Tentative Rulings for May 16, 2024
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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).)
The above rule also applies to cases listed in this "must appear" section.

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(41)

Tentative Ruling

Re: ***Sheryl Smith v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 23CECG01114

Hearing Date: May 16, 2024 (Dept. 403)

Motion: By Defendant Scott Ford, M.D. for summary Judgment

Tentative Ruling:

To deny Dr. Ford's motion for summary judgment.

Explanation:

This litigation addresses the wrongful death of Bryson Ferguson ("decedent"), brought by decedent's mother, Sheryl Smith, individually and as successor in interest to the Estate of Bryson Ferguson ("Plaintiff"). Plaintiff alleges decedent's passing on November 21, 2019, was the result of negligent medical care provided by defendants, including Scott Ford, M.D. ("Dr. Ford"), after a motor vehicle accident in which decedent was injured.

Allegations of the Complaint

The accident occurred on October 26, 2019. Plaintiff alleges decedent was a seat-belted passenger in a vehicle that was struck by a drunk driver. Decedent suffered substantial injuries after the force of the collision caused the airbag to deploy. Decedent "injured his left shoulder, arm, side and ankle, and he also injured his face and the right side of his head as a result of a seeming whiplash or contrecoup trauma." (Comp., 4:15-17.) Decedent had a loss of consciousness ("LOC") for an unknown period of time, followed by an altered mental state.

In paragraph 15 of the complaint, Plaintiff alleges:

> It is well established in emergency medicine that a blow to the head that causes an individual to lose consciousness is a traumatic brain injury that requires prompt assessment, because it can mark the beginning of a life-threatening brain bleed that could result in death in and of itself, or as a result of a combination of other conditions or future trauma. It is also well accepted in the medical field that time is of the essence in identifying and treating brain injuries.

(Comp., ¶ 15, p. 4:19-23.)

Plaintiff further alleges decedent faced a higher risk of developing seizure-inducing brain injuries in the weeks after the collision due to his history of seizures:

> It is documented in medical literature that epileptics are more susceptible to developing seizure-inducing brain injuries for the following several weeks, even from much less severe head trauma; yet Dr. Ford and the CCMC staff providers failed to examine, diagnose, and treat Mr. Ferguson's head and brain trauma post-collision.

(Comp., ¶ 19, p. 5:17-20.)

Plaintiff also alleges decedent did not receive the benefit of the protocol for patients who present with loss of consciousness after a motor vehicle accident:

> At the time of Mr. Ferguson's emergency visit to CCMC, the hospital had an emergency protocol for patients who presented with a history of a motor vehicle accident that resulted in a loss of consciousness. That protocol provided that all such patients would receive a thorough neurological assessment including brain imaging (CT scan with or without contrast), and a neurologist consult depending on the findings of the imaging studies. Inexplicably, Mr. Ferguson did not receive these services.

(Comp., ¶ 22, p. 6:9-14.)

In summary, Plaintiff alleges Dr. Ford failed to meet the post-collision standard of care for a person with a history of seizures who experienced loss of consciousness, which included his failure to perform a thorough neurological exam, his failure to order a CT scan to determine the extent of decedent's head trauma, and the failure to provide appropriate discharge instructions.

Law Governing Summary Judgment

Dr. Ford now moves for summary judgment. A trial court shall grant summary judgment if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c).) In determining a motion for summary judgment, the court views the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's evidence. The court does not weigh evidence or inferences. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856.) The court shall consider all inferences reasonably deducible from the evidence unless it is controverted by other inferences or evidence. (Code Civ. Proc., § 437c, subd. (c).)

A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of a cause of action or that it has a complete defense. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence to show there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) There is a triable issue if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the plaintiff. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850.) Doubts as to whether there is a triable issue of fact are resolved in favor of the opposing party. (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.)

The Parties Agree Expert Testimony Is Required to Establish Professional Malpractice

In any medical malpractice action, the plaintiff must establish the following elements:

> (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage. [Citation.]

(*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.) The parties agree that in professional negligence cases, expert testimony is required to establish the prevailing standard of care, unless the negligence is obvious to a layperson. (*Ibid.*)

Dr. Ford Fails to Meet His Burden of Persuasion and Production

Dr. Ford summarizes the case as follows: "Plaintiff alleges that, despite the decedent having no head injury or signs of neurological deficits in the ED, Dr. Ford should have, but failed to, obtained [sic] a neurological consultation and brain imaging before discharging the decedent home." (Memo., p. 3:12-14.) As he allegedly did in the emergency room, Dr. Ford completely ignores Plaintiff's allegations that decedent experienced post-collision loss of consciousness and symptoms of a head injury. Yet, several of his own alleged undisputed material facts provide evidence that decedent experienced and complained of head injury.

For example, to support Fact No. 1, Dr. Ford submits the declaration of David Barcay, M.D, paragraph 2, in which Dr. Barcay recites that he reviewed decedent's American Ambulance records. Those records include the following report, which lists the decedent's *first* symptom as facial pain with headache:

> EMS AOS to pt sitting in front passenger seat of vehicle in obvious pain or distress. Pt involved in 2 vehicle MVA. Per Fresno Fire, the pt was altered when they arrived and improved to GCS 15 before our arrival. Pt had LOC per bystanders. Pt was restrained and had airbag deployment. *Pt is having R sided facial pain w/ headache.* Pt having L elbow pain and pain from L knee to L foot. Pt denies any other medical cx.

(Dr. Ford's app., p. Ambulance 35 [147/255], italics added.)

Fact No. 3 is lengthy. It summarizes the decedent's "chief complaints" with no mention of the prior loss of consciousness. Yet, to support this fact, Dr. Barcay includes a citation to the hospital records at pages CCMC 000043-000061. At the second page of these records, four bullet points are listed under "Chief Complaint," following the phrase 'Patient presents with." The first bullet point is: "**• Motor Vehicle Crash,"** followed by the phrase on the next line: "*Passanger* [sic] *in t-bone, unknown MPH of impact. MVA. +LOC.*" (App., p. CCMC 000044 [69/255], bold and italics original.)

Fact No. 3 also includes the sentence, "At no time did the decedent report headache." As previously noted, Dr. Ford's own evidence shows the American

Ambulance report includes a reference to decedent's complaint of headache. Furthermore, several inferences are reasonably deducible from Dr. Ford's evidence. One inference is that decedent complained of headache at the scene, but never complained at the hospital. Other inferences include: (1) decedent and his sister reported decedent's facial pain with headache to other hospital staff members, but not to Dr. Ford; (2) decedent and his sister spoke to Dr. Ford about the complaint but Dr. Ford dismissed the concern; or (3) Dr. Ford simply failed to include the complaint in his record. The court considers all reasonable inferences, but does not weigh them. Dr. Ford's evidence does not conclusively establish that "[a]t no time did the decedent report headache."

Dr. Ford also fails to refute the allegation that a protocol exists for patients who present after a motor vehicle crash that resulted in a loss of consciousness. Dr. Barcay's declaration fails to address the standard of care for such a patient. He simply opines that if a patient has no loss of memory, it is irrelevant that the patient suffered a loss of consciousness after the collision.

Nor does Dr. Ford refute the allegation that a history of seizures renders a crash victim more susceptible to developing seizure-inducing brain injuries in the near future, even with much less severe head trauma than decedent's loss of consciousness for an unknown period of time. Dr. Ford's Fact No. 19, which states a history of seizures does not alter an emergency physician's standard of care, misses the point. Dr. Barcay simply makes the conclusory statement that a known "history of seizures does not warrant a neurological consultation or investigation into possible brain trauma unless there are indications for such interventions." (Barcay decl., p. 7:23-26.) He fails to list the "indications for such interventions." Plaintiff alleges the loss of consciousness following a motor vehicle collision is such an indication. Dr. Barcay simply opines "Dr. Ford correctly concluded that this medical condition [history of seizures] was under control and being handled by the decedent's primary treating physician." (Barcay decl., pp. 7:27-8:2.) Plaintiff does not fault Dr. Ford for not monitoring decedent's seizure medication. She contends Dr. Ford was negligent because he failed to take timely, crucial steps to ascertain the post-traumatic condition of defendant's brain following the collision and loss of consciousness and failed to consider decedent's increased susceptibility to develop new seizure-inducing brain injuries in the near future.

If a defendant fails to address an issue in a motion for summary judgment that has been raised in the plaintiff's complaint, as occurred here, the defendant fails to meet the initial burden to show the plaintiff's action has no merit. (*Hedayati v. Interinsurance Exchange of the Automobile Club* (2021) 67 Cal.App.5th 833, 846.) When the defendant fails to make the initial showing, it is unnecessary to review the plaintiff's opposing evidence and the court must deny the motion. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.) Therefore, the burden does not shift to Plaintiff to raise a triable issue of fact and the court may stop its analysis here.

Triable Issues of Material Fact Exist

Nevertheless, the court denies Dr. Ford's motion for the additional reason that Plaintiff has raised at least one triable issue of material fact. Fact No. 3 includes the statement, "At no time did the decedent report headache." Evidence to dispute Fact

No. 3 is found in the American Ambulance records discussed above. (Dr. Ford's app., p. Ambulance 35). Additionally, Plaintiff cites the declaration of decedent's sister, Brooke Smith, to dispute this fact. The declaration contains evidence that decedent and his sister repeatedly told Dr. Ford that decedent had "hurt his head in the motor vehicle accident he had that morning and was having head pain." (PEB, p. 57.)

In conclusion, the court denies Dr. Ford's motion for summary judgment for two reasons: (1) Dr. Ford fails to meet his burden of production and persuasion; and (2) Plaintiff raises a triable issue of material fact.

Evidentiary Objections

The court overrules Dr. Ford's Evidentiary Objection No. 4 to the declaration of percipient witness, Brooke Smith. The court declines to rule on the remaining evidentiary objections because none are directed to evidence that is material to the disposition of the motion.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Wheeler v. Kerr***
Case No. 23CECG01394

Hearing Date: May 16, 2024 (Dept. 403)

Motion: Plaintiff's Motion for Attorney's Fees

Tentative Ruling:

To grant the plaintiff's motion for attorney's fees and costs. However, the court intends to reduce the total fees and costs to $1,505.00.

Explanation:

Under Code of Civil Procedure section 425.16, subdivision (c)(1), "[e]xcept as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c)(1).)

"Thus, under Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, citations omitted.) "The amount of an attorney fee award under the anti-SLAPP statute is computed by the trial court in accordance with the familiar 'lodestar' method. Under that method, the court 'tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work.'" (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 491, citations omitted.) The court should also award fees for any time reasonably spent on establishing and defending the right to recover attorney's fees. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 ("*Serrano IV*").)

Here, plaintiff brought an anti-SLAPP motion to strike defendants' cross-complaint, which was granted without leave to amend. Therefore, plaintiff clearly prevailed on her anti-SLAPP motion, and she is entitled to an award of attorney's fees.

However, plaintiff has not submitted sufficient evidence to support her request for almost $10,000 in attorney's fees and costs. As discussed above, the basis for an award of attorney's fees is the "lodestar", which is the reasonable hourly rate prevailing in the community for similar work multiplied by the reasonable number of hours worked. (*Cabral v. Martins*, *supra*, 177 Cal.App.4th at p. 491.)

Here, plaintiff seeks an award of $9,881.50 in attorney's fees and costs incurred in connection with the anti-SLAPP motion, as well as the present motion for attorney's fees. Plaintiff's counsel bills at $400 per hour, which appears to be a reasonable rate for an attorney of his background, education, skill, and experience in the Fresno area. (Cuttone decl., ¶ 3 a-c.) Counsel's paralegal, Ms. Stasio, bills at $185 per hour, which also appears to be a reasonable rate for a paralegal with 23 years of experience in the Fresno area.

(*Id*. at ¶ 3 d.) While defendants argue that Ms. Stasio is not a paralegal and should not be allowed to charge $185 per hour for her work, the only evidence that defendants submit in support of their claim is a copy of an email which refers to Ms. Stasio as the office manager and legal assistant for Mr. Cuttone. (Cervantes decl., Exhibit A.) This evidence is ambiguous and inconclusive at best, and does not necessarily show that Ms. Stasio is not also a paralegal. Mr. Cuttone has represented that Ms. Stasio is his paralegal, and the court intends to accept his representation absent conclusive evidence to the contrary, which has not been presented here. Therefore, the court intends to approve the hourly rates of Mr. Cuttone and his paralegal.

On the other hand, plaintiff's counsel has not presented any evidence of the number of hours worked on the underlying anti-SLAPP motion, or which tasks were performed to bring that motion before the court. Counsel claims that he incurred $4,044.00 in fees to bring the motion, but he says nothing in his declaration about the hours worked on the motion, which tasks were performed, or who did which tasks. His declaration only discusses the work done in connection with the present attorney's fees motion, as well as the further work that he anticipates will be necessary if there is opposition to the motion. (Cuttone decl., ¶¶ 2-5.) Therefore, the court will not award any fees for the time spent on the anti-SLAPP motion, as there is no evidence of what work was done on the motion and plaintiff's counsel has failed to show that the request for $4,044.00 in fees for preparing and arguing the motion is reasonable.

Plaintiff's counsel has presented evidence to support his request for attorney's fees and costs related to the present motion for attorney's fees, however. Counsel claims that he and his paralegal worked seven hours on the attorney's fees motion, with Mr. Cuttone billing five hours of time and his paralegal billing two hours of time. (Cuttone decl., ¶¶ 2, 4.) He also anticipates spending another two hours to review the opposition, three hours to prepare a reply, .5 hours to review the court's tentative ruling, and two hours to appear at the hearing. (*Id*. at ¶ 5.) Thus, he expects to incur another 8.5 hours to handle the matter through the hearing, for additional fees of $3,400. (*Ibid*.)

Thus, there is some evidentiary support for the requested fees incurred in bringing the motion for attorney's fees. On the other hand, the amount of fees requested by counsel appears to be excessive for a relatively simple and straightforward fees motion. For example, the memo of points and authorities supporting the motion was just over five pages long, there is only one three-page declaration in support of the motion, and the notice of motion is only three pages long. The motion itself does not raise any complex or novel issues of law. The reply brief was also fairly short, at only five pages. As a result, the court intends to reduce the requested amount of hours to a more reasonable number. Given the simple nature of the motion, the court will award a total of three hours of attorney time and one hour of paralegal time, for total fees of $1,385, plus costs of $60 to bring the motion. The court will also award costs of $60 to bring the anti-SLAPP motion. Thus, the court intends to award total fees and costs of $1,505.00.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***In re Tract No. 4767 Homeowners Association***
Superior Court Case No. 24CECG00144

Hearing Date: May 16, 2024 (Dept. 403)

Motion: Petition to Reduce Required Voting Percentage for Amendment of CC&Rs Pursuant to Civil Code Section 4275

Tentative Ruling:

To grant.

Explanation:

Petitioner seeks reduction of the percentage of votes required to approve the amendment of the Conditions, Covenants, and Restrictions ("CC&Rs") from a supermajority to a simple majority (i.e. more than than 50%) of the votes.

Section 4275 of the Civil Code governs such relief, which has been described as a "safety valve" for a homeowners' association to obtain approval for an amendment to the CC&Rs when, because of voter apathy or other reasons, amendments cannot be approved by the normal procedures provided in the CC&Rs and the association would be hamstrung by the lack of supermajority approval. (*Blue Lagoon Association v. Mitchell* (1997) 55 Cal.App.4th 472, 477.)

Among other things not disputed here, a petitioner seeking relief under section 4275 bears the burden of proving the proposed amendment is reasonable. (*Mission Shores Assn. v. Pheil* (2008) 166 Cal.App.4th 789, 795.) Furthermore, "the term 'reasonable' in the context of use restrictions has been variously defined as 'not arbitrary or capricious', 'rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments,' and 'fair and nondiscriminatory.'" (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 577, citations omitted.)

Petitioner here has produced evidence that it has complied with the requirements of subdivision (a) of section 4275 by describing the efforts that it made to obtain the approval of a supermajority of the association members for the amendments. Petitioner has also alleged the number of affirmative votes and negative votes actually received, and the number or percentage of affirmative votes required under the original rules. Petitioner has also submitted copies of the original CC&Rs and Bylaws, the proposed Restated CC&Rs and Bylaws, and the ballot solicitation materials that were sent to the members. Petitioner made reasonably diligent efforts to obtain approval from its members. Balloting was conducted in accordance with the governing documents. Petitioner has also given the members at least 15 days' notice of the hearing date on the petition. The proposed amended CC&Rs received more than 50% approval by the members, and the amendments themselves are reasonable. Therefore, petitioner has complied with requirements of section 4275, and the court should grant the petition. This

evidence is sufficient for the court to make the findings required in subdivision (c) of section 4275.

Respondents contend petitioner has not satisfied the "reasonableness" element for relief under section 4275 because it has not demonstrated "stagnat[ed]" effectiveness due to the existing supermajority requirement. (Resp. brief, at p. 5:15-18.) However, in analyzing reasonableness, the California Supreme Court holds that "the focus is on the restriction's effect on the project as a whole, not on the individual homeowner." (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 385–386.)

Here, the essential basis for the petition was the lack of voter participation despite deadline extensions and extensive solicitation. (Pet. ¶ 9.) Accordingly, the proposed amendments are "reasonable" considering the interests of the community as a whole (69 out 110 possible votes favored amendment) to update governing documents to address community-wide concerns and to conform to, in part, new legislation.

Therefore, given the information before the court, the petition is granted.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Hudson Insurance Company v. Cory Brown***
Superior Court Case No. 23CECG02023

Hearing Date: May 16, 2024 (Dept. 403)

Motion: By Plaintiff for Discharge in Interpleader

Tentative Ruling:

To grant.

Explanation:

"When a person may be subject to conflicting claims for money or property, the person may bring an interpleader action to compel the claimants to litigate their claims among themselves." (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1122.) "An interpleader action is an equitable proceeding. [Citations.]" (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42–43.) In addition, whether a stakeholder may be permitted to deposit funds is "like that of any interpleader party[.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 876; Code Civ. Proc., § 386.5.)

Plaintiff filed its complaint alleging it had filed a license bond in the amount of $50,000 on behalf of defendant Cory Brown. Plaintiff has deposited the sum of $50,000 with the court, and requests further distribution be determined by the court and the remaining parties. There is no opposition to this motion, and thus no claim that plaintiff's liability exceeds the deposited sum. Accordingly, the motion is granted.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Peregrina v. Rivera***
Superior Court Case No. 20CECG01374

Hearing Date: May 16, 2024 (Dept. 403)

Motion: by Plaintiff to Enforce Settlement

Tentative Ruling:

To grant plaintiff Sandra Peregrina's motion to enforce settlement as to the payment of $14,000 only. Plaintiff shall submit a proposed judgment in accordance with this ruling.

Explanation:

Code of Civil Procedure Section 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case . . . the court, upon motion, may enter judgment pursuant to the terms of the settlement." It also provides that the parties may request that the court "retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc. § 664.6.) Due to the summary nature of the statute authorizing judgment to enforce a settlement agreement, strict compliance with its requirements is prerequisite to invoking the power of the court to impose a settlement agreement. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984.)

On December 15, 2023, plaintiff and defendant entered into a stipulation to settle this action in Department 503 of Fresno Superior Court before the Honorable Judge Jeffrey Y. Hamilton. The stipulation was reduced to writing in an Order After Hearing and signed by Judge Hamilton. (Peregrina Decl., Exh. A.) As part of the stipulation, the parties agreed the court shall retain jurisdiction "until inspection, exchange and terms" of the settlement were completed pursuant to Code of Civil Procedure section 664.6. (*Ibid*.)

Plaintiff seeks to enforce the terms of the agreement she alleges are not being followed by defendant and his attorney. Plaintiff attests to transferring possession of the locked trailer and all of its contents to defendant as agreed, however defendant has not paid the agreed amount of $14,000 and is instead offering $11,000 due to claimed items missing from the trailer and dead batteries. (Peregrina Decl., p. 2, lines 1-16.) Plaintiff argues defendant is not complying with the terms of the agreement, which were to receive the trailer and its contents, "as is" in exchange for $14,000 held in defense counsel's trust account. Plaintiff additionally claims defendant will not return her wedding band, which was in a safe that was inventoried per the terms of the stipulation. (*Id*. at p. 2, lines 24-27.) The motion is unopposed.

A settlement agreement is a contract. When interpreting a contract, the court's goal is to give effect to the mutual objective intent of the parties as it existed at the time

the contract was formed. (Civ. Code § 1636; *Palmer Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) That objective intent must be determined, whenever possible, by reference to the contract's words. (Civ. Code §§ 1638, 1639.) "In construing a contract, it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties." (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 19.) "Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, [courts must] apply that meaning. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

With regard to the transfer of possession of the trailer to defendant the stipulation within the Order After Hearing states: "Once all of the above has been subject to inspection, for damage or loss by Defendant and/or Defendant's counsel, Defendant shall pay Plaintiff the sum of $14,000.000 currently held on deposit in Defendant's counsel's trust account … ." (Peregrina Decl., Exh. A, p. 2, lines 8-10.) The terms do not reflect that defendant was accepting the items "as is," as argued by plaintiff. However, there is no provision allowing defendant to reduce the agreed settlement amount based on the inspection of the items upon transfer. The defendant is in breach of the agreement.

As for the wedding ring sought by plaintiff, the terms of the agreement state: "Respondent shall retain any personal effects to include but not limited to the safe its self, wedding rings, passport, etc." (Peregrina Decl., Exh. A, p. 2, lines 6-7.) The "Respondent" is not defined in the stipulation. The court is unable to ascertain which party is understood to be the "Respondent" by the terms of the Order. As such, the court is not able to determine if defendant is in breach of the stipulation.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Jose Garza v. City of Parlier***
Superior Court Case No. 21CECG02953

Hearing Date: May 16, 2024 (Dept. 403)

Motion: By Defendant City of Parlier to Bifurcate the Special Defense at Trial

Tentative Ruling:

To deny. (Code Civ. Proc., § 597.)

Explanation:

Code of Civil Procedure section 597 provides that where an answer asserts a defense not involving the merits of plaintiff's causes of action, but which constitutes a bar or ground of abatement, the court **may** proceed to trial of the special defense before the trial of other issues in the case. Defendant city appears to argue that trying the issue of exhaustion of administrative remedies separate from the merits is mandatory here.

Defendant city relies on *Hill RHF Housing Partners v. City of Los Angeles* (2020) 51 Cal.App.5th 621, 634 for its position that exhaustion of administrative remedies is a threshold question which is required to be addressed before considering the merits. This case has been overruled. (*Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2021) 12 Cal.5th 458.) Also, at issue in *Hill* was whether landowners in proposed business improvement districts were required to present specific objections at noticed public hearings in order to later be heard in court. (*Id*. at p. 468.) The issue presented in *Hill* is different than the issue here, which involves exhaustion of the administrative remedy for a police chief alleging a violation of Labor Code section 1102.5.

Defendant city has not provided sufficient legal authority for the specific position that this court is **mandated** to separately try the issue of exhaustion of administrative remedies where plaintiff has alleged the administrative remedy's futility. This court is well versed in the circumstances alleged regarding the futility of the administrative remedy here, and is not convinced of the claim of judicial economy in addressing the special defense separately from the merits of plaintiff's claims. The court is concerned that presentation of evidence will not be sufficiently separate regarding this special defense and the merits. Should defendant wish to make the request to address this issue separately at the time of trial, defendant will need to clarify either the mandatory nature of hearing the special defense first or the judicial economy.

Both parties primarily argue whether plaintiff was required to exhaust administrative remedies in their respective briefing here. The court would note that it is

only considering whether bifurcation of this issue is either mandatory or feasible in this case. The court will not address the merits of either party's position on the expected outcome on the issue of whether plaintiff sufficiently exhausted any administrative remedies. This ruling is limited to the issue of whether the court must or should bifurcate exhaustion of administrative remedies from the remainder of the issues at trial.

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: JS on 5/14/2024.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Jimenez v. Chicago Title Company, et al.***
Superior Court Case No. 23CECG02293

Hearing Date: May 16, 2024 (Dept. 403)

Motion: Defendants' Demurrer to the Second Amended Complaint

Tentative Ruling:

To sustain the demurrer for each cause of action as to plaintiff Josue Jimenez, with leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

To sustain the demurrer for the first, second, fourth, fifth, seventh, eighth, and ninth causes of action as to Rafael Gonzalez-Silva, with leave to amend. To overrule the demurrer for the third and sixth causes of action as to plaintiff Rafael Gonzalez-Silva. (Code Civ. Proc., § 430.10, subd. (e).)

Each request for judicial notice is granted. (Evid. Code, § 452, subds. (d), (h).)

Plaintiffs are granted 20 days' leave to file the Third Amended Complaint. The time in which the Third Amended Complaint can be amended will run from service by the clerk of the minute order. All new allegations in the Third Amended Complaint are to be set in **boldface** type.

Explanation:

Defendants demur to each cause of action alleged in the SAC on the ground that plaintiffs fail to state a cause of action. Defendants contend that plaintiff Josue Jimenez lacks standing to bring the suit, because he is not a real party in interest. Defendants further contend that the SAC fails to state facts sufficient to constitute each cause of action asserted.

Standing as to Each Cause of Action (Mr. Jimenez)

Defendants contend that plaintiff Josue Jimenez lacks standing to bring the suit, because he is not a real party in interest. "Where, as here, it is alleged that a party lacks standing to sue, the complaint can be challenged by general demurrer for failure to state a cause of action *in this plaintiff*." (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1009, italics in original.) "Standing is related to the requirement contained in Code of Civil Procedure section 367 that '[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.' [Citation.] " (*River's Side at Washington Square Homeowners Association v. Superior Court of Yolo County* (2023) 88 Cal.App.5th 1209, 1225 citing Code Civ. Proc., § 367.) "The real party in interest is generally the person who has the right to sue under the substantive law. [Citation.] "A party who is not the real party in interest lacks standing to sue because the claim belongs

to someone else." (*River's Side at Washington Square Homeowners Association v. Superior Court of Yolo County* (2023) 88 Cal.App.5th 1209, 1225, internal citations omitted.)

Defendants contend that each cause of action in the SAC arises out of a promissory note between plaintiff Rafael Gonzalez-Silva and the defendants, and the Deed of Trust executed by Mr. Gonzalez-Silva to the defendants to secure the promissory note, and that Mr. Jimenez is a stranger to this action.

In opposition, however, plaintiffs argue that Mr. Jimenez is a real party in interest to this action, because the SAC alleges that Mr. Gonzalez-Silva sold the property to Mr. Jimenez, and that Mr. Jimenez is the assignee of Mr. Gonzalez-Silva's loan obligation. Despite plaintiffs' argument, the operative complaint fails to plead any allegation indicating that Mr. Gonzalez-Silva's obligation to the subject note and Deed of Trust was also transferred along with the transfer of the property to Mr. Jimenez, i.e., that Mr. Jimenez is actually the assignee of the subject loan. Accordingly, the demurrer to each cause of action as to Mr. Jimenez is sustained, with leave to amend.

First Cause of Action – Fraud

Defendants contend that the SAC fails to allege any material representation made by defendants to plaintiffs, and even if this is properly alleged, plaintiffs fail to allege that they relied on such misrepresentation.

To sufficiently plead a cause of action for fraud, a plaintiff must separately plead each and every one of its elements: (1) a misrepresentation of a material fact by defendants; (2) the defendants' knowledge that the representation was false when made; (3) the defendant's intent to defraud for the purpose of inducing reliance; (4) the plaintiff's justifiable detrimental reliance thereon; and resulting damages to the plaintiff. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173; *Seeger v. Odell* (1941) 18 Cal.2d 409, 414; *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 200; *Civ. Code*, § 1709, 1710.)

Here, the SAC alleges that defendants have made a series of false statements concerning the payoff amount owed under the loan for the subject property. In particular, plaintiffs allege that defendants have repeatedly overstated the balance due. However, there are no allegations showing plaintiffs' reliance upon such representations. In fact, the allegations indicate that plaintiffs have maintained their stance of discrediting defendants' payoff amount.

However, plaintiffs argue that the demurrer must be overruled, because the element of reliance is a question of fact that cannot be decided on demurrer. Although "the question of whether a plaintiff's reliance *is reasonable* is a *question of fact*…" (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498-1499, emphasis added.), plaintiffs provide no authority to show that whether plaintiff relied *at all* is a question of fact. Therefore, the demurrer to the first cause of action is sustained, with leave to amend.

Second Cause of Action – Wrongful Foreclosure

Defendants argue that plaintiffs have failed to allege any of the elements to state a claim for wrongful foreclosure.

"The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.)

Plaintiffs allege that defendants recorded a Notice of Trustee Sale on January 17, 2024, noticing the sale of the subject property to occur on February 20, 2024. However, the amount due on the defendants' Notice of Default is incorrect. Plaintiffs further allege that they attempted to tender the correct amount owed; however, the tender was rejected. Notably, the SAC was filed on February 6, 2024, prior to the alleged sale of the property; and thus, it cannot have been alleged that the defendants caused an illegal sale to occur at the time the operative complaint was submitted. Therefore, the demurrer is sustained, leave to amend.

Third Cause of Action – Usury

"The essential elements of usury are: (1) The transaction must be a loan or forbearance; (2) the interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely repayable by the borrower; and (4) the lender must have a willful intent to enter into a usurious transaction." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798.)

Defendants contend that the SAC fails to allege what rate of interest was actually charged to or paid by the plaintiffs, and what the maximum rate of interest permitted by law is.

Plaintiffs concede that the interest rate is not alleged in the operative complaint, and instead, indicates that such information is provided for in *defendants'* request for judicial notice. "A pleader is not required to state facts which are peculiarly within the knowledge of his opponent." (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460.)

Notably, the maximum rate of interest permitted by law is often a question to be determined by a consideration of multiple factual and legal circumstances. As such, the court would find it sufficient for plaintiffs to simply allege the actual interest rate of the allegedly usurious loan and that the rate exceeds the statutory maximum, which plaintiffs have done.

Accordingly, the demurrer to the third cause of action is overruled as to Mr. Gonzalez-Silva. To the extent that defendants argue that they are exempt from usury law, this is inappropriate for determination on demurrer.

Fourth Cause of Action – Accounting

"[A] cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff." (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460.) Defendants contend that plaintiff have not alleged the existence of a relationship which requires an accounting. However, defendants have not provided any authority to support their argument, i.e., that the relationship between Mr. Gonzalez-Silva and the defendants, as obligor and obligees of a loan, does not require an accounting. Nonetheless, the SAC fails to allege that any balance is due to the plaintiffs, and the demurrer to the fourth cause of action is sustained, with leave to amend.

Fifth Cause of Action – Quiet Title

The complaint shall be verified and shall include all of the following:

(a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any.

(b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession.

(c) The adverse claims to the title of the plaintiff against which a determination is sought.

(d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought.

(e) A prayer for the determination of the title of the plaintiff against the adverse claims.

(Code Civ. Proc., § 761.020.)

As defendants point out, the operative complaint fails to allege the date as to which the determination is sought and a prayer for the determination of the title of the plaintiff against the adverse claims.

Additionally, defendants argue that plaintiffs have not filed or served a Notice of Pendency of Action. However, defendants do not provide authority to show if a plaintiff's failure to file a Notice of Pendency of Action is ground for demurrer.

Next, defendants further contend that Mr. Gonzalez-Silva cannot state a claim for quiet title of the subject property, because he has not alleged any facts demonstrating

an interest in the property. Although the SAC alleges that both plaintiffs hold title to the subject property, plaintiffs' previous verified complaints alleged that "[o]n September 4, 2020, Gonzalez-Silva transferred the property to the plaintiff Josue Jimenez through a Grant Deed." (First Amended Complaint, ¶ 11.) Moreover, attached as Exhibit 11 to the First Amended Complaint ("FAC") is a Grant Deed conveying the subject property from Rafael Gonzalez Silva to Josue Jimenez and Ma Esther Cervantes Ambris, as joint tenants. (See the FAC, Exh. 11.) In ruling on demurrer, a court may take judicial notice of admissions or inconsistent statements by plaintiff in earlier pleadings in the same lawsuit, and may disregard conflicting factual allegations in the complaint. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The court takes judicial notice of the allegations made and exhibits attached to the FAC, filed on August 3, 2023, and disregards the conflicting allegations in the operative complaint indicating that Mr. Gonzalez-Silva holds title to the subject property.

Accordingly, the demurrer to the fifth cause of action is sustained, with leave to amend.

Sixth Cause of Action – Unfair Business Practices

Defendants contend that plaintiffs' unfair business practices claim is based on its fraud and usury causes of action. Accordingly, should the court sustain the demurrer to the fraud and usury causes of action, the cause of action for unfair business practices should also be sustained. However, as explained above, the demurrer to the usury cause of action is overruled. Accordingly, the demurrer to the sixth cause of action is also overruled.

Seventh Cause of Action – Unjust Enrichment

The elements of an unjust enrichment claim are the "receipt of a benefit and unjust retention of the benefit at the expense of another." (*Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726.)

Here, plaintiffs have not alleged that defendants received a benefit and retained it at plaintiffs' expense. Plaintiffs have merely alleged that defendants have initiated the process of a foreclosure sale on the subject property based on an incorrect default amount. Thus, the demurrer to the seventh cause of action is sustained, with leave to amend.

Eighth Cause of Action – Temporary Restraining Order

Defendants demur to the eighth cause of action on the ground that it is not a cause of action, but rather is a remedy. Indeed, a temporary restraining order is a remedy and not a proper cause of action. The demurrer to the eighth cause of action is sustained, with leave to amend the prayer for relief.

Ninth Cause of Action – Declaratory Relief

Defendants contend that the ninth cause of action for declaratory relief is not directed at any of the defendants and fails to state an actual controversy. In particular,

defendants request for judicial notice of the foreclosure sale of the subject property, which occurred on February 20, 2024. (Request for Judicial Notice, Exh. 2.) Defendants argue that since the property has been foreclosed on, there is no controversy as to plaintiffs' title to the subject property and the validity of the Notice of Default.

Since the declaratory relief sought in the SAC is for an order declaring the Notice of Default and Notice of Trustee Sale on January 17, 2024, invalid, null, and without effect, and the sale has already occurred, indeed, it appears the controversy as to this issue would be moot.

However, plaintiffs argue that the actual controversy at issue is the disputed delinquency amount. The demurrer is sustained with leave to amend to allow plaintiffs to draft a declaratory relief claim based on that issue.

Plaintiffs' Request for Sanctions Pursuant to Code of Civil Procedure 128.7

The court notes that plaintiffs have filed a notice of intent to move for sanctions under Code of Civil Procedure 128.7. It is unclear if this is a notice of plaintiffs' intent to move for sanctions, or if this is an actual request for sanctions. Any request for sanctions sought in conjuncture with the preexisting demurrer is disregarded at this time, since a hearing has not been requested.

"A motion for sanctions under [Code of Civil Procedure section 128.7] shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." (Code Civ. Proc., § 128.7, subd. (c)(1).)

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: JS on 5/14/2024.
(Judge's initials) (Date)