is not clear what the foundation for his statement is. He seems to be relying on hearsay statements of other people as the basis for his statement.

Likewise, to the extent that Amireh makes statements about who broke into the storage container and stole plaintiffs' property, the statements lack foundation and are not based on personal knowledge. (Amireh Decl., ¶¶ 14, 16.) Amireh does not have any direct knowledge of the circumstances regarding the break-in or who committed the theft, and he appears to be relying on hearsay statements by the sheriff or other persons. He also has not authenticated or laid a proper foundation for the introduction of the sheriff's report into evidence, and he cannot testify to the facts contained in the report, which are hearsay. (Amireh Decl., Ex. B.) Amireh also admitted that he has no personal knowledge of the vetting procedures used by the employer of one of the girlfriends of the person who allegedly broke into the container. (Amireh Decl., ¶ 20; Amireh Depo., p. 185:9-18.)

Therefore, the court sustains many of the objections to Amireh's declaration, and it will refuse to consider the sheriff's report attached to the declaration. In particular, the court sustains plaintiffs' objections 1, 2, 10, 12, 14, 15, 16, and 18 to Amireh's declaration, including the objection to the sheriff's report attached to the declaration. The other objections are overruled. Therefore, since there is no evidence to support many of the purportedly undisputed facts in support of the motion, Aladdin's Carpet has failed to meet its burden of showing that its motion should be granted.

In any event, even if Aladdin's Carpet had met its burden, plaintiffs have submitted evidence that raises triable issues of material fact with regard to the negligence causes of action. For example, while Aladdin's Carpet claims that it informed plaintiffs that they could not store money, jewelry, or guns in the storage containers and that plaintiffs agreed to this limitation, plaintiffs have denied that they were ever told by Aladdin's Carpet not to store guns or money in the storage containers. (Gage Decl., Exs. 5, 6; Jayson Zarcone Decl., ¶ 2; Jaime Zarcone Decl., ¶ 2.) They also deny that there was any written form that stated what they could or could not store in the containers. (Jayson Zarcone Decl., ¶ 11.) They deny that they placed a safe with money or guns in the containers. (Jayson Zarcone Decl., ¶ 3; Jaime Zarcone Decl., ¶ 3.) They claim that Aladdin's Carpet employees were the ones who moved all their belongings into the containers. (*Ibid.*)

Plaintiffs also deny that Aladdin's Carpet gave them the locks and keys to the storage containers, or that they were the only ones with access to the keys to the containers. (Jayson Zarcone Decl., ¶¶ 4-6; Jaime Zarcone Decl., ¶¶ 4-6.) They further deny that they were the ones who locked up the storage containers on the night of the theft, as they did not have keys to the locks. (*Id.* at ¶ 6.) There was no evidence that the locks were cut or pried open, which indicates that the thief had a key to the locks. (Jayson Zarcone Decl., ¶ 8.) Jayson Zarcone also states that he saw his neighbor's surveillance video of the incident, which he claims showed that a black vehicle come to plaintiffs' property on the night of the theft, and that the vehicle was the same vehicle used by workers from Aladdin's Carpet during the days before the theft. (*Id.* at ¶ 7.)

Thus, plaintiffs have submitted sufficient evidence to raise triable issues of material fact as to whether Aladdin's Carpet breached its duty of care owed to plaintiffs by failing to ensure that the storage containers with their property inside were properly secured, and whether Aladdin's Carpet caused plaintiffs' damages. While Aladdin's Carpet claims that it was plaintiffs who placed the guns and money in the storage container despite being told not to do so, plaintiffs' testimony indicates that they were not told not to place guns or money in the storage container, and in any event they did not place any of their property in the container. Similarly, while Aladdin's Carpet claims that it gave plaintiffs new locks and keys to secure the container, plaintiffs deny that they were given any locks or keys to the container, and they deny that they were the ones who locked up the container on the night of the theft. There was allegedly no damage to the container, such as cut locks or pry marks, and Amireh states that it would have been extremely difficult to tamper with the lock due to the metal sheath around it. (Jayson Zarcone Decl., ¶ 8; Amireh Decl., ¶ 9.) Therefore, a trier of fact could reasonably infer that the person who stole plaintiffs' property had access to the keys. In other words, a reasonable trier of fact could infer that one of Aladdin's Carpet's employees was involved in the break-in, or at least gave the keys to the person who broke into the container.

Aladdin's Carpet claims that the person who stole plaintiffs' property was not employed by and had no affiliation with it, so Aladdin's Carpet did not breach its duty of care or cause plaintiffs' injuries. However, as discussed above, Aladdin's Carpet has not submitted any admissible evidence to show who stole plaintiffs' property, as the only evidence on this issue is the sheriff's report, which is hearsay, and the statements of Amireh, who lacks personal knowledge of the identity of the thief. It is not clear from the evidence whether the thief was affiliated with Aladdin's Carpet or not. Thus, Aladdin's Carpet has not met its burden of showing that it did not cause plaintiffs' injuries because it did not employ the thief.

Also, as noted above, plaintiffs deny that they had the keys to the storage container, and there is no evidence that the lock was cut or pried open. (Jayson Zarcone Decl., ¶¶ 4-6, 8.) Aladdin's Carpet admits that it would have been very difficult to cut or pry the lock open without the key, as the lock was covered by a metal sheath. (Amireh Decl., ¶ 9.) Thus, a reasonable trier of fact could infer that Aladdin's Carpet was the one who had the keys to the container, and that an employee of Aladdin's Carpet either opened the lock on the container or gave a key to the thief so that he could open it. Thus, there is a triable issue of material fact as to whether Aladdin's Carpet caused plaintiffs' injuries by allowing someone access to the keys to the container, which resulted in the theft of plaintiffs' property.

Aladdin's Carpet has also contends that it is not liable for the criminal actions of third parties, as such intervening criminal acts break the chain of causation. (*Conn v. City of Reno* (9th Cir.2010) 591 F.3d 1081, 1101; *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-66.) Aladdin's Carpet claims that the thief was not employed or affiliated with it, and that the thief's girlfriend was employed by a different company which was not owned or controlled by Aladdin's Carpet. Also, Aladdin's Carpet alleges that Employenet, the girlfriend's employer, did a background check on the girlfriend at Aladdin's Carpet's request, so there was no failure to vet any employees.

Again, however, Aladdin's Carpet has failed to meet its burden of showing that the thief who stole plaintiffs' property was not employed by or affiliated with it. The only evidence submitted by Aladdin's Carpet on this issue is inadmissible hearsay in the sheriff's report, and the statements of Amireh, which lack foundation and personal knowledge. Amireh's statements about the thief's girlfriend being vetted by Employnet also appear to be nothing more than speculation and lack foundation or personal knowledge, as Amireh admitted in his deposition that he does not know anything about the background check allegedly done by Employnet, and he only assumed that the employee had been vetted. (Amireh Depo., pp. 184:10 - 186-20.)

By contrast, plaintiffs' evidence indicates that they did not have the keys to the container, which suggests that Aladdin's Carpet did have the keys. If Aladdin's Carpet was the only entity with the keys to the container, then a trier of fact could reasonably infer that someone at Aladdin's Carpet either opened the lock or gave the keys to the thief. If so, then the trier of fact could reasonably conclude that Aladdin's Carpet was a proximate cause of plaintiffs' injuries. As a result, the court denies Aladdin's Carpet's motion for summary judgment, and the alternative motion for summary adjudication of the fourth and eighth causes of action.

On the other hand, the court treats the motion for summary adjudication of the eighth cause of action for negligent infliction of emotional distress as a motion for judgment on the pleadings, and grants the motion. As Aladdin's Carpet correctly points out, negligent infliction of emotional distress is not an independent cause of action, but rather simply the tort of negligence that results in emotional distress. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) Thus, the eighth cause of action is redundant of the fourth cause of action, which alleges a general negligence claim.

Also, a plaintiff generally cannot recover emotional distress damages for negligence that only causes harm to property, as opposed to harm to the plaintiff's person. (*Sher v. Leiderman* (1986) 181 Cal.App.3d 867, 884; *Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012-1013.) "'The fact that emotional distress damages may be awarded in some circumstances does not mean they are available in every case in which there is an independent cause of action founded upon negligence.' 'No California case has allowed recovery for emotional distress arising solely out of property damage'; moreover, a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554-555, internal citations omitted.)

In the present case, plaintiffs allege that Aladdin's Carpet's negligence only led to harm to their personal property, namely theft of their money and guns from the storage container, and emotional distress related to the property loss. (FAC, ¶¶ 50-54, 79-85.) However, harm to property alone is generally not enough to support an emotional distress claim, absent some other preexisting relationship or intentional tort. (*Cooper, supra*, 153 Cal.App.3d at p. 1012.) Plaintiffs have not alleged that Aladdin's Carpet intentionally harmed their property, and the only relationship between the parties was purely contractual, which is not enough to support an emotional distress claim. (*Erlich, supra*, 21 Cal.4th at pp. 554-555.) Therefore, plaintiffs' eighth cause of action fails to state a

valid claim for negligent infliction of emotional distress, even assuming that it is possible to state a separate cause of action for emotional distress damages.

In their opposition, plaintiffs do not appear to dispute that they cannot recover emotional distress damages based on negligence, but they argue that they can still recover such damages under other theories, such as conversion, trespass, or nuisance. However, plaintiffs' first amended complaint only alleges claims for negligence and negligent infliction of emotional distress against Aladdin's Carpet, as well as a claim for intentional infliction of emotional distress. The trespass and nuisance claims have only been alleged against Floyd Johnston Construction and Wilson, not Aladdin's Carpet. There is no conversion claim alleged in the complaint, and none of the facts alleged in the first amended complaint appear to support a conversion claim against Aladdin's Carpet. Plaintiffs only allege that Aladdin's Carpet was negligent in failing to secure their property and thus allowing it to be stolen, not that Aladdin's Carpet intentionally took the property itself. (FAC, ¶¶ 50-54.) Thus, plaintiffs cannot rely on theories of nuisance, trespass, or conversion to support their claim for emotional distress damages.

In any event, Aladdin's Carpet's motion only addresses the fourth and eighth causes of action, so the question of whether emotional distress could be recovered in connection with one of the other causes of action is not properly before the court. The only issue here is whether plaintiffs can recover emotional distress damages in connection with their claim for negligence based solely on the loss of their personal property. The law is clear that they cannot. (*Erich, supra*, 21 Cal.4th at pp. 554–555.)

Therefore, the court treats the motion for summary adjudication of the eighth cause of action as a motion for judgment on the pleadings, and grants the motion. Furthermore, it does not appear that plaintiffs can allege any additional facts to cure the defect in their cause of action if they were given leave to amend. As a result, the court denies 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:** KAG **on** 9/17/2021.  
(Judge's initials) (Date)

(32)

**Tentative Ruling**

Re: **Vargas v. Kong**  
Superior Court Case No. 20CECG00432

Hearing Date: September 23, 2021 (Dept. 503)

Motion: Plaintiffs' motion to appoint deceased plaintiff's successor in interest

**Tentative Ruling:**

To grant. (Code Civ. Proc., § 377.31.)

**Explanation:**

"[A] cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (Code Civ. Proc., § 377.20, subd. (a).) "A pending action or proceeding does not abate by the death of a party if the cause of action survives." (Code Civ. Proc., § 377.21.)

Plaintiffs allege that plaintiff Telesforo Antunez Morales ("decendent") passed away on November 5, 2020. (Vargas Decl. ¶ 3.) The death certificate attached to the declaration indicates, however, that decendent died on October 30, 2020. The complaint, filed on February 4, 2020, alleges a cause of action for motor vehicle negligence, which survives decendent's death. (See *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, fn. 3 [a decendent's personal injury action survives the decendent's death and may be brought by his or her estate].) But the estate is not entitled to an award for plaintiff's general damages if plaintiff dies before judgment. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530; see Code Civ. Proc., § 377.34.) In order to continue decendent's personal injury claim, however, another person must be substituted into the action on decendent's behalf.

Code of Civil Procedure section 377.31 provides that, "[o]n motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decendent's personal representative or, if none, by the decendent's successor in interest." The personal representative or successor in interest has an absolute right to be substituted for the decendent. (*Adams v. Superior Court* (2011) 196 Cal.App.4th 71, 79.)

A "decendent's successor in interest" means the beneficiary of the decendent's estate or other successor in interest who succeeds to a cause of action or to a particular item of property that is the subject of a cause of action. (See Code Civ. Proc., § 377.11.) Under Code of Civil Procedure section 377.10, "beneficiary of the decendent's estate" means:





(34)

**Tentative Ruling**

Re: **Campus Pointe Commercial, L.P. v. Seema Kwatra**  
Superior Court Case No. 20CECG02262

Hearing Date: September 23, 2021 (Dept. 503)

Motions: By Plaintiff to Compel Responses to Form Interrogatories and  
to Deem Request for Admissions Admitted

**Tentative Ruling:**

To grant plaintiff's motion to compel defendant Seema Kwatra to provide initial responses to form interrogatories, set one. (Code Civ. Proc., § 2030.290.) Defendant shall serve verified responses, without objections, to the form interrogatories within 10 days of the date of service of this order. Defendant shall also pay sanctions of \$235 to plaintiff's counsel within 30 days of the date of service of this order. (*Ibid.*)

To grant plaintiff's motion to deem defendant Seema Kwatra to have admitted the truth of the matters in the requests for admissions, set one. (Code Civ. Proc., § 2033.280.) Defendant shall also pay additional sanctions of \$235 to plaintiff's counsel within 30 days of the date of service of this order. (*Ibid.*)

**Explanation:**

A party that fails to serve a timely response to a discovery request waives "any objection" to the request. (Code Civ. Proc., §§ 2030.290, subd. (a), 2033.280, subd. (a).) The propounding party may move for an order compelling a party to respond to the discovery request. (Code Civ. Proc., § 2030.290, subd. (b).) In the case of requests for admission, the propounding party may move for an order that the truth of any matters specified in the requests be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).)

Where a party fails to timely respond to a propounding party's request for admissions, the court must grant the propounding party's motion requesting that matters be deemed admitted, unless it finds that the party to whom the requests were directed has served, prior to the hearing on the motion, a proposed response that is substantially in compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c); see also *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778.) "Substantial compliance" means compliance with respect to " 'every reasonable objective of the statute.' [Citation.]" (*Id.* at p. 779.) Where the responding party serves its responses before the hearing, the court "has no discretion but to deny the motion." (*Id.* at p. 776.)

In the case at bench, there is no evidence that responses have been served since the filing of this motion. The motion to compel responses to form interrogatories is granted. Unless responses are served before the hearing, the motion to deem requests for admission is granted and the requests are deemed admitted.

## Sanctions

The court may award sanctions against a party that fails to provide discovery responses. (Code Civ. Proc., § 2023.010, subd. (d), (h).) The court must impose a monetary sanction against the party or attorney, or both, whose failure to respond necessitated the motion to deem matters admitted. (Code Civ. Proc., §2033.280, subd. (c).)

The court awards plaintiff sanctions for one-half of time for each motion, and the \$60 filing fee for each motion. (See Altounian Decl. ¶ 6.) Defendant is ordered to pay \$235 for each motion to plaintiff's counsel within 30 days of the clerk's mailing of the minute order.

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: KAG on 9/20/2021.  
(Judge's initials) (Date)

(35)

### Tentative Ruling

Re: **Muhammad v. Tylar Property Management Company et al.**  
Superior Court Case No. 19CECG03941

Hearing Date: September 23, 2021 (Dept. 503)

Motion: Demurrer to First Amended Complaint

### Tentative Ruling:

To take the demurrer 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 specified in Code of Civil Procedure section 430.41, and, if necessary, schedule a new hearing date for a demurrer.

**Explanation:**

Before filing a demurrer, the moving party "shall meet and confer in person or by telephone" with the party who filed the pleading that is subject to the motion. (Code Civ. Proc., § 430.41, subd. (a).)

Here, the meet and confer efforts of counsel for moving defendants do not conform to the statute's explicit requirements. (See Code Civ. Proc., § 430.41, subd. (a), (a)(3).) The parties are ordered to meet and confer pursuant to the statute and, if necessary, schedule a new hearing date for a demurrer.

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: KAG on 9/21/2021.  
(Judge's initials) (Date)