

Tentative Rulings for May 3, 2016
Departments 402, 403, 501, 502, 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).)

- 15CECG02968 *Mendoza v. Kerman Unified School Dist.* (Dept. 502)
- 16CECG00988 *Wells Fargo Equipment Finance, Inc. v. The Presort Center of Fresno, LLC dba Kingsburg Produce* (Dept. 502)
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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.

- 15CECG00355 *Valencia v. City of Reedley* is continued to Tuesday, May 10, 2016, at 3:30 p.m. in Dept. 402.
- 13CECG02631 *McGraw v. Velocity Express LLC et al.* is continued to Thursday, May 5, 2016 at 3:00 p.m. in Dept. 403. There is no tentative ruling and the hearing will go forward on this matter on May 6 unless the court is notified that the party will submit the matter without an appearance.
- 14CECG03031 *Singh v. Trius Trucking* is continued to Thursday, May 5, 2016 at 3:00 p.m. in Dept. 403. There is no tentative ruling and the hearing will go forward on this matter on May 6 unless the court is notified that the party will submit the matter without an appearance.

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: **Haley v. Brumbaugh**
Case No. 14 CE CG 01906

Hearing Date: May 3rd, 2016 (Dept. 402)

Motion: Defendants' Demurrer to Complaint and Motion to Strike
Punitive Damages Claim

Tentative Ruling:

To sustain the demurrer to the entire complaint, without leave to amend, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10, subd. (e).) To deny the motion to strike punitive damages, as moot in light of the ruling on the demurrer. (Code Civ. Proc. §§ 435, 436.)

Explanation:

Demurrer: Plaintiff attempts to allege claims for negligence, trespass to chattels, and intentional infliction of emotional distress against defendants Brumbaugh and Milam after they allegedly lost his personal property. However, since defendants are employees of the California Department of Corrections and Rehabilitation, plaintiff must comply with the requirements of the Government Tort Claims Act before bringing a lawsuit against them.

“Under the Tort Claims Act, a plaintiff may not maintain an action for money or damages against a public entity unless first a written claim has been presented to the public entity and rejected in whole or in part or deemed rejected by operation of law. ([Gov. Code] §§ 905; 905.2; 945.4.) Failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity. Before a cause of action may be stated, a plaintiff must allege either compliance with this procedure or circumstances excusing compliance.” (*Sofranek v. Merced County* (2007) 146 Cal.App.4th 1238, 1246, some internal citations omitted.)

“In turn, Government Code section 950.2 prescribes that a cause against a public employee for injury resulting from an act or omission in the scope of his employment is barred if an action against the employing public entity is barred.” (*Fisher v. Pickens* (1990) 225 Cal.App.3d 708, 718.) Thus, “[i]t is well settled that a government claim must be filed with the public entity before a tort action is brought against the public entity or public employee.” (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 843, internal citations omitted.)

“Government Code section 945.6 requires ‘any suit brought against a public entity’ to be commenced no more than six months after the public entity rejects the claim. A civil action is ‘commenced’ by filing a complaint with the court. The statute of

limitations for commencing a government tort claim action is not tolled by virtue of a plaintiff's imprisonment." (*Moore v. Twomey* (2004) 120 Cal.App.4th 910, 913-14, internal citations omitted.)

"Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity... We conclude that failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." (*State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.)

Also, "If a plaintiff alleges compliance with the claims presentation requirement, but the public records do not reflect compliance, the governmental entity can request the court to take judicial notice under Evidence Code section 452, subdivision (c) that the entity's records do not show compliance." (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376, internal citations omitted.)

Here, plaintiff alleges that the defendants confiscated his property on March 6th, 2013. (Complaint, ¶ 12.) He became aware of the loss of his property sometime after he was released from Administrative Segregation, although he does not allege exactly when he actually learned that his property was missing. (*Ibid.*) Plaintiff filed his government tort claim regarding the missing property with the California Victim Compensation and Government Claims Board on May 7th, 2013. (Request for Judicial Notice, Exhibit A. The court intends to take judicial notice of the claim under Evidence Code section 452, subd. (c).) The claim was rejected by the Board on September 19th, 2013, with notice of the rejection given to plaintiff by a letter dated September 27th, 2013. (Exhibit B to Request for Judicial Notice. The court will also take judicial notice of the rejection letter.)

Therefore, plaintiff had six months from the date of the rejection letter was mailed in which to file his complaint for civil damages arising out of his lost property. However, plaintiff did not actually file his complaint against defendants until July 3rd, 2014, over nine months after the claim was rejected. While plaintiff alleges in his form complaint that he complied with the Government Tort Claims Act, the judicially noticeable documents from the Claims Board show that the complaint is actually untimely. Thus, the court intends to sustain the demurrer as to the entire complaint and all defendants, as the judicially noticeable facts show that the complaint is time-barred.

Furthermore, the court intends to deny leave to amend, since there is no way for plaintiff to amend the complaint to cure the defect. Plaintiff cannot truthfully allege that the complaint was filed less than six months after the claim was rejected. Nor has plaintiff filed any opposition or made any effort to show that there was some tolling or estoppel that might explain the delay in filing the complaint. Therefore, the court intends to sustain the demurrer to the entire complaint without leave to amend.

Motion to Strike: While it does appear that the punitive damages claim is entirely unsupported by any facts showing that defendants acted with fraud, malice or oppression (Civil Code § 3294), there is no need to rule on the motion to strike in light of

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Tentative Ruling

Re: ***Integrated Voting Solutions, Inc. v. Anderson***
Superior Court Case No. 16CECG00375

Hearing Date: **May 3, 2016 (Dept. 402)**

Motion: Defendant's motion to quash for lack of personal jurisdiction

Tentative Ruling:

To grant. The case is dismissed. (CCP § 418.10(a)(1).)

Explanation:

Essentially, “[w]hen a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction.” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

Also, “[f]or limited jurisdiction, the court must focus on the nature and quality of the activity in the forum state, not the quantity.” (*As You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4th 1859, 1869.) Although physical presence is unnecessary, to establish personal jurisdiction through “personal availment” the contacts cannot be due to the “‘unilateral activity of another party or third person.’” (*Hall v. LaRonde* (1997) 56 Cal.App.4th 1342, 1348 quoting *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475.) The contacts must be “more than ‘random,’ ‘fortuitous,’ or ‘attenuated.’” (*ibid.*)

Accordingly, there were insufficient contacts where a nonresident never worked, owned property, maintained bank accounts or solicited business in California. (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273.) Similarly, a recruiting coordinator's visit to California to recruit a particular student athlete was also held insufficient contact to justify personal jurisdiction. (*Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670, 680.)

Lastly, in determining personal jurisdiction arising from a breach of contract claim, the critical inquiry is, “where the consequences of performing that contract come to be felt.” (*Stone v. State of Tex.* (1999) 76 Cal.App.4th 1043, 1048, quoting *Dunne v. State of Florida* (1992) 6 Cal.App.4th 1340, 1345.)

Here, the plaintiff does not address whether the defendant's contacts with California were “continuous and systematic”. Rather, the opposition argues the defendant has purposefully availed herself to jurisdiction in California. (see Opp. MPA, pg. 3:7-8.)

However, like the nonresident in *Pavlovich*, there is no evidence the defendant performed her employment duties, owned property, maintained bank accounts or

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Tentative Ruling

Re: **Nguyen v. Luong**
Superior Court Case No. 14 CECG 02185

Hearing Date: May 3, 2016 (**Dept. 402**)

Motion: By Defendant for summary judgment, or in the alternative, summary adjudication

Tentative Ruling:

To deny the motion for summary judgment, or in the alternative, summary adjudication on the grounds that the moving party has not met its burden pursuant to CCP § 437c(p)(2). A Separate Statement has been submitted that does not comply CRC Rule 3.1350 and does not address the causes of action as pleaded. See *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160.

Given that the moving party has not met its burden, it is not necessary to examine the opposition or the reply and thus, the court will not. See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.

Explanation:

Background

According to the complaint, Plaintiff and Defendant began to cohabit in November of 2003. The relationship produced a child in 2004. In 2005, the parties moved from San Jose, CA to Fresno. In 2006, by pooling their resources, they were able to produce \$36,000 as a down payment on a new house located in Clovis. Title was held jointly but it was Defendant who was listed as the mortgagor. The parties allegedly agreed that each had the right to 50% of the property. A joint bank account was opened. However, Plaintiff claims that it was her income that was the primary source of payment for the mortgage, property taxes and related fees.

On or about 2007, Plaintiff alleges that she signed a Quitclaim Deed and transferred her share of the residence to the Defendant to streamline refinancing on the property. It is alleged that the parties agreed that the Plaintiff would still maintain a 50% ownership in the property. During the course of their relationship, the parties acquired many personal assets including a 2012 Toyota Corolla and a 2006 Acura. There were also loans from family members to the Plaintiff that were used for the benefit of the family.

In February 2014, Defendant forcibly evicted the Plaintiff with the assistance of the Clovis Police. Defendant claimed that the Plaintiff was renting a room in the home and that he wanted her out. Defendant prevented the Plaintiff from taking her

personal property and refused to pay back a loan from Plaintiff's mother in the amount of \$35,000.

On June 18, 2014, Defendant filed a small claims action against the Plaintiff as Case No. 14 CESC 01188 to obtain full ownership of the 2012 Corolla. On July 25, 2014, Plaintiff filed a complaint as the instant case alleging 5 causes of action:

- (1) breach of contract;
- (2) Fraud—breach of promise without intention to perform;
- (3) conversion;
- (4) accounting; and
- (5) declaratory relief.

On September 11, 2014, Defendant filed a Notice of Demurrer and a Memorandum of Points and Authorities. On November 25, 2014, the matter was heard. The Court noted that the Defendant had failed to file the demurrer itself as required by CRC Rule 3.1320. Instead, he set forth the grounds for the demurrer in the Notice. But, where there are several grounds for demurrer, each must be stated in a **separate paragraph**; and must state whether the challenge is to the entire pleading or to some specific cause of action therein. [CRC 3.1320(a)]

The Court overruled the special demurrer on grounds of uncertainty. In overruling the general demurrers to each cause of action, the Court determined that the case at bench is a classic “palimony” case. In other words, the fact of nonmarital cohabitation is not itself a barrier to the judicial recognition and enforcement of express and **implied agreements** between the parties. They have the same right to enforce contracts and assert equitable rights and interests as do any other unmarried persons. And courts may also look to a “variety of other remedies” in order to protect the parties' lawful expectations. [*Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 & fn. 24] Thus, unmarried cohabitants can avail themselves of the following traditional legal and equitable remedies to enforce properly-founded property, support and other financial claims and obligations arising out of their relationship:

- Action for *breach of express contract* (e.g., to pool earnings and hold acquisitions in accord with community property law, or to hold earnings and acquisitions as separate property; to provide support, etc.). [*Marvin v. Marvin*, *supra*, 18 Cal.3d at 674–675; see *Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1118—alleged agreement to share property acquisitions equally and to provide “lifetime support”]
- Action on an *implied contract* based upon the parties' conduct (e.g., to share earnings and acquisitions or to provide support). [*Marvin v. Marvin*, *supra*, 18 Cal.3d at 677–684; see *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887–888—alleged implied agreement for support upon termination of relationship]
- Action to enforce a *partnership or joint venture* agreement (express or implied). [*Marvin v. Marvin*, *supra*, 18 Cal.3d at 684]

- Action to impose a *constructive trust, resulting trust* or *equitable lien*. [*Marvin v. Marvin*, supra, 18 Cal.3d at 684]
- Action for *declaratory relief* to establish rights under a cohabitation agreement. [*Marvin v. Marvin*, supra, 18 Cal.3d at 675; see *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1073]
- Action for *specific performance* of a property agreement (where damages are not an adequate remedy; e.g., real property (Civil Code § 3387) or personal property with sentimental value (Rest.2d Contracts § 360, comm. “b”). [See *Byrne v. Laura*, supra, 52 Cal.App.4th at 1073—*Marvin* claimant could properly elect to pursue specific performance of property agreement with respect to residence and family heirlooms]
- Action in *quantum meruit* to recover the reasonable value of services rendered (household, business or other legally-compensable services), less the reasonable value of support received, upon proof the services were rendered “with the expectation of monetary reward.” [*Marvin v. Marvin*, supra, 18 Cal.3d at 684; see *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 449]

Where existing (traditional) remedies prove “inadequate,” trial courts may fashion *additional equitable remedies* to protect the parties’ “reasonable expectations.” “[T]he suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.” [*Marvin v. Marvin*, supra, 18 Cal.3d at 684, fn. 25]

Summary Judgment in General

Role of Pleadings

A summary judgment motion must show that the “*material facts*” are undisputed (CCP § 437c(b)(1)). The pleadings serve as the “outer measure of materiality” in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. [*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74—“the pleadings determine the scope of relevant issues on a summary judgment motion”; *Hutton v. Fidelity Nat’l Title Co.* (2013) 213 Cal.App.4th 486 at 493—summary judgment defendant need only “negate plaintiff’s theories of liability as *alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings.”]

Role of Separate Statement

Some cases follow the “Golden Rule” of summary judgment and refuse to consider evidence not listed in the moving party’s separate statement of undisputed facts on a motion for summary judgment. [*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335; *North Coast Business Park v. Nielsen Const. Co.* (1993) 17 Cal.App.4th 22, 30; *Thrifty Oil Co. v. Sup.Ct. (Linder)* (2001) 91 Cal.App.4th 1070, 1075, fn. 4] Other cases hold that whether to consider evidence omitted from the moving party’s separate statement rests in the trial court’s sound discretion. [*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 310-311;

Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson (2005) 131 Cal.App.4th 1466, 1478; *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 437]

If the moving party contends there is **no evidence** to support an element of the opponent's case, the moving party must set forth *all* the material evidence on a point. Thus, the statement of "undisputed facts" must include the opponent's discovery responses even if their content is inadmissible (e.g., hearsay, or for lack of foundation). Including the opponent's responses does not waive the evidentiary objection. The proper method is to include the inadmissible discovery responses and state why they may not be considered by the court. [*Rio Linda Unified School Dist. v. Sup.Ct. (Diaz)* (1997) 52 Cal.App.4th 732, 740-741--parents' deposition answers, which were inadmissible hearsay as to cause of child's death, were properly included in moving party's separate statement (inclusion did not waive hearsay objection)]

All of the evidence relied upon must be set forth in the separate statement. It is not enough to cross-refer to other sources where such evidence may be located. [See *Artiglio v. General Elec. Co.* (1998) 61 Cal.App.4th 830, 841-842—Opposing Party's Separate Statement stated: "See evidence previously produced in opposition to earlier motion for summary judgment"; *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1916, fn. 3—facts stated elsewhere need not be considered by court]

Failure to comply with the separate statement requirement constitutes ground for denial of the motion, in the court's discretion. [CCP § 437c(b)(1); see *Wilson v. Blue Cross of Southern Calif.* (1990) 222 Cal.App.3d 660, 671—where only one of several codefendants filed separate statement, and it made no mention of others, summary judgment could not be granted in their favor; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106—instead of stating key events as "undisputed facts," defendant stated what witnesses *said* about those events; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160—separate statement failed to address allegations of material fact in complaint] Absent a separate statement, most courts will not even consider the motion ... unless perhaps in "truly exceptional" cases involving a single, simple issue with minimal evidentiary support. [*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335; *Security Pac. Nat'l Bank v. Bradley* (1992) 4 Cal.App.4th 89, 94]

As a result, if the separate statement fails to indicate *all* necessary facts, the judge *need not read* the supporting declarations and other evidentiary documents. [See *Rio Linda Unified School Dist. v. Sup.Ct. (Diaz)* (1997) 52 Cal.App.4th 732, 740] But dictum in the case of *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 states that if dispositive evidence is *obvious* to the court and parties, it may be an abuse of discretion for the court to disregard it. By the same token, similarly, a court clearly has discretion to deny summary judgment on the basis of mere *format errors* (e.g., absence of headings in separate statement as required by CRC 3.1350). [See *Truong v. Glasser* (2010) 181 Cal.App.4th 102, 118]

Initial Burden on the Moving Party

The moving party bears the initial burden of production to make a *prima facie* showing that there are no triable issues of *material fact*. [*Aguilar v. Atlantic Richfield Co.*

(2001) 25 Cal.4th 826 at 850] The opposing party's failure to file counter-declarations does *not* relieve the moving party of the above burden: "There is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every *element* ... necessary to sustain a judgment in his favor." [*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 (emphasis in original; internal quotes omitted)]

Defendant's Burden

A defendant (or cross-defendant) moving for summary judgment must "show" that *either*:

- one or more elements of the "cause of action ... *cannot be established*"; OR
- there is a *complete defense* to that cause of action. [CCP § 437c(p)(2) (emphasis added)]

This means that where plaintiff has the burden of proof at trial by a preponderance of evidence, defendant "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, *he* (defendant) would not be entitled to judgment as a *matter of law*, but would have to present *his* evidence to a trier of fact." [*Aguilar v. Atlantic Richfield Co.* (2001), *supra* 25 Cal.4th at 851 (emphasis in original; parentheses added)] The import of "more likely than not" in the foregoing quote is that a moving defendant must generally present evidence that, if uncontradicted, "would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established ... The same is true when a moving defendant seeks to secure dismissal of the complaint based on an affirmative defense." [*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879]

Once defendants meet this burden, the *burden shifts to plaintiff* to prove the existence of a triable issue of fact regarding that element of its cause of action or that defense. If plaintiff is unable to do so, defendants are entitled to judgment as a matter of law. [*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780-781; *Consumer Cause, Inc. v. SmileCare* (2001), *supra* 91 Cal.App.4th at 468] If defendants fail to meet the above burden, their motion must be denied; plaintiff need not make any showing at all. *Id.*

The "tried and true" way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) *negating, as a matter of law*, an essential element of plaintiff's claim. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849, fn. 16—defendant had initial burden of affirmatively negating existence of duty] As the party moving for summary judgment, defendant has the burden to show it is entitled to judgment with respect to *all theories of liability* asserted by plaintiff. [*Lopez v. Sup.Ct. (Friedman Bros. Inv. Co.)* (1996) 45 Cal.App.4th 705, 717]

A cause of action "cannot be established" if the undisputed facts presented by defendant prove the contrary of plaintiff's allegations as a matter of law. [Brantley v. Pisaro, supra, 42 Cal.App.4th at 1597] Riding Coach's declaration that she received no complaints that a specific horse was unfit to ride did not establish that the horse was fit or that she lacked knowledge that it was unfit. Therefore, her declaration failed to meet her burden to demonstrate that, as a matter of law, there was no triable issue of fact relating to her duty of care to the rider. [Eriksson v. Nunnink, supra, 191 Cal.App.4th at 850] The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor." [Johnson v. American Standard, Inc. (2008) 43 Cal.4th 56]

Motion at Bench

A Separate Statement consisting of 33 "undisputed facts" was submitted. It does not conform to CRC Rule 3.1350. Subsection (d)(3) states: "... The statement must state in numerical sequence the undisputed material facts in the first column **followed by the evidence that establishes those undisputed facts in that same column...**" Here, there are multiple facts listed in the Separate Statement without reference to the evidence that establishes those facts. See Facts Nos. 2-4, 6, 10-11, 13, 15-16, 20-31.

Second, the Separate Statement includes no facts applicable to the motion for summary judgment, only the motion for summary adjudication. See page 1 of the Separate Statement. Third, many of the facts state that the Plaintiff has "no evidence" to establish...." But, as stated supra, the Separate Statement of "undisputed facts" **must include** the opponent's discovery responses that indicate there is "no evidence." See *Rio Linda Unified School Dist. v. Sup.Ct. (Diaz)*, supra at 740-741. Defendant may argue that the discovery responses were attached to the Declaration of Nguyen. But, the pertinent discovery responses should have been set forth in the Separate Statement. Notably, by submitting the discovery responses in this manner, Defendant asks the Court to "make his case for him."

Finally, the motion for summary adjudication does not address the causes of action alleged in the Complaint. This is mandatory. See *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. The request for summary adjudication of the first cause of action for breach of contract fails to address the fact that a **breach of oral contract** is pleaded. See Complaint at ¶¶ 19-30. The request for summary adjudication of the second cause of action for fraud does not address the elements of fraud as pleaded. See Complaint at ¶¶ 31-43. The same defect exists as to the motion for summary adjudication of the third and fourth causes of action. As for the fifth cause of action seeking declaratory relief, a motion for summary adjudication must completely dispose of the cause of action. See *Hood v. Sup.Ct. (United Chambers Administrators, Inc.)* (1995) 33 Cal.App.4th 319, 322, 323. Fact No. 31 cites to no evidence in support and Facts Nos. 32 and 33 only address the issue of the ownership of the Corolla. In the end, the moving party has not met his burden pursuant to CCP § 437c(p)(2).

Tentative Rulings for Department 403

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Tentative Ruling

Re: **Leticia Contreras v. Fresno County Employees' Retirement Association, et al.**

Superior Court Case No. 15CECG02892

Hearing Date: May 3, 2016 (Dept. 403) **IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 5, 2016 AT 3:00 P.M. IN DEPARTMENT 403.**

Motion: Vacate trial date and set status hearing

Tentative Ruling:

To deny.

Explanation:

Where an applicant is dissatisfied with a retirement board's denial of retirement benefits, the applicant may apply to the Superior Court for a writ of mandate to compel the board to set aside its decision and enter a new one in favor of the applicant. (Code of Civ. Proc. §1094.5.)

Where an applicant seeks to recover money in a specific sum for past services, and not reinstatement, a writ of mandate is not the proper method to by which to proceed, as a writ of mandate may not be issued where the petitioner's rights are otherwise adequately protected. (*Agosto v. Board of Trustees of Grossmont-Cuyamaca Community College Dist.* (2010) 189 Cal.App.4th 330, 336; *Coombs v. Smith* (1936) 17 Cal.App.2d 454, 455; see Code Civ. Proc. §1086.) "It is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract." (*Elevator Operators etc. Union v. Newman* (1947) 30 Cal.2d 799, 808; see also *300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1254 – 1255.)

In the case at bar, Plaintiff seeks wages and benefits allegedly lost when she was placed on a leave of absence for approximately two years, but also requests that her service connected disability retirement be granted. The mixed nature of Plaintiff's requested relief makes Defendants' motion to vacate the trial date improper, as Plaintiff is entitled to proceed on her complaint with regard to the "back pay" Plaintiff alleges she is owed. Accordingly, Defendants' motion is denied.

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

Tentative Rulings for Department 501

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Tentative Ruling

Re: ***The State of California v. 4285 Golden State I, LLC, et al.***
Superior Court Case No. 15CECG02944

Hearing Date: May 3, 2016 (Dept. 501)

Motion: Order for prejudgment possession

Tentative Ruling:

To grant. (Code Civ. Proc. §1255.410(d).) The Court will sign the order presented by Plaintiff.

Explanation:

A motion for a prejudgment order of possession is authorized by Code of Civil Procedure section 1255.410, which provides the statutory scheme for possession of property being sought in a condemnation action, prior to final judgment. Such possession is permitted where the application has been opposed if the plaintiff demonstrates that it is entitled to take the property by eminent domain, has deposited an amount equal to the probable amount of compensation to be awarded to defendant, there is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment in the case, the plaintiff will suffer a substantial hardship if the application for possession is denied or limited, and the hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant that would be caused by the granting of the order of possession. (Code Civ. Proc. §1255.410(d)(2).)

The Relocation Assistance Act ("Act") requires a public entity to compensate a displaced party for actual, reasonable, and necessary moving and related expenses (Gov. Code §7262). In other words, the Act provides compensation for losses which typically occur when a business is "forced to move and give up the benefits of its former location." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 270.) Such relocation assistance is a recognition of the need to compensate, independently of condemnation proceedings, certain losses that occur as a result of a condemnation action. (*Baldwin Park Redevelopment Agency v. Irving* (1984) 156 Cal.App.3d 428, 438.) *Compensation under the Act for certain business losses which occur as a result of a condemnation action is independent of the condemnation proceedings.* (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189; *italics added.*) Any party aggrieved by a determination as to eligibility for, or the amount of, a payment authorized by the Act may have the application reviewed by the public entity or by the relocation appeals board. (Gov. Code §7266(b).) Where a party is dissatisfied with the relocation benefits awarded by the condemning entity in

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Tentative Ruling

Re: ***John Pevyhouse v. Karen Higgins***
Superior Court Case No. 15CECG03343

Hearing Date: May 3, 2016 (Dept. 501)

Motion: Demurrer

Tentative Ruling:

To order the demurrer off calendar for failure to comply with Code of Civil Procedure section 430.10 (a).

To order parties to meet & confer as required by CCP § 430.41 (a). If the meet & confer is unsuccessful, then the demurring party may calendar a new date for hearing the demurrer to the original complaint.

Explanation:

Code of Civil Procedure section 430.41

Before filing a demurrer, the demurring party must meet and confer in person or by telephone with the party that filed the pleading which is subject to the demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. (Code Civ. Proc., §430.41(a).)

As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies. CCP §430.41(a)(1). The party that filed the complaint, cross-complaint, or answer must provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the pleading could be amended to cure any legal insufficiency. (Code Civ. Proc., §430.41(a)(1).)

The parties must meet and confer at least five days before the date the responsive pleading is due. (Code Civ. Proc., §430.41(a)(2).) If the parties are unable to do so, the demurring party must be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer. (Code Civ. Proc., §430.41(a)(2).)

A demurring party must file and serve with the demurrer a declaration stating the means by which it met and conferred with the party that filed the pleading subject to demurrer and that the parties did not reach an agreement resolving the objections raised in the demurrer or stating that the party that filed the pleading subject to demurrer failed to respond to the demurring party's request to meet and confer or otherwise failed to meet and confer in good faith. (Code Civ. Proc., §430.41(a)(3).)

(30)

Tentative Ruling

Re: ***Anna Campbell v. Washington Unified School***
Superior Court Case No. 14CECG03353

Hearing Date: May 3, 2016 (Dept. 501)

Motion: Demurrer

Tentative Ruling:

To Overrule the demurrer, with Defendant Washington Unified School District granted 10 days leave to file its answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

On March 15, 2016, Defendant demurred to Plaintiff's First Amended Complaint ("FAC") on the basis of: (1) California Code of Civil Procedure section 430.10 (f) [The pleading is uncertain], due to Plaintiff's failure to specifically identify statutory grounds justifying public entity liability.

Civil Code section 430.10 (f)

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Thus, demurrers for uncertainty will almost certainly be overruled where the facts alleged in the complaint are *ascertainable* by invoking discovery procedures. (*Khoury v. Maly's of Calif., Inc.*, *supra*, 14 Cal.App.4th 616, 710.)

Here, Defendant argues that Plaintiff's allegations are uncertain because Plaintiff asserts that Defendant is liable under Government Code sections: 815.2, 815.4, 815.6, 818.6, 835, 835.2, 840.2, and 840.4 (FAC, filed: 2/9/16 p4, 6). "In light of the general listing of numerous Government Code sections, [Defendant] cannot ascertain which particular code sections are being relied upon to provide a valid statutory basis imposing liability on [Defendant]" (Demurrer Memo, filed: 3/15/16 p5 lns 25-27). However, a quick cursory review of each section reveals that only Government Code sections 835 and 835.2 are applicable:

California Government Code sections **815.2, 815.4, 840.2, and 840.4**

Plaintiff fails to allege any facts establishing liability under California Government Code sections 815.2, 815.4, 840.2, or 840.4; no injuries are alleged to have been caused by any particular employee or independent contractor.

California Government Code section 816.6

California Government Code section 815.6 declares that failure to comply with applicable statutory or regulatory standards is negligence unless reasonable diligence has been exercised in an effort to comply with those standards. (*Alarid v. Vanier* (1958) 50 Cal.2d 617; *Lehmann v. Los Angeles City Bd. of Educ.* (1957) 154 Cal.App.2d 256.) Section 815.6 does not provide a specific duty on which liability can be predicated.

California Government Code section 818.6

California Government Code section 818.6 recognizes an immunity that has been accepted by the New York courts (because of the extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted).

California Government Code section 835

California Government Code section 835 imposes liability upon a public entity if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939.) To state a cause of action against a public entity under section 835, a Plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it. (Cal. Gov. Code § 835; *Vedder v. County of Imperial* (1974) 36 Cal.App.3d 654, 659.)

California Government Code section 835.2

California Government Code section 835.2 defines notice regarding section 835. In relevant part, it states,

“(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

Tentative Rulings for Department 502

(19)

Tentative Ruling

Re: **R.V. v. Blancas**
Court Case No. 15CECG002237

Hearing Date: May 3, 2016 (Department 502)

Motion: by defendant Monson-Sultana Joint Union Elementary School District to deem Requests for Admission Admitted

Tentative Ruling:

To deny.

Explanation:

The street name in the address for plaintiff's counsel's firm is spelled differently than it is on the Complaint, in the proof of service of the motion and in the proof of service for the requests for admission at issue.

This ruling is made without prejudice to any discovery or subsequent motion served on plaintiff's counsel at a fully correct address.

Pursuant to 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: DSB on 5/2/16.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Phillips v. Steinhauer et al.***
Court Case No. 14 CECG 02269

Hearing Date: May 3, 2016 (Dept. 502)

Motion: Default prove up

Tentative Ruling:

To deny without prejudice.

Explanation:

The court is required to render default judgment only “for such sum...as appears to be just”, based on the evidence presented. (Code Civ. Proc. § 585, subd. (b).) At the hearing, the plaintiff must prove-up his right to relief, by introducing sufficient evidence to support his claim. (See Rylaarsdam & Edmon, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2015) § 5:201; *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560; and 6 Witkin, *Cal. Procedure* (5th Ed. 2008) Proceedings Without Trial, § 169, p. 609.) Code of Civil Procedure section 585, subdivision (d), pertaining to default prove ups, provides: “The facts stated in such affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.”

“A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

First, plaintiffs have established the existence of, and terms of, the contract. They have authenticated the written Loan Agreement by declaring that they found the original Loan Agreement among the papers of their brother and that the signature of their brother on the Agreement is genuine.

Second, plaintiffs have established decedent's performance under the contract. Plaintiffs have established that both defendants admitted that they owe a debt under the Loan Agreement, which means funds were paid under that agreement. The statements of defendants are admissible as party admissions. (Evid. Code § 1220.)

Third, plaintiffs have established breach of the loan agreement, as they declare that both defendants admit to owing money under the agreement.

However, plaintiffs cannot establish a certain sum of damages owed for breach of the agreement. While plaintiffs can establish by authentication of their brother's handwriting that that least four payments were made, they cannot exclude the

possibility that other payments were made. It is possible that cash payments were made. It is possible that payments were made that were not recorded. Plaintiffs cannot exclude this possibility because they were unaware of the Loan's existence until after decedent's death and thus have no personal knowledge to support their conclusions that "[o]ther than the four payments made by defendants, no other payments have been made by them since on or about August 13, 2012" and "[d]efendants made four monthly payments as provided in the 'Loan Agreement' for the months of May 2012, June 2012, July 2012 and August 2012 – leaving payments for 80 months, unpaid, due and owing..." (Decls. at ¶¶ 11, 12b.) Significantly, plaintiffs have not testified that defendants ever admitted they owed a particular sum or that they paid only a particular sum or a particular number of payments. Absent this evidence, plaintiffs cannot prove that they are owed any specific sum of 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: DSB **on** 5/2/16.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: **Woods v. Central Valley Real Estate Management, Inc.**
Court Case No. 13CECG03138

[AND]

Gant v. Central Valley Real Estate Management, Inc.
Court Case No. 15CECG03124

Hearing Date: **May 3, 2016 (Dept. 502)**

Motion: Demurrers by CRP Properties, Inc., to First Amended Complaint in each of the above actions

Tentative Ruling:

In Case No. 13CECG03138: To sustain the demurrers as to plaintiffs Piedra, Mendez (Mark & Tawnia), Mack, and Calafiore, without leave to amend (i.e., as to defendant CRP Properties, Inc., only). As to the remaining plaintiffs: 1) to overrule the demurrers to the First, Third, Fourth and Fifth causes of action (notwithstanding plaintiffs' inaccurate concession that the Fifth cause of action is time-barred); and 2) to sustain the demurrer to the Second cause of action, with leave to amend.

In Case No. 15CECG03124 (i.e., as to plaintiff Gant): To overrule the demurrers to the First, Fourth and Fifth causes of action. To sustain the demurrer to the Second cause of action, with leave to amend. To sustain the demurrer to the Third cause of action, without leave to amend.

To consolidate the two actions, *sua sponte*, for all purposes unless the parties appear at the hearing and establish why this should not be the court's order. (Code Civ. Proc., § 1408, subd. (a).) Case No. 13CECG03138 will be the lead case (Judge Black presiding). All further documents filed in the case shall be filed only in the lead case, and shall include the caption and case number of the lead case, followed by the case number of the other consolidated cases. Plaintiffs are ordered to serve a copy of this order on all defendants.

Plaintiffs are granted 30 days' leave to amend during which time they must meet and confer concerning the amended complaint before a combined Second Amended Complaint is filed. (Code Civ. Proc., § 430.41, subd. (c).) The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the Second Amended Complaint are to be set in **boldface** type.

Explanation:

Meet and Confer:

Defense counsel's compliance with the meet and confer statute (Code Civ. Proc. § 430.41) was barely adequate. In a declaration filed on February 10, 2016, Ms.

Mayhew attached an email from Ms. Spencer indicating that she (Ms. Spencer) was not handling the case, but that Ms. Elder was. Thus, the fact that Ms. Spencer was not available when Ms. Mayhew called their office (*one time*) is irrelevant. Ms. Mayhew should have made another effort to speak with Ms. Elder, or she could have scheduled a phone appointment with her. On these facts, it is difficult to find that it was Ms. Elder who refused to comply with meeting and conferring. In future, this court expects counsel to make serious effort at attempting a telephonic or in-person conference before filing a demurrer. However, the court will address the merits of the demurrer, as it does not appear meet and confer at this juncture will be of any further aid to the parties.

Consolidation:

The complaints in each case are substantially identical; they are based on the same operative facts and named the same defendants (albeit some of them have now been dismissed from Case No. 15CECG03124). It appears that consolidation is appropriate in this action under Code of Civil Procedure section 1048, subdivision (a), based on having common questions of law and fact, pending in the same court. The court also finds it appropriate for Case No. 13CECG03138 to be designated as the lead case. A single trial on all claims involved will avoid unnecessary costs and delays and will serve the interests of judicial economy and convenience. (*Jud Whitehead Heater Co. v. Obler* (1952) 111 Cal.App.2d 861, 867.) It does not appear consolidation will unduly complicate the trial of these claims, or confuse the jury, since common issues relating to the liability of the defendants will predominate.

Plaintiffs Piedra, Mendez (Mark & Tawnia), Mack, and Calafiore (Case No. 13CECG03138):

These five plaintiffs in the 2013 action have all alleged that their respective tenancies began after defendant CRP Properties, Inc. ("CRP") had sold the property. A landlord cannot be held responsible for breaches of covenants running with the land after he has parted with it or has ceased to enjoy its benefits. (Civ. Code § 1466.) Thus, these plaintiffs necessarily can raise no cause of action against CRP. CRP's demurrers to all causes of action as to these plaintiffs is sustained, without leave to amend.

Statute of Limitations

The statute of limitations on a cause of action for breach of the Warranty of Habitability is four years for a written lease, and two years for an oral lease. As this implied covenant flows from the rental agreement, the limitations period depends on whether it is written or oral. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 662—a promise which law implies as part of contract is as much a part of contract as if written out.) The case cited by defendant *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 584, affirms that the running of the statute is "the same whether a warranty is express or implied," but this simply means it is the same for whatever type of contract is under consideration (i.e., written or oral), and in that case it was a written contract.

The statute of limitations on a nuisance action generally depends on whether the nuisance is *permanent* or *continuing*. (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 868; Code Civ. Proc., § 338, subd. (b).) Here, it appears plaintiffs are alleging continuing nuisance, as they are alleging these defects could have been repaired, but were not. A continuing nuisance may be maintained at any time before the nuisance is abated or within three years thereafter. (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1092.)

The statute of limitations on a negligence action is two years, not based on Code of Civil Procedure section 339 as cited by defendant, but rather on section 335.1. Section 335.1 pertains not only to actions for bodily injury, but all infringement of personal rights as distinguished from property rights. (*Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal.App.3d 310, 313.)

The statute of limitations on an Intentional Infliction of Emotional Distress (“IIED”) action is two years, rather than one year as argued by defendant. An action for IIED is not governed by Code of Civil Procedure section 340. In 2003 the Legislature created a two-year limitations period for personal injury and wrongful death actions, and in so doing deleted the reference to these torts from section 340 and created a new statute, section 335.1, which now governs actions for negligent and intentional personal injuries or death. Thus, the statute of limitations for an IIED action is two years. The cases cited by defendant pre-date the 2003 legislative change. (See, e.g., *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1449; *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 355, as modified (May 15, 2008).)

Defendant argues that all of plaintiffs' limitations periods necessarily start from the time each plaintiff began their tenancy. However, this argument is not internally consistent, and also it fails to take into account that plaintiffs have alleged continuing wrongs by the successive landlords, which impacts accrual of the relevant statutes of limitations. Taking the latter issue first, clearly plaintiffs have alleged numerous *and ongoing* problems at the property. Where the wrong complained of is continual or recurring, the cause of action is subject to continuous accrual for statute of limitations purposes, such that a cause of action accrues each time a wrongful act occurs, triggering a new limitations period. (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 821, as modified (July 18, 2001); *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 342.) This theory applies generally “whenever there is a continuing or recurring obligation.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1199.) Certainly, the obligations of a landlord to maintain, repair, and keep tenantable its rented premises is such a continuing or recurring obligation. “Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation [citation]—each may be treated as an independently actionable wrong with its own time limit for recovery. (*Id.*)

Alternately, the “continuing violation” theory might apply under the facts as alleged. This allows the plaintiff to recover not only for actions that took place during the statutory period, but also for misconduct occurring outside the period if it sufficiently linked to the conduct within the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812.) This doctrine is a response to inequities that might occur where a

party has engaged in long-standing misfeasance, but would obtain immunity from suit even for recent and ongoing misfeasance if the “date of discovery” rule was applied. (*Aryeh v. Canon Business Solutions, Inc.*, *supra*, 55 Cal.4th at p. 1197.)

Furthermore, defendant’s argument that the start date of each plaintiff’s tenancy is the starting of the statutory period as to claims against all landlords is logically inconsistent. Plaintiffs are alleging continuing wrongs against successive landlords, which means there are different statutory periods *as to each landlord*. The court has taken judicial notice of the records supplied by CRP on this motion, which establishes it did not own the property until June 17, 2011. Consistent with its own argument, none of the plaintiffs could possibly have had a cause of action accrue against CRP, specifically, before it even owned the property. Defendant rightly points out that it cannot be held liable for breaches or torts committed by prior landlords. (See, e.g., Civ. Code § 1466.) Thus, none of the plaintiffs could possibly have had an actionable claim against CRP until on or after June 17, 2011.

While defendant cannot be held liable for the wrongs of prior owners, that does not mean it can avoid dealing with defects at the property, or liability therefor. The implied warranty of habitability requires a landlord to inspect the premises to discover dangerous conditions, and to maintain the premises during the tenant’s occupancy, and when a building is purchased which is in poor repair, the buyer breaches the covenant upon the acquisition of title, and the tenants have the immediate right to enforce the warranty against the new owner (although damages against the new owner are only calculated from the time of ownership). (See *Knight v. Hallsthammar* (1981) 29 Cal.3d 46—breach of warranty asserted in defense to unlawful detainer action.)

Under the facts as alleged, breaches or wrongdoing occurred continuously throughout the period of CRP’s ownership. This means under either the “continuing violation” or the “continuous accrual” theories, plaintiffs are correct that the date defendant sold the property, February 22, 2012, provides the outside time limit on CRP’s liability as to any continuing violation. In this context, it is effectively the “start” of the limitations period, at least for purposes of demurrer.

- Ruling on statute of limitations issue in Case No. 13CECG03138:

None of the plaintiffs’ claims are barred on statute of limitations grounds. The tenants fall into two categories: those who were original plaintiffs, and those who did not join the complaint until the First Amended Complaint was filed. The “relation back” doctrine applies to the original plaintiffs, who are regarded as filing their claim as of the original filing date. However, that doctrine does not apply to plaintiffs newly named in an action. (See *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 532—doctrine applies to new parties who are assignees or successors in interest of original plaintiffs.) Instead, the timeliness of the new plaintiffs’ claim is tested from the filing of the First Amended Complaint on February 13, 2014.

The first category of original tenants includes plaintiffs Woods, Sandhu, Williams, and Smith. Testing the time period from February 22, 2012, and using the shortest

statutory period discussed above (two years) their action was filed on October 7, 2013, well before two years from February 22, 2012. Thus, all their claims are timely (i.e., if the shortest claim is timely, the longer ones are as well). Tenant Ransom is the only plaintiff included in the second category who was challenged on statute of limitations grounds. The First Amended Complaint was filed on February 13, 2014, which is also prior to the shortest statutory time period, which would be up on February 22, 2014. Thus, all of his claims are timely as well.

- Ruling on statute of limitations issue in Case No. 15CECG03124:

Only the Nuisance cause of action is barred on statute of limitations grounds, and the analysis is the same whether the court considers plaintiff's initial allegation that events occurred "at all times relevant" or her amended allegation that they occurred "within the last four years." She necessarily alleged continuing violations occurring up until the point when defendant sold the property in February 2012, and she was a tenant during that period. Her complaint was filed on October 7, 2015. Although she was originally named as a plaintiff in the 2014 action, she was effectively dismissed (without prejudice) by being omitted as a plaintiff when the amended complaint was filed. This did not prevent her from filing this subsequent action, but the timeliness of her claim is tested as of the filing of this complaint; there is no relation back to the separate complaint from which she was dismissed. (*Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 445.)

Testing the time period from February 22, 2012, her claim was timely as to the four-year statutes of limitation of the First and Second causes of action (which would not run until February 2016). However, as to the Third (Nuisance) cause of action, even if plaintiff is alleging a continuing nuisance, and even assuming it continues unabated to this day, it appears defendant CRP can only be held liable for three years from the date it sold the property. (*Mangini v. Aerojet-General Corp.*, *supra*, 12 Cal.4th at p. 1092.) Thus, the limitations period for this cause of action ran on February 22, 2015, and plaintiff did not file her action until October 7, 2015. Thus, this claim is time-barred. As to defendant's argument that she is also barred from raising the Negligence and IIED claims (Fourth and Fifth causes of action), she points out that she has not alleged these claims against CRP.

Demurrer to First Cause of Action (Warranty of Habitability):

Plaintiffs have adequately alleged giving notice to CRP (and all defendants), and numerous opportunities to cure, as they have alleged that they "continued to complain to Defendants about the unlawful and substandard conditions at the Property," and that defendants "refused to repair" and also "threatened, harassed and intimidated" them for complaining. (FAC, ¶122.) They allege they "made complaints to defendants about the conditions at the property" which rendered it untenable and substandard, and their complaints were ignored. (FAC, ¶126.) They allege defendants were on "actual and constructive notice of the conditions" based on their "obvious nature." (FAC, ¶127.)

Furthermore, a landlord is under an affirmative duty to inspect the premises at the start of the lease, and when the lease is renewed or the premises is relet. (*Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 468, *overruled on other grounds by Peterson v. Superior Court* (1995) 10 Cal.4th 1185—landlord subject to liability for those matters which would have been disclosed by a reasonable inspection; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1605.) Normally, this is a question of fact. (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 780.)

Defendant argues the cause of action is also defective because plaintiffs did not allege, as to any landlord, to whom notice was given, when it was given, what defects were reported, etc. However, such specificity is not required at the pleading stage; plaintiffs have not pled evidentiary facts, but rather ultimate facts, which is all that is required. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) The evidentiary facts defendant seeks can be learned through discovery.

Demurrer to Second Cause of Action (Breach of Covenant of Quiet Enjoyment):

The covenant of quiet enjoyment is not breached until there has been an actual or constructive eviction, which plaintiffs fail to allege. (*Standard Live Stock Co. v. Pentz* (1928) 204 Cal. 618, 625.) A constructive eviction is “any disturbance of the tenant’s possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy, in whole or in a substantial part, for the purposes for which they were leased, amounts to a constructive eviction, if the tenant so elects and surrenders his possession.” (*Tregoning v. Reynolds* (1934) 136 Cal.App. 154, 157 (emphasis added); *Clark v. Spiegel* (1971) 22 Cal.App.3d 74, 79—“clear obligation incumbent upon a lessee alleging an interference with the implied covenant of quiet enjoyment to vacate the premises within a reasonable time.”) The only exception to this is where the tenant elects to remain in possession and sue for contract damages. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 140.) However, plaintiffs here have not sued for contract damages. Demurrer to this cause of action is sustained, but with leave to amend.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 5/2/16.
(Judge’s initials) (Date)

Tentative Rulings for Department 503

(27)

Tentative Ruling

Re: ***Harrell v. Avalon Health Care Group, et al.***
Superior Court Case No. 16CECG00339

Hearing Date: **May 3, 2016 (Dept. 503)**

Motion: Defendant's motion to change venue to Madera County

Tentative Ruling:

To grant.

Explanation:

"A corporation . . . may be sued in the county . . . where the obligation or liability arises . . ." (CCP § 395.5) An out-of-state corporation, if qualified to do business in California, falls within this provision. (*Easton v. Superior Court* (1970) 12 Cal.App.3d 243, 246.)

Here, there are no assertions the corporate defendants are not qualified to do business in California. Moreover, the attachments to plaintiff's counsel's declaration in opposition demonstrate the corporate defendants have satisfied the requirements to transact business within the state. (see Dec. of Peter Sean Bradley, Ex. A and B.) Accordingly, the corporate defendants are entitled to the provisions of CCP § 395.5 which make venue proper in the county "where . . . liability arises". (*Easton, supra*, 12 Cal.App.3d at 246.) Fresno County is consequently not the proper venue for the claim.

Pursuant to 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: A.M. Simpson on 4/29/16.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Leonel Valencia, et al. v. H/S Development Company, LLC, et al.***
Superior Court Case No. 13CECG03980

Hearing Date: May 3, 2016 (Dept. 503)

Motion: Cross-Complainant Mendota Investment Company's motion for summary adjudication of its sixth and seventh causes of action as against Cross-Defendant Lee Construction

Tentative Ruling:

To grant. (Code Civ. Proc. § 437c.)

Explanation:

Generally speaking, express indemnity is not subject to equitable considerations or a joint legal obligation to the injured party, but rather is enforced in accordance with the terms of the contracting parties' agreement. (*Prince v. Pacific Gas & Elec. Co.* (2009) 45 Cal. 4th 1151, 1158; see also *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) Where each of two parties is made responsible by law to an injured party, the passively negligent party, to whom the right of indemnity inures, is entitled to shift the entire liability for the loss to the other party, whose active negligence was the proximate cause of the loss. (*Muth v. Urricelqui* (1967) 251 Cal.App.2d 901, 908.)

In *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, the court pointed out, "[C]ase law has long confirmed that, unless the parties' agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's active defense against claims encompassed by the indemnity provision." (*Crawford*, supra, at p. 555; see also *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.* (1962) 202 Cal.App.2d 99, 114 ["under the contract of indemnity, no contrary intent appearing, [indemnitor] was bound to defend the actions. (Citation.)"].)

A standardized contract between unequals is enforceable unless it defeats the reasonable expectations of the weaker party or is unconscionable. (*Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co.* (1986) 180 Cal.App.3d 639, 647.) Determining whether a contract is unconscionable begins with an inquiry into whether the contract is one of adhesion. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817-819.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694.) Where the court finds the contract adhesive, it must then determine whether "other factors are present which, under established legal rules - legislative or judicial - operate to render it [unenforceable]." (*Graham*, supra, at p. 820.) There are two judicially imposed limitations on the enforcement of adhesion contracts or provisions contained therein: (1) where such a contract or provision does not fall

within the reasonable expectations of the weaker or “adhering” party, it will not be enforced against him or her; and (2) where a contract or provision, “even if consistent with the reasonable expectations of the parties,” considered in its context, is unduly oppressive or unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.) Elements of both procedural and substantive unconscionability must be present for a court to find the contract unenforceable. (*Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042.) Where a contract is found to be one of adhesion and thus procedurally unconscionable, if the indemnity clause contained therein is not substantively unconscionable, the provision is enforceable. (*Id.*)

The Supreme Court summarized the doctrine of unconscionability as preventing contracts from imposing terms that are “overly harsh,” “unduly oppressive,” or “so one-sided as to shock the conscience[.]” (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.) The court noted that the unconscionability doctrine is not concerned with “a simple old-fashioned bad bargain.” (*Ibid.*)

Code of Civil Procedure section 1060 specifically provides for a declaration of rights pursuant to a written contract. (See *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719.) A complaint for declaratory relief is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. (*Id.*; *Linda Vista Village San Diego Homeowners Association, Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 181; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 605; see CCP §1060.)

In the case at bench, Cross-Complainant Mendota seeks summary adjudication of its sixth cause of action for breach of contract – duty to defend, and its seventh cause of action for declaratory relief, both as against Cross-Defendant Lee Construction.

The agreement entered into by Cross-Complainant Mendota and Cross-Defendant Lee provides:

(11) Sub Contractor [sic] expressly agrees to hold harmless and to indemnify Builder against all loss, damage, or claim, or whatsoever nature, arising out of performance of the work under this Contract...

(26) ...To the fullest extent permitted by law, Subcontractor shall indemnify, defend (at Subcontractor's sole expense) and hold harmless... Contractor...from and against any and all claims...demands, damages, actions, causes of action, suits, losses, judgments, fees and cost...which arise directly or indirectly or are in any way connected with the work performed, materials furnished or services provided under this Subcontract by Subcontractor or its agents. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of Subcontractor, its employees or agents whether active or passive. Said indemnity and defense obligations shall further apply, whether or not said claims arise out of the concurrent act, omission, or negligence of the Indemnified Parties, whether active or passive...

Subcontractor acknowledges and agrees that if Builder notifies Subcontractor or [sic] a claim pursuant to the Code, such notice shall immediately trigger Subcontractor's obligations under these indemnification provisions.
(Moving Party's UMF 3; Hair Decl., Exh. D.)

The parties do not dispute that they executed the agreement attached to Mr. Hair's declaration, nor do they dispute that the stucco work at issue here was performed by Cross-Defendant Lee.

The indemnity provision in the agreement clearly creates an obligation on Cross-Defendant Lee's part to indemnify Cross-Complainant Mendota should any claims be brought against Mendota that are related to the stucco work performed by Lee. The provision is not one that shocks the conscience, is unduly oppressive, or overly harsh here, nor was the indemnity provision unavailable to Cross-Defendant Lee at the time of signing, or written in unduly small type. Plaintiffs in the underlying action allege that the stucco application, product and/or systems were faulty. (First Amended Compl., 35:5-6.) Cross-Complainant Mendota has tendered its defense to Cross-Defendant Lee, triggering Lee's duty to defend Cross-Complainant Mendota pursuant to the agreement.

Cross-Complainant has met its burden, so the burden shifts to Cross-Defendant to set forth facts showing the existence of a triable issue of material fact. Cross-Defendant Lee alleges that the indemnity provision is unenforceable because the contract is one of adhesion, that mere incidental involvement is insufficient to trigger the duty to defend or indemnify, that Cross-Complainant has failed to establish it has or will incur legal fees, and that the issue of duty cannot be fully disposed of at this time. As stated above, an indemnity provision may be enforced if it is not substantively unconscionable, even if the contract itself is one of adhesion. Cross-Defendant Lee has failed to show that the indemnity provision at issue is substantively unconscionable. Moreover, Cross-Defendant Lee's assertion that its involvement here is "merely incidental," is irrelevant in light of the specific provisions of the agreement. The agreement requires, in clear and unambiguous language, that Cross-Defendant Lee indemnify and defend Cross-Complainant when any complaint against Cross-Complainant indicates Cross-Defendant Lee's stucco work. Here, the first amended complaint does just that. (See First Amended Compl., 35:5-6.) Lastly, the agreement does not require Cross-Complainant prove that it has or will incur legal fees in order that Cross-Defendant Lee's duty to defend arises. (See also Civil Code sect. 2782.05, subds. (e), (f).) The issue of Cross-Defendant Lee's duty to indemnify and defend Cross-Complainant in the instant action is completely disposed of with the finding that the agreement entered into by the parties requires Cross-Defendant Lee to indemnify and defend Cross-Complainant Mendota against all claims, suits and causes of action which arise from or are connected with the work performed by Cross-Defendant Lee, where, as here, Plaintiffs' first amended complaint includes causes of action alleging faulty stucco work.

