

Tentative Rulings for July 27, 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).)

14CECG02569 *Yarael v. Coalinga Regional Medical Center (Dept. 503)*

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

15CECG03951 *Green v. California Department of Corrections and Rehabilitation is continued to Wednesday, August 3, 2016, at 3:30 p.m. in Dept. 403.*

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20)

Tentative Ruling

Re: ***Cobblestone Creek, Inc., et al. v. Hunter Insurance Services, Inc., et al.***, Superior Court Case No. 14CECG03578

Hearing Date: **July 27, 2016 (Dept. 402)**

Motion: ProBuilders Specialty Ins. Co.'s Motion for Leave to File Cross-Complaint

Tentative Ruling:

To deny.

Explanation:

ProBuilders seeks leave to file a cross-complaint (Hutchinson Dec. Exh. A) against co-defendant Hunter Insurance Services. ProBuilders contends that at the time of the alleged acts and omissions, there was in effect a Producer Agreement between ProBuilders and Hunter (Parker Dec. ¶ 5.a.), and subsequent to the time of the alleged acts or omissions by Hunter, additional Producer Agreements were entered into by and between ProBuilders and Hunter in 2006, 2009, 2010 and 2011. ProBuilders contends that pursuant to these Producer Agreements, Hunter is obligated to indemnify and hold ProBuilders harmless from the claims brought by Cobblestone in the instant action. Further, pursuant to the Producer Agreements, Hunter was, and is obligated to obtain and maintain errors and omissions insurance.

Hunter opposes the motion first on the ground that ProBuilders was not a party to the Producer Agreements. The motion is not denied on this ground. While the primary contracting party is National Builders Insurance Services, Inc. ("NBIS"), the 2003 and 2006 Producer Agreement specifically referred to ProBuilders (or in the 2003 agreement its predecessor Builders & Contractors Insurance Company, RRG) as the "Insured," which had rights and obligations under the agreements. The indemnity clause is broad enough to encompass ProBuilders. At the very least the merits of the claims ProBuilders seeks to assert is not an issue that should be conclusively decided at this stage.

However, there remains the issue of the timing of this motion.

"Even if a [proposed pleading] is in proper form, unwarranted delay in presenting it may, of itself, be a valid reason for denial." (*P&D Consultants Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) Courts are much more critical of proposed pleadings when offered "after long unexplained delay, or on the eve of trial,

Tentative Rulings for Department 403

03

Tentative Ruling

Re: **Bank of Stockton v. Garcia**
Case No. 12 CE CG 03902

Hearing Date: July 27th, 2016 (Dept. 403)

Motion: Defendants/Cross-Defendants John and Janie Garcia's
Motion to Quash Subpoena to World's Foremost Bank

Tentative Ruling:

To deny the motion to quash the subpoena to World's Foremost Bank, as the subpoena is now moot. (Code Civ. Proc. § 1987.1.) To deny plaintiffs' request for monetary sanctions against defendants. (Code Civ. Proc. § 1987.2.)

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED ON WEDNESDAY, AUGUST 3, 2016 AT 3:30 IN DEPARTMENT 403.

Explanation:

According to counsel for Morris and Sharon Garcia, World's Foremost Bank has refused to produce any documents pursuant to the California subpoenas, and will not produce any documents until Morris and Sharon obtain a subpoena from a Nebraska court under Nebraska law. While defense counsel has not provided a declaration stating these facts, she does make this representation in her briefs, so the court intends to find that the motion to quash is moot and deny it.

However, the court also intends to deny the plaintiffs' request for monetary sanctions against John and Janie Garcia, as the only reason that the motion has been denied is because the bank refused to respond to the subpoena. The motion would likely have been granted if it had not become moot, especially in light of the court's order sustaining the demurrer to the third amended complaint without leave to amend. Since there is no longer an operative complaint against John and Janie or the LLC's, there is no basis for Morris and Sharon to seek to obtain their financial documents. Therefore, the court intends to find that the motion to quash was justified even though it later became moot, and sanctions are not warranted against defendants.

Pursuant to CRC 3.1312 and CCP §1019.5(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 07/26/16.**
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Marcum v. St. Agnes Medical Center et al.***, Superior Court
Case No. 15CECG01327

Hearing Date: **July 27, 2016 (Dept. 403)**

Motion: Defendant Herbert Lee Thomas's Motion for Trial Setting
Preference

Tentative Ruling:

To grant. (Code Civ. Proc. § 36(a).) The parties are to appear in Dept. 403 at 3:30 p.m. on Wednesday, August 3, 2016 to discuss the accommodations requested by the opposing parties.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE ENTERTAINED ON WEDNESDAY, AUGUST 3, 2016 AT 3:30 IN DEPARTMENT 403.

Explanation:

Code of Civil Procedure section 36, subdivision (a) states, in relevant part:

A party to a civil action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court makes all of the following findings:

- (1) The party has a substantial interest in the action as a whole.
- (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

The motion must be supported by declaration showing good cause to grant the motion. (Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2015) § 12:272.) The declaration must show facts entitling the case to priority in setting.

Parties over the age of 70 are not automatically entitled to preference. They must also establish that they have an interest in the action as a whole, and that their health is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. (Code Civ. Proc. § 36.) Thus, the court has discretion in determining whether the extent of the party's interest and the party's physical health requires trial setting preference. (Weil & Brown, *supra*, at § 12:246.1.)

Defendant Herbert Thomas clearly has an interest in the action as a whole. The court finds that the declarations submitted in support of the motion supply sufficient information to conclude that that the current health and medical condition of Herbert

Thomas, at 93 years of age, is such that preference is necessary to prevent prejudicing his interest in the litigation.

Though plaintiff filed an opposition, he does not dispute that both elements of section 36, subdivision (a), are met in this case. The opposition is solely based on the status of the pleadings. But that is not a relevant consideration under the statute. The court is required to grant the motion if the two specified findings are made.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(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 07/26/16.**
 (Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***William E. Johnson and Mala Doreen Johnson v. California Department of Transportation and California Highway Patrol***
Superior Court Case No. 13 CECG 02003

Hearing Date: July 27, 2016 **(Dept. 403 on behalf of Dept. 501)**

Motion: By Defendant California Department of Transportation seeking a court order to depose Alyssa Marie Villanueva

Tentative Ruling:

To grant the motion. The deposition of Alyssa Marie Villanueva will take place at the Central California Women's Facility in Chowchilla, CA on July 29, 2016. Counsel for the moving party is responsible for making arrangements with the Litigation Coordinator for the facility at (559) 665-6025.

Explanation:

On June 30, 2016, Defendant "Caltrans" filed a motion seeking a court order to depose via video Alyssa Marie Villanueva at the Central California Women's Facility in Chowchilla, CA. Ms. Villanueva was convicted of driving under the influence and striking and killing Plaintiff's decedent, Regan Johnson while she was pulling up the cones on Hwy 99 during construction. The motion was served on Plaintiffs' counsel and Villanueva's defense counsel. It is unopposed.

Merits

CCP § 1995. Witness a prisoner; deposition; production before court; courts authorized to order production states:

If the witness be a prisoner, confined in a jail within this state, an order for his examination in the jail upon deposition, or for his temporary removal and production before a court or officer may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a small claims court.
2. By a justice of the Supreme Court, or a judge of the superior court of the county where the action or proceeding is pending, if pending before a small claims court, or before a judge or other person out of court.

CCP § 1996. Witness a prisoner; order for production before court; motion; supporting affidavit states:

Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 1997. Witness a prisoner; production before court in county of imprisonment; deposition states:

If the witness be imprisoned in a jail in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

The Declaration of Kristina Garabedian is offered in support of the motion. She is an attorney and an associate at the law firm providing a defense for Cal Trans. She states that Villanueva is incarcerated at the Women's Facility in Chowchilla for the death of Regan Johnson. Garabedian further states that Villanueva is expected to testify as to the circumstances surrounding her intoxication on the night of July 11, 2012 and her driving while intoxicated whereby she drove into the closed lanes and fatally struck Regan Johnson on July 11, 2012. See Declaration at ¶¶ 1, 3-5.

The requirements of CCP §§ 1995-1997 have been met. The motion will be granted.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 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: KCK **on 07/25/16.**
 (Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(29)

Tentative Ruling

Re: ***Tonya MacDonald v. Daniel Ayers, et al.***
Superior Court Case No. 14CECG03418

Hearing Date: July 27, 2016 (Dept. 502)

Motions: Default judgment against Defendant Carolyn Ayers-Latham;
Motion to compel, request for admissions against Defendant Daniel Ayers

Tentative Ruling:

To deny the request for entry of default judgment against Defendant Carolyn Ayers-Latham, without prejudice. (Code Civ. Proc. §585(c).)

To take off calendar the motion to compel and request for admissions against Defendant Ayers, without prejudice to Plaintiff re-filing these motions, unless Plaintiff appears at the hearing with proofs of service of the motions showing service on Defendant Ayers in conformance with Code of Civil Procedure section 1005 (Code Civ. Proc. §1005.5), and proofs of service of the discovery requests at issue.

Explanation:

Default Judgment

Where default has not been entered against a defendant, a request for default judgment is premature. (Code Civ. Proc. §585(c).) Here, Defendant Ayers-Latham's default has not been entered. (See Request to Enter Default, filed 6/13/2016.) The Court notes that the clerk's basis for denial of Plaintiff's request to enter default was in error. The form complaint used by Plaintiff was one for personal injury, such that it would appear to the clerk that a statement of damages was required, as is the case in a personal injury action. However, as Plaintiff's claims against Defendants do not in fact sound in personal injury, no statement of damages need be served and filed. Unfortunately, there are other errors on Plaintiff's Request to Enter Default, such that the request is defective and the Court cannot at this time order the entry of Defendant Ayers-Latham's default.

At item 6(a) of Plaintiff's Request to Enter Default, Plaintiff failed to list the name of the party to whom the request was not mailed. Also, some of the costs listed in the Memorandum of Costs at item 7 are improper. (See Code of Civ. Proc. §1033.5.) Because of these defects, Defendant Ayers-Latham's default cannot be entered at this time.

If, at a future date, Plaintiff obtains entry of default against Defendant Ayers-Latham and wishes to then seek a default judgment pursuant to California Rules of Court, rule 3.1800, Plaintiff will need to obtain a new hearing date for the default prove-

up. (See Superior Court of Fresno County, Local Rules, rule 2.2.1; Code Civ. Proc. §585(c).) Note, however, that because the defense asserted by Defendant Ayers in his answer could, if proven, exonerate Defendant Ayers-Latham, Plaintiff will need to wait until resolution of the action on the merits prior to seeking a default judgment against Defendant Ayers-Latham. In other words, Plaintiff may seek entry of default against Defendant Ayers-Latham by filing a corrected Request to Enter Default; however a default *judgment* against Defendant Ayers-Latham may not be sought or entered until after resolution of the entire action. (See, e.g., *Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co.* (1960) 184 Cal.App.2d 649, 655; *Mirabile v. Smith* (1953) 119 Cal.App.2d 685, 688.) As entry of default is prerequisite to entry of default judgment, Plaintiff's request for entry of default judgment against Defendant Ayers-Latham is denied without prejudice.

Motion to Compel; Request for Admissions

In order to preserve a party's due process rights, a court cannot hear a motion that has not been properly served on the other party in conformity with the service provisions of Code of Civil Procedure section 1005. (See also Code Civ. Proc. §1005.5 [motion is "deemed to have been made" upon filing *and* service of the notice of motion].)

Here, Plaintiff has not filed proofs of service of her motion to compel or request for admissions, on Defendant Ayers. Accordingly, unless Plaintiff can provide such proofs of service at the hearing, showing service effected within the statutory timeframe, the Court cannot hear the motions, and they are taken off calendar without prejudice to Plaintiff filing them again, with proper proofs of service.

The Court notes that the proofs of service of Plaintiff's discovery requests on Defendant Ayers are also absent from the file. Though Plaintiff attaches copies of the discovery requests themselves, no proof of service was submitted for either. Plaintiff is not required to *file* the proofs of service with the court (Code Civ. Proc. §§ 2030.280; 2033.270), however where a plaintiff moves to compel a party to respond to a discovery request, or to deem the matters contained in requests for admissions admitted, evidence that the discovery requests were in fact propounded on defendant must be submitted in order for the Court to evaluate the appropriateness of granting the motion. If Plaintiff has these proofs of service, they also may be brought to the hearing.

Pursuant to California Rules of Court, rule 3.1312, 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 07/20/16.**
(Judge's initials) (Date)

Tentative Ruling

Re: ***Banda-Wash v. Wash***
Case No. 15 CE CG 00967

Hearing Date: July 27th, 2016 (Dept. 502)

Motion: Defendant/Cross-Complainant John Wash's Demurrer to First Amended Answer to Cross-Complaint, and Motion to Strike Portions of Cross-Complaint

Tentative Ruling:

To overrule the demurrer to the first amended answer to the cross-complaint. (Code Civ. Proc. § 430.10, subd. (e), (f).) To deny the motion to strike portions of the first amended answer, except for the motion to strike the prayer for attorney's fees on page 6, line 7 of the first amended answer, which the court intends to strike without leave to amend. (Code Civ. Proc. §§ 435, 436.)

Explanation:

Demurrer: Defendant has argued that plaintiff's amended answer still does not allege any facts to support the third through eighth and tenth through fourteenth affirmative defenses. He also contends that the facts that are alleged are vague and do not support any of the claimed defenses. However, "The rules of pleading require, with limited exceptions not applicable here, only general allegations of ultimate fact. The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. A pleading is adequate so long as it apprises the defendant of the factual basis for the plaintiff's claim." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469-1470, internal citations omitted.)

Here, plaintiff has alleged ultimate facts to support each of her claimed affirmative defenses. For example, she alleges in her third and fourth affirmative defenses various ultimate facts to support her mistake of fact and mistake of law defenses, including that cross-complainant is not currently a co-owner of the subject property, that the subject property has alternative water sources, that cross-complainant did not pay at least half of all costs associated with the property, that there is no existing partnership as alleged in the cross-complaint, that cross-defendant is the owner and has proper possession of the equipment, tools, citrus crops, and/or trees and other personal property identified in the cross-complaint, and that cross-defendant had no knowledge of any existing contracts and/or relationships between cross-complainant and his suppliers, laborers and/or buyers. (First Amended Answer to Cross-Complaint, pp. 2, 3.) The facts here are sufficient to apprise defendant of the nature of the claimed defenses and their factual underpinnings.¹

¹ Defendant also relies on additional facts set forth in his own declaration to support his demurrer and motion to strike. However, the court cannot consider such extrinsic evidence when ruling

Also, while defendant complains that the fifth affirmative defense is insufficiently alleged because it does not specify which causes of action are allegedly barred by the statute, the defense complies with Code of Civil Procedure section 458. Section 458 states that, "In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." (Code Civ. Proc., § 458.)

Here, the fifth affirmative defense states that "Cross-defendant alleges the cross-complaint is barred by the statute of limitations, pursuant to Code of Civil Procedure §§ 335.1; 337; 338; and 343." While cross-defendant does not specify which causes of action are barred by which statute, section 458 does not require an allegation as to which specific cause of action is barred by the particular statute cited. It is sufficient to allege that the "cause of action" is barred. Therefore, the fifth affirmative defense is adequately alleged.

The sixth, seventh and eleventh affirmative defenses allege estoppel, waiver and ratification of the alleged conduct based on the execution of the settlement agreement in the related action. While defendant takes issue with the legal effect and enforceability of the settlement agreement, it appears that plaintiff has alleged sufficient ultimate facts to support the defenses.

The eighth affirmative defense alleges failure to mitigate damages based on the defendant's failure to participate in reasonable efforts to resolve the matter. While the allegations are not specific, they are sufficient to apprise defendant of the factual basis of the defense and should be enough to allow him to inquire further about the defense in discovery.

The tenth, twelfth, and thirteenth affirmative defenses incorporate the allegations of the complaint to support the claimed unclean hands, willful misconduct, and lack of breach of duty defenses. It is permissible for an answer to incorporate allegations of the complaint, and in fact the court must take the allegations of both the complaint and the answer into consideration when ruling on a demurrer to the answer. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733-734.) Therefore, plaintiff has alleged sufficient ultimate facts to support these defenses.

The fourteenth affirmative defense alleges that plaintiff is entitled to an offset based on defendant's wrongful acts as alleged in the complaint. Again, it is proper to rely on the allegations in the complaint to support an affirmative defense in the answer,

on a demurrer or motion to strike, but can only consider facts alleged in the pleadings and matters that may be judicially noticed. (Code Civ. Proc. §§ 430.30; 437.) Therefore, the court intends to disregard the additional facts alleged in defendant's declaration, other than the statements regarding his efforts to meet and confer with plaintiff's counsel before bringing the demurrer and motion to strike.

so the defense is sufficiently alleged. Therefore, the court intends to overrule the demurrer to the first amended answer.

Motion to Strike: Defendant's motion essentially restates his arguments supporting the demurrer and contends that the new allegations are all insufficient and improper, and thus must be stricken. However, as discussed above, the answer is now sufficiently supported by ultimate facts, so the court will not strike the new allegations in the answer.

On the other hand, defendant is correct that the prayer for attorney's fees is unsupported by any citations to a contract or statute that would permit an award of attorney's fees. (Code Civ. Proc. § 1021; Civil Code § 1717.) Without a contractual or statutory basis for attorney's fees, a request for such fees is improper and should be stricken. (Code Civ. Proc. §§ 435; 436.) Therefore, the court intends to strike the prayer for attorney's fees from the answer, without leave to amend. (See First Amended Answer, p. 6, line 7.)

Pursuant to CRC 3.1312 and CCP §1019.5(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 07/26/16.**
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: **Heitz v. Bethesda Lutheran Communities, Inc.**
Court Case No. 16CECG01267

Hearing Date: **July 27, 2016 (Dept. 502)**

Motion: Motion by Defendants Bethesda Lutheran Communities, Inc. and Estate of Nicholas Spurling, Deceased, to Strike Plaintiff's Prayer for Punitive Damages

Tentative Ruling:

To grant without leave to amend. Defendants are granted 10 days' leave to file their answer(s) to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Defendant's initial argument is dispositive: this is a wrongful death action and punitive damages are not recoverable. While Code of Civil Procedure section 377.34 allows punitive damages in a survivorship action, which is the decedent's own action which "survives" to the estate, Code of Civil Procedure section 377.61 provides that wrongful death actions, i.e., the statutory cause of action held by decedent's heirs, "may not include damages recoverable under Section 377.34." (Code Civ. Proc. § 377.61; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 450—California statutes and decisions "bar the recovery of punitive damages in a wrongful death action." *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616, fn 14; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 829—survival and wrongful death statutes are "mutually exclusive." See also *Ford Motor Co. v. Superior Court* (1981) 120 Cal.App.3d 748, 751—constitutionality of statute upheld.)

Plaintiff did not discuss this issue at all in her opposition, and thus apparently concedes the point. The two causes of action as to which plaintiff prays for punitive damages, Negligent Hiring/Retention and Negligent Training/Supervision, are clearly brought by plaintiff as decedent's heir and allege damages to her flowing from decedent's wrongful death. Thus, they are wrongful death counts even if not labeled as such. Punitive damages are not recoverable on these claims.

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 07/26/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: **Vang v. Vang**
Case no. 14 CE CG 03392

Hearing Date: July 27th, 2016 (Dept. 503)

Motion: Plaintiffs' Motion to Strike Memorandum of Costs or Tax Costs

Tentative Ruling:

To grant the motion to strike defendant Estate of Bee Pha's memorandum of costs. (Code Civ. Proc. § 1032.)

Explanation:

The Estate of Bee Pha has filed a memo of costs seeking to recover its costs as a prevailing party under Code of Civil Procedure section 1032. However, the Estate is not a "prevailing party" in the action and thus is not entitled to its costs.

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc., § 1032, subd. (a)(4).)

Here, the Estate is not a "prevailing party" under the definition of section 1033.5, subd. (a)(4), since no dismissal or judgment has been entered in its favor. While plaintiff did dismiss Bee Pha as an individual defendant on May 2nd, 2016, the dismissal does not mention the Estate, which is a separate party. Nor has any other judgment or decision been entered in favor of the Estate. Furthermore, the Estate is not even a party to the settlement agreement, and no dismissal or judgment has yet been entered as a result of the settlement.

Also, the Estate has never appeared in the action, so it has no standing to seek its costs. Plaintiffs filed a second amended complaint on April 22nd, 2016, naming the Estate of Bee Pha as a defendant. However, the Estate never filed an answer or made any other type of general appearance in the action prior to filing its memo of costs. Nor does it appear that the Estate was ever served with the second amended complaint. Therefore, the Estate does not have standing to seek an award of costs.

In addition, even assuming that the filing of the second amended complaint gave the Estate standing to seek its costs, most, if not all, of the costs sought by the Estate were incurred before the second amended complaint was filed. The invoices

attached to the memo of costs show that requested costs were incurred prior to the April 22nd, 2016 filing date of the second amended complaint. It does not appear that the Estate has any right to recover costs for time periods before it was added as a party to the action.

Consequently, the court intends to strike the memo of costs as improperly filed.

Pursuant to CRC 3.1312 and CCP §1019.5(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 07/25/16.**
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: **LloydWinter P.C. v. Colonial First Lending Group, Inc.**

Case No. 15CECG01061

Hearing Date: July 27, 2016 (Dept. 503)

Motion: By Plaintiff LloydWinter, P.C. to amend the judgment to add Brad McComie and Casey Little as Judgment Debtors on Alter Ego Theory.

Tentative Ruling:

To deny the motion.

Explanation:

Plaintiff moves to amend the judgment pursuant to Code of Civil Procedure sec. 187. Section 187 states:

“When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”

Pursuant to this statutory authority, a Court can amend a judgment against a corporation to add a nonparty alter ego as a judgment debtor. (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 508.) It is important to note that the amendment does not add a new defendant, it merely sets forward the “true name” of the “real defendant.” (*Misik v. D’Arco* (2011) 197 Cal.App.4th 1065, 1072.)

However, this procedure is unavailable where the judgment sought to be amended is, in fact, a default judgment. (See *Motores de Mexicali, S.A. v. Super.Ct.* (1958) 51 Cal.2d 172, 175-176; *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 779.) This in part because of due process concerns, but also because an alter ego must have control over the litigation, and where there is no contested litigation (as in a default proceeding) there is no such control. (*NEC Electronics, supra*, 208 Cal.App.3d at 780-781.) For the directors of the corporation, being merely “aware” of the litigation is insufficient—they must also “control” and act in the litigation. (*Id.*) Here, there is no such evidence because there was no litigation.

Further, as the proposed defendants have pointed out, Plaintiff has brought no admissible evidence to show entitlement to having the motion granted. In order to prevail on a motion to add judgment debtors under this theory, a plaintiff must show: “(1) the parties to be added as judgment debtors had control of the underlying litigation and were virtually represented in that proceeding; (2) there is such a unity of interest and ownership that the separate personalities of the entity and the owners no longer exist; and (3) an inequitable result will follow if the acts are treated as those of the entity alone.” (*Relentless Air Racing, LLC v. Airborn Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 815-16.) Here, Plaintiff’s declaration only presents information that the declarant “believes,” and does not show either the “unity of interest and ownership” or the “inequitable result.”

For all these reasons, the motion is denied.

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** 07/25/16.
(Judge’s initials) (Date)

(28)

Tentative Ruling

Re: **Perez v. Pitman Farms**

Case No. 16CECG01060

Hearing Date: July 27, 2016 (Dept. 503)

Motion: By Defendant Pitman Farms to Strike Allegations from Complaint.

Tentative Ruling:

To grant the motion to strike in its entirety with leave to amend.

Plaintiff shall have ten court days from the date of this order in which to file an amended complaint. Any new or changed allegations must be in **boldface** typeset.

Explanation:

A motion to strike can be used to: "(a) Strike out any irrelevant, false, or improper matter inserted in any pleading"; or "(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. §§ 431.10, subd.(b); 436, subd.(a).) A court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255.)

A motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif.* (2010) 191 Cal.App.4th 53, 63.) Mere conclusory allegations will simply not suffice. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Punitive damages are governed by Civil Code §3294:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious

disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Here, Plaintiff has alleged that she discovered she was pregnant in May-June of 2015. (Complt. ¶¶19-20.) She was given work restrictions by her physician. (Complt. ¶21.) Plaintiff gave the restrictions to her direct supervisor, Frank, on June 5, 2016. (Complt. ¶22.) Frank told Plaintiff she could not continue to work with the work restrictions. (Complt.¶23.) Plaintiff attempted to seek accommodation of the restrictions and was ultimately directed to speak to the = Human Resources Manager "Terri." (Complt. ¶¶24-25.) Terri told Plaintiff she could not work for Plaintiff under those restrictions, and sent her home and "return to work once her work restrictions had been lifted." (Complt. ¶¶26-27.) Plaintiff again proposed possible accommodations, but was sent home. (Complt. ¶28-30.)

On July 15, 2015, Plaintiff went to her physician to request that her work restrictions be lifted, and the doctor complied. (Complt. ¶31.) Despite the lifting of the restrictions, she was not placed back in her position, and, therefore, Plaintiff was effectively discharged. (Complt. ¶¶32-35.) Plaintiff also contends that Defendant committed other wage and hour violations not relevant here. (Complt. ¶¶ 36-38.)

The remaining allegations in the Complaint are largely boilerplate allegations of ultimate facts.

The basis for the punitive damages in this case appears to be oppression or malice, because there are no claims of fraudulent activity in the Complaint. The allegations described above do not appear to be either "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others" or "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." There is nothing in the Complaint that describes that Defendant's actions were intended to cause Plaintiff "injury" or which was in "conscious disregard" of Plaintiff's rights for purposes of a showing of "malice." (*Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 958 ("Malice" implies an act "conceived in a spirit of mischief or with criminal indifference towards the obligations owed; there must be an intent to vex, annoy, or injury . . . Mere negligence, even gross negligence, is not sufficient to justify such an award.")) Likewise, the allegations listed above do not rise to the required level of "oppression." (*Richardson v. Employers Liab. Assur. Corp.* (1972) 25 Cal.App.3d 232, 246 (oppression must be "cruel and unjust"))

disapproved on other grounds by Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 580 fn.10.))

The facts alleged, while showing a basis for statutory and tort liability, as applicable, simply do not rise to the level of malice, fraud or oppression required for punitive damages. (*Brousseau v. Jarrett* (1997) 73 Cal.App.3d 864, 872 (conclusory allegations are insufficient to support claims of punitive damages).)

Defendants also sought to strike language in paragraphs 56 and 73 on the basis that the allegations appeared to be unrelated to the Complaint. Plaintiff has not responded to this portion of the motion. Therefore, the Court will grant the motion to strike those paragraphs as well.

Therefore, the motion to strike is granted with leave to amend.

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

(5)

Tentative Ruling

Re: ***Butts et al. v. Mission Homes et al.***
Superior Court Case No. 15 CECG 02480

Hearing Date: July 27, 2016 **(Dept. 503)**

Motion: By Lexington Insurance Company

Tentative Ruling:

To grant the motion pursuant to CCP § 387(b). The proposed Complaint in Intervention is to be filed within 10 days of notice of the ruling. Notice runs from the date that the Clerk serves the Minute Order plus 5 days for service by mail. See CCP § 1013(a).

Explanation:

On August 5, 2015, Plaintiffs Charles Butts and Janice Butts and nine other Plaintiffs filed a complaint against Mission Homes alleging various causes of action based upon construction defects in 8 single-family homes located in Sanger, CA. On May 11, 2016, the Defendants filed a Cross-Complaint seeking indemnity, etc. against numerous subcontractors. One of the Cross-Defendants is State Center Roofing Co., Inc.

On June 13, 2016, Lexington Insurance Company filed a motion seeking leave to file a Complaint in Intervention. It asserts that it issued a commercial general liability policy to State Center Roofing. It further asserts that the corporate status of State Center Roofing is suspended. Accordingly, it lacks the capacity to defend. [See *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306] As a result, Travelers contends that it has a right to intervene citing inter alia *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 CA4th 212.

Because a liability insurer agrees to pay any judgment obtained against its insured (see Ins.C. § 11580(b)(2)), it has the *right to intervene* where an insured is *barred* from defending itself. In such cases, intervention is necessary to protect the insurer's own interests because it may be obligated to pay any judgment rendered against its insured (assuming no coverage defenses). [*Reliance Ins. Co. v. Sup.Ct. (Wells)* (2000) 84 Cal.App.4th 383, 386-387—insurer entitled to intervene where insured barred from defending because its corporate status had been suspended for nonpayment of franchise tax]

The moving party has made the necessary showing. See Exhibit A to the Declaration of Mah indicating that the current corporate status of State Center Roofing

Co., Inc. is suspended. A copy of the proposed Complaint in Intervention was submitted. See Exhibit B. The motion will be granted pursuant to CCP § 387(b).

Pursuant to California Rules of Court, rule 3.1312(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 07/26/16.
(Judge's initials) (Date)