

Tentative Rulings for July 26, 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).)

14CECG02408 *Rattan v. Singh et al.* (Dept. 502)

14CECG03916 *Carter v. Central Unified School Dist. et al. and related cross- action*
(Dept. 402)

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

14CECG00069 *Timothy Sailors v. City of Fresno* is continued to Tuesday, August 9, 2016 at 3:30 p.m. in Dept. 503.

15CECG03847 *Efrain Garcia vs. CCS Companies* is continued to Wednesday August 3, 2016 at 3:30 p.m. in Dept. 502.

16CECG00949 *Bradshaw v. Acqua Concepts, Inc., et al.* Motion for Bond is continued to Thursday, August 18, 2016, at 3:30 p.m. in Dept. 503. Demurrer, Motion to Strike and Motion to Compel are continued to Tuesday, 30, 2016 at 3:30 p.m. in Dept. 503.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: **Thomas v. Community Regional Medical, et al.**
Case No. 14 CE CG 02526

Hearing Date: July 26th, 2016 (Dept. 402)

Motion: Defendant Fresno Community Hospital's Motion for Summary Judgment

Tentative Ruling:

To grant defendant Fresno Community Hospital's motion for summary judgment as to the entire complaint. (Code Civ. Proc. § 437c.)

Explanation:

Under Code of Civil Procedure section 340.5, "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (Code Civ. Proc., § 340.5.)

In addition, "For the purposes of this section: (1) 'Health care provider' means... any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code..." (Code Civ. Proc. § 340.5, subd. (1).) "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Code Civ. Proc., § 340.5, subd. (2).)

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.... [T]he limitations period begins once the plaintiff ' ' has notice or information of circumstances to put a reasonable person on *inquiry*' " ' [Citations.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111, italics in original, footnote omitted.)

“While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.” (*Id.* at 1112, internal citations omitted.)

Here, plaintiff's second amended complaint alleges six separate “counts” against the defendants, but each is clearly based on alleged professional negligence. Defendant Fresno Community Hospital also qualifies as a “health care provider”, as it is a licensed health facility under Division 2 of the Health and Safety Code, section 1250. Therefore, plaintiff was required to bring her claims for professional negligence against Fresno Community within one year of the date that she first knew or should have known about her injury and its negligent cause, or three years of the injury, whichever occurred first.

However, the undisputed facts show that plaintiff knew about her injury and its allegedly negligent cause since at least September of 2012, yet she did not file her complaint for negligence until August 28th, 2014, almost two years later. Plaintiff testified in her deposition that she underwent a surgery on May 3rd, 2003 to repair a small bowel obstruction and to repair a ventral hernia. At that time, Dr. Parvez placed a composite mesh in her abdomen. (Defendant's Undisputed Material Fact No. 5.) After the surgery, plaintiff suffered from excruciating pain, trouble with bowel movements, and loss of appetite. (UMF No. 7.)

Eventually, plaintiff underwent another surgery on September 7th, 2012 at defendant Fresno Community Hospital, in which Dr. Bilello removed the mesh from her abdomen. (UMF No. 6.) After the surgery, Dr. Bilello told her that he had removed the mesh, and plaintiff realized that the hospital should have told her about the danger posed by the mesh much earlier. (UMF No. 9.) She believed that, had the hospital or Dr. Parvez had told her earlier about the problems with the mesh, she could have taken steps to deal with the problems sooner. (UMF No. 10.)

Plaintiff then had to undergo a third surgery on September 27th, 2012, to deal with an abdominal hematoma and infection. (UMF No. 7.) She understood at the time that the complications from the September 27th, 2012 surgery were caused by the hospital's negligence because she had been discharged too soon and there had not been adequate follow-up from the last surgery. (UMF No. 11.) She believed that the hospital was responsible for sending her home too early. (*Ibid.*) She also found out that she had developed a bed sore after the September 7th, 2012 surgery. (UMF No. 12.) She suspected that the bed sore was due to the hospital's negligence, since one of the nurses told her “they let you lay on your back too long.” (*Ibid.*)

Plaintiff has not filed an opposition or attempted to introduce any admissible evidence to dispute any of these facts. Thus, according to the undisputed facts, plaintiff first learned or suspected of the allegedly negligent acts of the hospital in September of 2012. As a result, she was required to file her complaint for negligence against the hospital by no later than September of 2013. (Code Civ. Proc. § 340.5.) However, plaintiff did not actually file her complaint until August 28th, 2014, nearly two years after she first learned or suspected of the injuries and their negligent cause.

(23)

Tentative Ruling

Re: **State of California, acting by and through the State Public Works Board v. HPI/GSA-4C, L.P.**
Superior Court Case No. 15CECG01906

Hearing Date: Tuesday, July 26, 2016 (**Dept. 402**)

Motion: Plaintiff The State of California, acting by and through the State Public Works Board's, Motion for Order of Possession

Tentative Ruling:

To deny without prejudice Plaintiff State of California, acting by and through the State Public Works Board's, motion for order of possession. (Code Civ. Proc., § 1255.410.)

Explanation:

Plaintiff State of California, acting by and through the State Public Works Board ("Plaintiff"), moves for an order for prejudgment possession of Parcel Nos. FB-10-0112-1, FB-10-0112-01-01, and FB-10-0112-02-01 pursuant to Code of Civil Procedure section 1255.410.

However, Plaintiff's motion for order of possession fails to comply with the procedural requirements of Code of Civil Procedure section 1255.410, subdivision (a). First, although Plaintiff's motion for order for possession attempts to describe the property by reference to its complaint, Plaintiff's first amended complaint is the current operative pleading. While Plaintiff attempts to correct its reference to its original complaint in the notice of errata it filed on July 11, 2016, the notice of errata does not correct the reference to Plaintiff's original complaint because Code of Civil Procedure section 1255.410, subdivision (b) requires that the all motion papers be served not less than 90 days before the hearing date. Therefore, Plaintiff's motion fails to "describe the property of which the plaintiff is seeking to take possession, which description may be by reference to the complaint[.]" (Code Civ. Proc., § 1255.410, subd. (a).) Second, Plaintiff's motion fails to "state the date after which the plaintiff is seeking to take possession of the property." (*Id.*) Third, although Plaintiff's motion includes some of the statement required by Code of Civil Procedure section 1255.410, subdivision (a), the motion fails to include the entire required statement. Specifically, Plaintiff's motion fails to include the following portion of the required statement: "If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship." (*Id.*)

Consequently, the Court denies without prejudice Plaintiff's motion for order for possession pursuant to Code of Civil Procedure section 1255.410.

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Ergur v. Catron***
Superior Court Case No.: 16CECG00481

Hearing Date: July 26, 2016 (**Dept. 403**)

Motion: Demurrer by Defendants Gary Catron and Leslie Catron

Tentative Ruling:

To sustain the general demurrer to the eighth cause of action, without leave to amend, and to overrule the remaining demurrers, with Defendants granted 10 days' leave to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

The Court sets an order to show cause as to why service of the summons and complaint has not been made on Defendant Raymond Scott for August 26, 2016, at 10:02 in Dept. 401.

Explanation:

The eighth cause of action for punitive damages fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) There is no cause of action for punitive damages. (*Grieves v. Superior Court* (1984) 157 Cal. App. 3d 159, 163-164.)

Grounds for demurrer are entirely statutory, and are generally found in Code of Civil Procedure section 430.10. Grounds for demurrer are not found in Corporations Code sections 15910.01-15910.06, Code of Civil Procedure section 430.80, or Corporations Code section 800.

The remaining demurrers are not well-taken, and are overruled.

A demurrer for lack of legal capacity to sue under subdivision (b) is in the nature of a contention that the party is a minor, deceased, or lacking decision-making capacity, and is rarely disclosed on the face of the pleading. It is differentiated from a lack of standing to sue, which is ground for general demurrer. (*Rylaarsdam & Smalley Edmon, Cal. Prac. Guide: Civ. Proc. Before Trial* (TRG 2016) §§7:69.1-7:72, citing *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 995, 1009.)

Special demurrers for uncertainty are disfavored, and will be sustained only where the complaint is so bad that the defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or

her. (Code Civ. Proc., § 430.10, subd. (f); *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid.*)

A special demurrer for uncertainty will be overruled where the defendant has not distinctly specified exactly how or why the pleading is uncertain, and where the uncertainty allegedly appears by reference to page and line numbers of the complaint. (*Fenton v. Groveland Community Services District* (1982) 135 Cal.App.3d 797, 809, overruled in part on other grounds in *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 328.) Defendants have not complied.

A demurrer based on Code of Civil Procedure section 430.10, subdivision (g) is: "In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subd. (g); *Miles v. Deutsche Bank Nat'l Trust Co.* (2015) 236 Cal.App.4th 394, 401.) There is no cause of action for breach of contract alleged here.

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: KCK **on 07/25/16 .**
 (Judge's initials) (Date)

(5)

Tentative Ruling

Re:

Gwartz, et al. v. Weilert, et al.
Superior Court Case No. 09CECG01032

Hearing Date:

July 26, 2016 **(Dept. 403)**

Motions:

- (1) By Judgment Creditors for Clarification of the Amounts of Costs and Fees Awarded in Total;
- (2) By Judgment Creditors to Dismiss Interpleader Action

Tentative Ruling:

To deny the first motion and order the judgment creditors to file a motion to amend the judgment.

To release the interpleaded funds held in trust under Case No. 13 CECG 02046 (minus the award of fees and costs to Dowling & Aaron) to Gwartz & Skigin as co-trustees of the Pendragon Trust. The Clerk's Office is ordered to release the amount of \$129,453.32.

To deny the remainder of the second motion.

Explanation:

Motion seeking Clarification

According to 2 *Witkin, Cal. Proc. 5th Courts* § 361 (2008):

"The familiar declaration that the clerk has purely ministerial functions does not mean that the clerk's duties are confined to such clerical tasks as accepting papers for filing and keeping records. Many of the clerk's acts are judicial in the sense that they determine the rights of parties to the litigation; e.g., the entry of a judgment or order, default, or dismissal. The significance of the "ministerial" label is that the clerk has **neither power to decide questions of law nor any discretion in performing those judicial duties**; the clerk must act in strict conformity with statutes, rules, and orders of the court. [*Lane v. Pellissier* (1929) 208 Cal. 590, 592, 283 P. 810--no power to change record entry of judgment to correct what he thought was mistake in date; *Isbell v. Sonoma* (1978) 21 Cal.3d 61, 71--no authority to reject confession of judgment for inadequate proof that debtor has made valid waiver of due process rights; *Rose v. Leland* (1912) 20 Cal.App. 502, 504, 129 P. 599--no power to enter default by determining that defendant's answer is legally insufficient; *Liberty Loan Corp. of North Park v. Petersen* (1972) 24 Cal.App.3d 915, 919--no authority to enter default judgment for deficiency after creditor has dealt with and sold personal property that was security for debt sued upon; exercise of judicial discretion is required.]"

In the motion at bar, the issuance of the writ is a ministerial act. See CCP § 699.510(c)(2). Notably, the Order after the ex parte hearing instructed Plaintiffs to file a noticed motion seeking leave to amend the judgment. The Clerk's Office instructed the Plaintiffs to do the same. The Clerk's Office is not empowered to interpret the various orders taxing costs, awarding attorney's fees, etc. and then add amend the judgment on its own. See *Lane v. Pellissier*, supra. Nor will another order from this Court provide the relief that the Plaintiffs are seeking. Plaintiffs must file a noticed motion seeking leave to amend the judgment. The motion seeking clarification will be denied.

Motion seeking to Dismiss the Interpleader Action

Interpleader in General

When a person is subject to conflicting claims for money or property, that person may bring an interpleader action pursuant to CCP §386(b) to compel the claimants to litigate their claims among themselves. [*City of Morgan Hill v Brown* (1999) 71 Cal.App.4th 1114, 1122]. Once the person admits liability and deposits the money or property with the court, the person is discharged from liability and is free of any obligation of participating in the litigation between the claimants. The purpose of interpleader is to prevent a multiplicity of suits. *Id.* at 1122. Interpleader actions are equitable proceedings. [*Dial 800 v Fesbinder* (2004) 118 Cal.App.4th 32, 42].

When a stakeholder has requested attorney's fees and costs, the court must rule on this request at the time of ordering the stakeholder's discharge and dismissal and may not wait until the trial among the adverse claimants. See CCP §386.6(a); *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 Cal.App.3d 1028, 1036 and *Great West-Life Assur. Co. v Superior Court* (1969) 271 Cal.App.2d 124, 128. As for the trial, the interpleader action is tried to the court; parties to the interpleader action are not entitled to a trial by jury. [*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1512]

Case at Bench

The interpleader action was filed as Case No. 13 CECG 02046. It was assigned to the Honorable Jeffrey Hamilton. On June 27, 2103, a verified complaint was filed by Pathology Associates, a partnership against Brian Gwartz and Cheryl Skigin, as co-trustees for the Pendragon Trust and Michael A. Weilert, M.D. Inc. The same day, Pathology Associates deposited the sum of **\$155,070** with the Court. On September 12, 2013, Weilert, M.D., Inc. filed a notice of bankruptcy. On October 2, 2013, Michael Weilert filed a notice of bankruptcy. See Notices of Entries.

On December 16, 2013, Pathology Associates obtained relief from the stay of the bankruptcy proceeding instituted by Weilert, M.D., Inc. and on December 30, 2013, Pathology filed a motion seeking discharge and an award of costs and attorney fees. See Request for Judicial Notice filed in On January 3, 2014, Gwartz and Skigin filed a demurrer. They also filed opposition to the motion seeking discharge. Pathology filed opposition to the demurrer. Both sides filed replies in support of their respective motions.

On January 28, 2014, Judge Hamilton took these matters under advisement. On February 5, 2014, an order was entered whereby the demurrer was overruled, the motion for discharge was granted and Pathology Associates was awarded the sum of **\$25,616.68**. Finally, Case No. 13 CECG 02046 was consolidated with the case at bench.

Merits

In support of the motion at bench, the Judgment Creditors have filed a stipulation signed by Robert Hawkins, the Trustee appointed in the Chapter 7 proceedings filed by Michael Weilert, M.D., Inc. [hereinafter MWD Inc.] See Stipulation filed on June 17, 2016. Notably, Hawkins stipulates that the Trustee is the holder of all rights in the assets of MWD Inc. He further stipulates that there are no claims in the MWD Inc. estate which have a competing or superior interest to Pendragon to the Interpleader funds. MWD Inc. has no right, title or interest to the Interpleader funds. MWD Inc. stipulates to the release of the Interpleader funds to Pendragon. See Stipulation at page 5 ¶¶ 1, 5-7, 8. The stipulation will be accepted as an admission that MWD Inc. has no claim to the funds.

In light of the stipulation, the Court will enter release the interpleader funds (less the attorney fees and costs) to the judgment creditors pursuant to CCP § 386(e).

Judgment Creditors also requests that the court:

(1) adjust the award of fees pursuant to CCP §386.6 to place that burden upon the alleged competing claimant MWD; and

(2) awarding Pendragon fees incurred by the refusal of third party obligor, Pathology Associates to conform to the Assignment Order pursuant to CCP §§ §701.010 and §701.020."

See Notice of Motion at page 2 lines 6-14. The second request is brought if the first request is not granted.

CCP § 386.6 states:

(a) A party to an action who follows the procedure set forth in Section 386 or 386.5 may insert in his motion, petition, complaint, or cross complaint a request for allowance of his costs and reasonable attorney fees incurred in such action. In ordering the discharge of such party, the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court. At the time of final judgment in the action the court may make such further provision for **assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper.**

(b) A party shall not be denied the attorney fees authorized by subdivision (a) for the reason that he is himself an attorney, appeared in pro se, and performed his own legal services.

Tentative Rulings for Department 501

Tentative Rulings for Department 502

Tentative Rulings for Department 503

Tentative Ruling

(17)

Re: **McKesson Medical-Surgical, Inc. v. Valley Medical Systems, Inc.**
Superior Court Case No. 16 CECG 00449

Hearing Date: July 26, 2016 (Dept. 503)

Motion: Plaintiff's Motion to Compel Responses to Special Interrogatories, Set One
Plaintiff's Motion to Compel Responses to Request for Production, Set One
Plaintiff's Motion to Deem Requests for Admissions, Set One
Admitted

Tentative Ruling:

To grant the Motions to Compel Responses to Special Interrogatories, Set One, and Requests for Production, Set One, as to defendant Valley Medical Systems, Inc. fdba Valley Home Health, fdba Mercury Medical Equipment, fdba Valley Rehab Systems. Defendant Valley Medical Systems, Inc. fdba Valley Home Health, fdba Mercury Medical Equipment, fdba Valley Rehab Systems will provide verified responses to the Special Interrogatories, Set One, and Requests for Production, Set One served by plaintiff without objection within 15 days after the clerk's service of this order.

To grant the Motion to Deem Admissions Admitted. The truth of the matters specified in the Requests for Admission, Set One, is to be deemed admitted, unless defendant Valley Medical Systems, Inc. fdba Valley Home Health, fdba Mercury Medical Equipment, fdba Valley Rehab Systems serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.230.

Defendant Valley Medical Systems, Inc. fdba Valley Home Health, fdba Mercury Medical Equipment, fdba Valley Rehab Systems shall pay the law firm of Sweet & Walker the sum of \$830 in sanctions within 30 days of service of this order.

To order plaintiff to pay additional filing fees of \$60.00 to be due and payable to the court clerk within 30 days of service of this order. (Gov. Code § 70617, subd. (a).) Compelling responses to three sets of discovery documents constitutes three motions.

Explanation:

Special Interrogatories:

Special interrogatories were served by mail March 30, 2016. (Walker Decl. ¶ 2; Exhibits B, C.) No responses have been received. (Walker Decl. ¶ 4-5.) The motion to

compel the initial responses to the special interrogatories is granted. (Code Civ. Proc., §§2030.260, subd. (a), 2030.290, subd. (b).)

Requests for Production:

Requests for Production of Documents were likewise served by mail March 30, 2016. (Walker Decl. ¶ 2; Exhibits D, E.) No responses have been received. (Walker Decl. ¶ 4-5.) The motion to compel the production of documents is granted. (Code Civ. Proc., §2031.300, subd. (b).)

Motion to Deem Requests for Admission Admitted:

Code of Civil Procedure section 2033.280, subdivision (b) provides that if a party fails to timely respond to requests for admission "The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction."

A set of request for admissions was served on defendant by mail March 30, 2016. (Walker Decl. ¶ 2; Exhibits X, Y.) No responses have been received (Walker Decl. ¶ 5.) The court will deem the requests for admission admitted. Code of Civil Procedure section 2033.280, subdivision (b) leaves the court no discretion to deny the motion where no opposition has been filed. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828; *Brigante v. Huang* (1993) 20 Cal.App.4th 1569.) Accordingly, the court must grant the motion for order deeming the matters admitted unless plaintiff serves a proposed response that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.230 at or before the hearing. (*Tobin, supra*, 3 Cal.App.4th at p. 828.)

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

Tentative Ruling

Issued By: A.M. Simpson **on** 7/25/16.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: **Talesfore v. Clovis Auto Cars dba Clovis Volkswagen**
Court Case No. 16 CECG 00480

Hearing Date: July 26, 2016 (Dept. 503)

Motion: Petitioners John and Wendy Talesfore's Petition to Compel Arbitration or, in the alternative, for Appointment of Arbitrator

Tentative Ruling:

To deny the petition to compel arbitration. To continue the hearing on the alternate petition to appoint an arbitrator to Tuesday, August 16, 2016, at 3:30 p.m. in Department 503. Petitioners shall file a copy of the contract, wherein the entire arbitration clause is clearly readable by August 2, 2016. A courtesy copy shall be delivered to Department 503. No further briefing is allowed.

Explanation:

The Petition to Compel Arbitration

Procedurally, the party moving to compel arbitration must file a petition to compel arbitration (if no lawsuit is currently pending), prepared in accordance with the rules applicable to motions generally. (Knight, Fannin, Chernick & Haldeman, *California Practice Guide: Alternative Dispute Resolution* (Rutter Group 2015) "Contractual Arbitration" §§ 5:301, 5:304; Code Civ. Proc. §1290.2.) However, a petition to compel arbitration is not a motion. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (Code Civ. Proc., § 22.) "Every other remedy is a special proceeding." (Code Civ. Proc., § 23.) "Special proceedings" must be commenced independently of an action by petition in order to obtain special relief. (Code Civ. Proc., §§ 420, 422.10; *In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532, 537.)

Specifically, "a Code of Civil Procedure section 1281.2 petition to compel arbitration falls within the provisions of the Code of Civil Procedure for "special proceedings of a civil nature." (*Bouton v. USAA Cas. Ins. Co.* (2008) 167 Cal.App.4th 412, 427.) Code of Civil Procedure section 1290 provides that, if no lawsuit is pending, a proceeding to compel arbitration must be commenced by filing a petition. The petition must allege specific facts, as opposed to mere conclusions, demonstrating the existence of an arbitrable controversy. (*Graphic Arts Int'l Union v. Oakland Nat'l Engraving Co.* (1986) 185 Cal.App.3d 775, 781.) A party seeking to compel arbitration pursuant to Code of Civil Procedure section 1281.2 must also "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.) Finally, the petition to compel must set forth the provisions of the written

agreement and the arbitration clause verbatim, or such provisions must be attached and incorporated by reference. (Cal. Rules of Court, rule 3.1330; see *Condee v. Longwood Mgmt. Corp.* (2001) 88 Cal.App.4th 215, 218-219.)

Here, while petitioners have filed, on February 19, 2016 and May 17, 2016, documents entitled Notice of Petition and Petition to Compel Arbitration, or in the Alternative for Appointment of Arbitrator," the documents do not satisfy the requirements of a Code of Civil Procedure section 1290 petition. First, they do not set forth specific facts demonstrating the existence of an arbitrable controversy. Both documents simply refer to "Petitioner's claims" without describing those "claims" in any factual manner. Second, the Petition neither attaches, nor describes, the arbitration agreement. Third, the petition does not demonstrate that respondent refuses to arbitrate the controversy. Rather, it indicates that respondent refuses to arbitrate before a specific forum, JAMS.

Accordingly, the petition to compel arbitration cannot be granted.

Alternative Petition to Appoint Arbitrator

The Court is inclined to rule on the merits of petitioner's alternative petition to appoint an arbitrator. However, as an initial matter, every single copy of the arbitration agreement submitted to the court is illegible in some material part. The court is reluctant to rely on the parts of the arbitration clause that the parties' cite in their briefs, since the quotes are heavily marked with ellipses and the Court must determine for itself the meaning of the arbitration clause as a whole. Accordingly, the Court requests that a clean, clear copy of the contract be provided for its review. The court will continue the matter and no further briefing will be entertained.

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: A.M. Simpson **on** 7/25/16.
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: **Champion Home Builders, Inc. v. CFG Capital, Inc.**

Case No. 15CECG03330

Hearing Date: July 26, 2016 (Dept. 503)

Motion: By Plaintiff Champion Home Builders, Inc. to discharge and for attorney's fees and costs.

Tentative Ruling:

To grant the motion for discharge; to deny the motion for attorney's fees and costs without prejudice.

Explanation:

Plaintiff Champion Home Builders, Inc., filed a complaint-in-intervention seeking an adjudication among different parties over who has a proper interest in money in its possession. To that end, it interpleaded \$18,000.00 into Fresno Superior Court pursuant to CCP §§386, *et seq.*

According to the Complaint-in-Intervention, Defendant Moreno took out a loan for \$82,500 from CFG. (Cmplt. ¶16.) Mr. Moreno deposited \$16,877.64 in escrow for a property located at 2959 South Hardt Street in Fresno, California. (Cmplt. ¶16.) These events occurred between September 26th and 29th, 2014. (Cmplt. ¶16.) On October 23, 2014, CFG wrote a check for \$18,000 payable to Plaintiff. (Cmplt. ¶17.) Beginning in July, 2015, Defendant Moreno sought the return of the deposit plus interest. (Cmplt. ¶¶17-10.)

Having now deposited the funds with the Court, Plaintiff now seeks to be discharged from the case and for attorney's fees. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 698.) The effect of this would be to discharge plaintiff from further liability, and to keep the fund in the court's custody until the rights of potential claimants of the moneys can be determined. (*Id.*)

Plaintiff has filed an affidavit supporting its right to an interpleader. (Code Civ. Proc. §§386, subd. (a); 386.5) There has been no objection and the papers appear to be in order, so the motion for discharge is granted. (See, e.g., *City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1127 (discharge proper where no objection is filed).)

Pursuant to Code of Civil Procedure §386.6, the interpleading party may seek costs and attorney's fees. (Code Civ. Proc. §386.6, subd. (a).) An award of such

attorney's fees is within the discretion of the Court. (*Farmers New World Life Ins. Co. v. Rees* (2013) 219 Cal.App.4th 307, 320-21 (whether and how much to award attorney fees for an interpleader action is within the trial court's discretion).)

Here, Plaintiff has presented a declaration of counsel in support of its claim for attorney's fees. However, the request is very conclusory, as there is no itemization of the number of hours worked by each attorney, no evidence supporting the basis for whether the attorneys hourly rates are reasonable, and no timesheets explaining what the attorneys' work on this case comprised.

Therefore, the Court denies the motion for attorney's fees without prejudice to ruling on it at a later date with a more proper evidentiary foundation.

Pursuant to California Rules of Court, rule 3.1312, subdivision (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: A.M. Simpson **on** 7/25/16.
(Judge's initials) (Date)