Tentative Rulings for April 30, 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.

_____

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(20) **Tentative Ruling**

Re: ***Irwin v. Clovis Unified School District***
Superior Court Case No. 23CECG04939

Hearing Date: April 30, 2024 (Dept. 403)

Motion: By Plaintiff for Trial Setting Preference

Tentative Ruling:

To grant.

Explanation:

This is a personal injury action. Plaintiff is 8 years old and moves for trial setting preference. Actions for personal injury are entitled to preference on motion of a party under 14 years of age who has a "substantial interest in the case as a whole." (Code Civ. Proc., § 36, subd. (b).) There is no dispute that plaintiff is under 14 years of age. Rather, the opposition argues that plaintiff does not have a substantial interest in the action as a whole. However, defendant's arguments focus on liability issues and public policy arguments against granting preference. These arguments are not relevant to the substantial interest inquiry. Granting trial preference is mandatory when the statutory requirements are met. (See *Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 223-24.) Plaintiff was injured and sues for damages. Clearly she has a substantial interest in the case as a whole, and is therefore entitled to trial preference. Defendant's arguments would more appropriately be directed at the legislature. Trial must be set to start 120 days from the order granting preference. (Code Civ. Proc., § 36, subd. (f).)

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 4/22/2024 .
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***In re: Quinton Lee Cocagne***
Superior Court Case No. 24CECG00453

In re: Leah Joy Cocagne
Superior Court Case No. 24CECG00455

In re: Chad Elijah Cocagne, Jr.
Superior Court Case No. 24CECG00457

In re: Amarie J. Cocagne
Superior Court Case No. 24CECG00467

Hearing Date: April 30, 2024 (Dept. 403)

Motion: Petitions to Approve Compromise of Disputed Claim of Minors

Tentative Ruling:

To grant. Orders signed. No appearances necessary.

The court sets a status conference on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403 for confirmation of deposit of the minors' funds into blocked accounts. If Petitioner files the Acknowledgments of Receipt of Order and Funds for Deposit in Blocked Account (MC-356) at least five (5) court days before the hearing, the status conference will come off calendar.

Explanation:

Regarding the matters of *In re: Leah Joy* and *In re: Chad Elijah Cocagne, Jr.*, Petitioner has not been appointed guardian ad litem. Regarding Chad Elijah Jr., an application was filed but was not accompanied by an order for the judge to sign. Regarding Leah Joy, an application and order are pending filing. However, under Probate Code section 3500, subdivision (a)(2), a parent who has care, custody, or control of the minor when the parents are living separate and apart has the right to compromise a disputed claim for damages. Here, the matters are before the court as a result of a disputed claim following the death of claimants' father. Therefore, claimants' mother, the sole living parent, is the petitioner for all of her children and can thus petition the court on behalf of her son and daughter. An order and application for appointment of guardian ad litem was filed and orders signed as to the other two claimants.

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 4/25/2024.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Gloria Floyd v. David S. Siegal & Co., Inc.***
Superior Court Case No. 23CECG00084

Hearing Date: April 30, 2024 (Dept. 403)

Motion: Defendant City of Fresno's Demurrer and Motion to Strike

Tentative Ruling:

To overrule the demurrer, with defendant City of Fresno granted 10 days' leave to file its answer to the Third Amended Complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

To take the motion to strike off calendar due to defective moving papers.

Explanation:

This motion arises out of a Third Amended Complaint ("TAC") filed February 14, 2024 alleging 1) premises liability against defendant Noble Federal Credit Union and 2) dangerous condition of public property against defendant City of Fresno. It does not appear that defendant Noble Federal Credit Union has been served with a Summons or the Third Amended Complaint yet. Defendant City brings this demurrer to the second cause of action alleged against it. In the TAC, plaintiff alleges that on February 19, 2022[1], she was walking her dog when she tripped and fell on a portion of public sidewalk which was lifted and uneven.

Demurrer

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 545.) The test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of the complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well established policy of liberality in reviewing a demurrer sustained without leave to amend, liberally construing the allegations with a view to attaining substantial justice among the parties. (*Glaire v. LaLanne-Paris Health Spa, Inc*. (1974) 12 Cal.3d 915, 918.)

Public entities are not liable for injuries from an alleged act or omission except where provided by statute. (Gov. Code, § 815; *Brenner v. City of El Cajon* (2003) 113

[1] The court has observed that the date of plaintiff's injury has changed from that stated in the original and the First Amended Complaint, which both indicated the incident occurred on March 24, 2021. It appears that the date changed in the Second Amended Complaint and has remained as February 19, 2022 since that filing.

Cal.App.4th 434, 438.) Claims against public entities must be specifically pled. (*Brenner v. City of El Cajon, supra*, 113 Cal.App.4th at p. 439.)

Government Code section 835 provides the statutory basis for a claim of a dangerous condition on public property. (Gov. Code, § 835; *Brenner v. City of El Cajon, supra*, 113 Cal.App.4th at p. 438.) The elements for a dangerous condition on public property are: "(1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition in sufficient time to have taken measures to protect against it." (*Brenner v. City of El Cajon, supra*, 113 Cal.App.4th at p. 439.)

Here, the notice for the demurrer and the memorandum of points and authorities are unclear with regards to what portion of the complaint is deficient. The notice says, "With each amended complaint, the substance of the basis for alleging the City is liable for a dangerous condition changes, rather than simply amending the complaint to comply with the Government Tort Claims Act." The notice does not specify how plaintiff has failed to comply with the Government Tort Claims Act, nor does the memorandum of points and authorities. In its previous demurrer, the issues were whether the defect was trivial and whether the entity had actual or constructive notice of said defect. In its ruling on the previous demurrer, the court found that plaintiff had sufficiently alleged a dangerous condition, but sustained the demurrer because the complaint failed to allege the notice element. (See Minute Order, October 17, 2023.)

Here, plaintiff has adequately pled each element for a dangerous condition in the TAC. She has pled that the dangerous condition existed on public property by alleging that the City has acknowledged it was granted and owns a sidewalk easement at the location of the incident. (TAC, ¶¶ 17, 37.) She has pled that the sidewalk was in a dangerous condition by alleging it had a section which was uneven and lifted in excess of one and a half inches. (TAC, ¶¶ 18, 25, 29, 32.) She has pled the condition caused her injuries by alleging that the condition caused her to trip and fall. (TAC, ¶¶ 18, 33.) She has pled the foreseeable risk created by the condition by alleging the uneven sidewalk was a trip and fall hazard. (TAC, ¶ 33.) She has pled notice of the condition by alleging the sidewalk condition existed since 2011 and that there was a visible prior, but insufficient attempt at a repair. (TAC, ¶¶ 25, 33, 38-40.) As such, plaintiff has sufficiently pled each element of the cause of action for a dangerous condition of public property.

To the extent the City argues that plaintiff has not alleged compliance with the claims presentation requirements of the Government Tort Claims Act, the TAC alleges her fulfillment of such in paragraph 15.

To the extent the City argues that plaintiff has had too many opportunities to amend her pleadings, the court would note that the most recent amendment occurred as a result of a stipulation between plaintiff and defendant City. (See Stipulation For Leave to Allow Plaintiff Gloria Floyd to File a Third Amended Complaint and Order, November 29, 2023.)

The court overrules defendant City's demurrer to the second cause of action in the TAC.

Motion to Strike

"A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." (Cal. Rules of Court, rule 3.1322(a).)

Here, defendant City's "Notice of Motion" fails to specify any portion of the complaint defendant seeks to have stricken. As such, the moving papers are defective.

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 4/26/2024.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Alaniz, et al. v. Singh, et al.***
Superior Court Case No. 23CECG02734

Hearing Date: April 30, 2024 (Dept. 403)

Motion: Defendant Ishkiret's Group LLP's Motion to Dismiss for Inconvenient Forum

Tentative Ruling:

To grant. (Code Civ. Proc., § 410.30.) The prevailing party is directed to submit to the court, a proposed judgment dismissing the action without prejudice within 7 days.

Explanation:

Timeliness of the Motion

Plaintiffs contend that the motion is untimely, because it is brought under Code of Civil Procedure section 418.10, which provides that the last day to file the notice of motion for a defendant who has not yet appeared in the action is when the responsive pleading to the complaint is due. However, "[t]he provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance." (Code Civ. Proc., § 410.30, subd. (b).) Here, plaintiffs' complaint was filed on July 7, 2023. The moving party, Ishkiret's Group LLP ("Ishkiret's Group"), filed its answer to the complaint on October 9, 2023, and filed the instant motion to dismiss on October 18, 2023. Since Ishkiret's Group filed its answer prior to the instant motion, the timeliness provisions of Code of Civil Procedure section 418.10 do not apply. Although the notice of motion indicates that the motion is brought under Code of Civil Procedure section 418.10, this is merely a technical defect. The court does not find the defect to be prejudicial to plaintiffs and determines the motion to be timely.

Forum Non Conveniens

"In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751, citations omitted.)

"On a motion for forum non conveniens defendant, as the moving party, bears the burden of proof. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard." (*Id.*, at pp. 751-752, citations omitted.)

Suitability

"As a general matter, a forum is suitable 'if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citation.] "[A] forum is suitable where an action 'can be brought,' although not necessarily won." [Citation.]' [Citation.]" (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 437, internal citations omitted.) The moving party must show all defendants are subject to personal jurisdiction in the alternative forum. (*Id.*, at pp. 676-677.) Alternatively, the moving party can show that all defendants are willing to submit to jurisdiction in the alternative forum as a condition of the California court granting its motion to stay or dismiss the California action. (*Stangvik v. Shiley Inc., supra,* 54 Cal.3d. 744, 752.)

It is undisputed that both California and Oklahoma are suitable forums for defendants Ishkiret Group and Gurmeet Singh; however, defendant Allen Lund Company, LLC ("Allen Lund Co.") is not subject to personal jurisdiction in Oklahoma. In its reply papers, the moving party indicates that Allen Lund Co. is willing to submit to personal jurisdiction of plaintiffs' claims alleged in the complaint in the State of Oklahoma. A declaration filed by counsel on Allen Lund Co.'s behalf indicating the same is submitted. (Bayles Decl., filed on April 23, 2024, at ¶ 5.) Accordingly, the moving papers have established Oklahoma to be a suitable forum for all defendants.

Interest Factors

If a suitable alternative forum exists, the weight of recognized private and public interest factors must be determined. The jurisdiction with the greater interest in the litigation normally should bear the burden of entertaining it. (*Stangvik v. Shiley Inc., supra,* 54 Cal.3d. 744, 758.) Private interest factors relate to where the trial and enforcement of any judgment will be the most expeditious and least expensive. Included are such matters as: access to sources of proof (residence of parties, witnesses, location of physical evidence); cost of obtaining attendance of witnesses; and availability of compulsory process for attendance of unwilling witnesses. (*Id.*, at p. 751.) The public interest factors include: avoiding overburdening local courts with congested calendars, particularly where numerous actions and parties are involved; protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern; and weighing the competing interests of California and the alternative jurisdiction in the litigation. (*Ibid*.)

Plaintiffs rely on *National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal.App.4th 902, 929 ("*National Football League*") and *Stangvik* to contend that they are entitled to due deference to their chosen forum, and the defendant's own state of residence is presumed to be convenient. However, both of these cases stand for the proposition that "California does not recognize a strong presumption in favor of a nonresident plaintiff's choice of forum…" (*National Football League*, at p. 924.) "Many

cases hold that the plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant. [Citations.] But the reasons advanced for this frequently reiterated rule apply only to residents of the forum state: (1) if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient [Citations.]; and (2) a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances." (*Stangvik,* at p. 754-755.)

Here, plaintiffs are not residents of California and are not entitled to the strong presumption in favor of their choice of forum. At best, they are "entitled to a due deference" but "not a strong presumption, in favor of its choice of forum. That deference is to be weighed and balanced by the trial court along with all the other pertinent factors, including the defendant's residence or principal place of business, and has no direct bearing on the moving defendant's burden of proof." (*National Football League* at p. 929.)

Next, the defendants' residence is also a factor to be considered in the balance of convenience. "If a corporation is the defendant, the state of its incorporation and the place where its principal place of business is located is presumptively a convenient forum." (*Stangvik*, at p. 755.) Here, all of the defendants are California residents and California is presumed to be a convenient forum. Accordingly, in order to prevail on its motion, the moving party must "overcome the presumption of convenience by evidence that the alternate jurisdiction is a more convenient place for trial of the action." (*Id*., at p. 756.)

Plaintiffs assert that the motion must be denied, as a motion pursuant to Code of Civil Procedure section 410.30 supported by only affidavits by counsel is not enough to overcome the presumption. Plaintiffs rely only on an unpublished Los Angeles County trial court case in support of such a contention, and argue that California Rules of Court, rule 8.1115 allows for consideration of such a case when the opinion is relevant under the doctrines of law of the case. Plaintiff has not only misquoted the California Rules of Court rule, but has also misunderstood the meaning of "doctrines of law of the case."

"Except as provided in (b), an opinion of a California Court of Appeal or ***superior court appellate division*** that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a), emphasis added.) "An unpublished opinion may be cited or relied on: (1) When the opinion is relevant under the doctrines of law of the case…" (Cal. Rules of Court, rule 8.1115(b).)

First, the case relied upon by plaintiffs does not appear to be either a California Court of Appeal or ***superior court appellate division*** case. Consequently, the exceptions of subdivision (b) of the rule are wholly inapplicable.

Next, "[t]he doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127, italics in original,

internal citations and quotations omitted.) Thus, the doctrine of the law of the case cannot be drawn from a trial court case. Moreover, any law of the case that was established in the Los Angeles County Superior Court case is completely inapplicable to any case other than subsequent proceedings involving the parties of that case.

Therefore, plaintiffs have not shown that an unpublished trial court case may be cited or relied upon, and the case is disregarded in its entirety. Since plaintiffs fail to provide any authority indicating that an affidavit by counsel is insufficient to support a motion for forum non conveniens, the court finds plaintiffs argument to that effect to be without merit and the evidence is considered.

Ishkiret's Group contends that the State of Oklahoma is the more convenient forum, since the subject auto collision giving rise to the action occurred there. Accordingly, the moving defendant provides that the physical evidence relating to the roadway, the accident, and decedent's death is located in Oklahoma. Additionally, the majority of the witnesses, including the third-party driver—Mr. Kerley, law enforcement, coroner's personnel, and other emergency responders, are in Oklahoma. Thus, Ishkiret's Group contends it would incredibly costly to obtain the attendance of witnesses at trial and depositions. Ishkiret's Group further emphasizes the availability of the compulsory process for attendance of any witnesses who may be unwilling to attend depositions or trial, is better suited in Oklahoma. Indeed, the moving party raises compelling points tending to suggest that the private interest factors weigh in favor of litigating the action in Oklahoma.

On the other hand, plaintiffs argue that most of the relevant documentary evidence is located in California. In particular, plaintiffs indicate that they have further alleged a claim for negligent hiring, training, supervision, retention, etc., and thus, much of the evidence pertaining to the defendant Gurmeet Singh's employment is located in California. While that may be the case, it is clear that the accident giving rise to plaintiffs' claims, is the heart of the action. Moreover, with the advances in modern technology which allows for sharing of information through electronic means, *documentary* evidence can easily be accessed from anywhere around the world. Without a doubt, it is probably much easier and less costly to access documentary evidence located in California (from Oklahoma) than it would be to access witnesses in Oklahoma (from California). And while there may be witnesses in California pertaining to plaintiffs' negligent hiring/supervision/retention claim, these witnesses can likely be accessed with minimal effort, as these witnesses are likely to be agents, employees, or otherwise related to the defendants, whereas the witnesses in Oklahoma are unrelated third-parties to the action.

Therefore, the moving defendant has shown that the private interest factors weigh heavily in favor of litigating the case in Oklahoma. The court also does not find the fact that the moving party has availed itself to discovery in California to be dispositive to the motion.

Ishkiret's Group also argues that the public interest factors weigh in favor of hearing the action in Oklahoma. Ishkiret's Group makes a conclusory statement that litigation in Oklahoma would avoid overburdening the court's already congested calendar. Plaintiffs however, indicate that the case would not overburden the court, as

a single case has little or no impact on court congestion. Despite the court's extremely congested calendar, the court agrees that the litigation of plaintiffs' case probably would have relatively little impact on the court's congestion. Although there are multiple plaintiffs and defendants involved, all of the plaintiffs are heirs of the plaintiffs' decedent in pursuing this wrongful case.

Next, Ishkiret's Group contends that the local community has little direct concern with the case, as it arises out of an accident that occurred in Oklahoma and a fatally injured Texas resident. Since the accident and subsequent death occurred in Oklahoma, the citizens of Oklahoma have a stronger interest in the case than would those of California. However, plaintiffs contend that California has a stronger interest in the action, because defendants are residents of California and California residents have an interest in regulating companies who maintain their principal place of business here and to deter negligent conduct. "This interest… is to deter negligent conduct; the likelihood of a substantial recovery against such a manufacturer strengthens the deterrent effect." (Stangvik, at p. 759.)

Notably, however, under the facts in the present case, any additional deterrence that would result if defendants were called to account for their allegedly wrongful conduct in a California court rather than in an Oklahoma court would be negligible. The burden imposed on defendants in defending against this case, "and the damages that defendants might be required to pay if they are found liable, would provide sufficient deterrence to prevent wrongful conduct in the future even if the suits filed by nonresident plaintiffs were tried elsewhere." (*Stangvik*, at p. 759.)

Nonetheless, the moving and opposing parties have both provided compelling arguments to show that both California and Oklahoma likely have significant interest in the outcome of this case. And thus, it does not appear that the public interest factors clearly weigh in favor of either parties' position.

On balance of the private and public interest factors—the private which heavily weighs in favor of litigating in Oklahoma and the public which appears to hold neutral weight, it appears Oklahoma is the more convenient forum for this case. Therefore, 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 4/26/2024.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Hicks v. Jackson, et al.***
Superior Court Case No. 23CECG04303

Hearing Date: April 30, 2024 (Dept. 403)

Motion: (1) Demurrer to Amended Answer
(2) Demurrer to Amended Cross-Complaint

Tentative Ruling:

To overrule the general and special demurrers to defendant Jackson's Amended Answer. (Code Civ. Proc. § 430.20, subd. (a) and (b).) To overrule the general and special demurrers to the first, third, sixth, seventh, eighth, eleventh and twelfth affirmative defenses. (Code Civ. Proc. § 430.20, subd. (a) and (b).)

To overrule the general and special demurrer for uncertainty to the Amended Cross-Complaint. (Code Civ. Proc. § 430,10, subd. (e) and (f).) To sustain the general and special demurrers to the first, third, fourth, and fifth cause of action. (Code Civ. Proc. § 430.10, subd. (e) and (f).) To overrule the general and special demurrers to the second cause of action. (Code Civ Proc., § 430.10, subd. (e) and (f).) To overrule the special demurrers to the sixth, seventh, eighth, and ninth causes of action. (Code Civ. Proc. § 430.10, subd. (f).) To sustain the general demurrer to the sixth, seventh, eighth, and ninth causes of action. (Code Civ. Proc. § 430.10, subd. (e).)

Leave to amend the Amended Cross-Complaint is granted. The Second Amended Cross-Complaint shall be filed and served within 30 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Demurrer to Amended Answer

Under Code of Civil Procedure section 430.20, "A party against whom an answer has been filed may object, by demurrer as provided in Section 430.30, to the answer upon any one or more of the following grounds: (a) The answer does not state facts sufficient to constitute a defense. (b) The answer is uncertain. As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (Code Civ. Proc., § 430.20, subd. (a), (b), paragraph breaks omitted.)

"Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations omitted.) It is improper to allege affirmative defenses based on legal conclusions. Facts supporting affirmative defenses must be alleged with as much detail as the facts supporting a cause of action. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) 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 Mut., Inc*. (2006) 142 Cal.App.4th 1457, 1469-1470, internal citations omitted.)

"It has been consistently held that 'a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action. If there is any reasonable possibility that the plaintiff can state a good cause of action, it is error to sustain a demurrer without leave to amend.' ... 'The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.' ... There is no need to require specificity in the pleadings because 'modern discovery procedures necessarily affect the amount of detail that should be required in a pleading.'" (*Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099, internal citations omitted.)

Also, a defendant is only required to plead facts to support true affirmative defenses. Where the defendant's defense amounts to only a denial or traverse of the plaintiff's causes of action, the defendant does not have to allege any additional facts beyond the facts already alleged in the complaint. "The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. [Citation.] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.' [Citation.] Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter,' but only a traverse." (*State Farm Mutual Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725.)

"A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense. [Defendant's] attempt to prove that it provided a reasonable accommodation merely negates an element that [plaintiff] was required to prove and therefore was not an affirmative defense required to be pled in [defendant's] answer." (*Zivkovic v. Southern California Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1088, citations omitted.)

In the case at bench plaintiff has generally demurred to the answer and demurred both generally and specially to the first, third, sixth, seventh, eighth, eleventh and twelfth affirmative defenses[2].

Plaintiff's general demurrer to the answer is premised on its failure include the required elements of an answer to a complaint for partition set forth in Code of Civil Procedure section 872.410.

[2] The memorandum includes arguments as to why each of the twelve affirmative defenses fail, however, the demurrer itself includes only the first, third, sixth, seventh, eighth, eleventh and twelfth affirmative defenses.

Code of Civil Procedure section 872.410 states in relevant part,

> The answer shall set forth: [¶] (a) Any interest the defendant has or claims in the property. [¶] (b) Any facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true.

Defendant Jackson's amended answer satisfies the requirements for an answer to a complaint for partition. She reaffirms throughout the answer that she is the sole owner of the property at issue. There is no confusion or ambiguity as to the intended meaning of "sole owner" as any proportion of ownership other than a one hundred percent ownership. The amended answer sets forth facts controverting plaintiff's allegation of one-half ownership of the home by challenging the grant deed supporting plaintiff's ownership as fraudulent.

Allegations of fraud must be pleaded "with specificity," requiring the following elements: misrepresentation (false representation, concealment or nondisclosure); knowledge of falsity ("scienter"); intent to defraud, i.e., to induce reliance; justifiable reliance; and resulting damage (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App4th 347, 363.) Every element of a cause of action for fraud must be alleged in full, factually and specifically. (*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.) Accordingly, the policy of liberal construction of the pleadings "will not ordinarily be invoked to sustain a pleading defective in any material respect[;]" instead, this "particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, internal citations and quotation marks omitted.)

Here, defendant Jackson alleges that in June 2019 she was presented with a grant deed prepared by plaintiff as part of a Note Secured by Deed of Trust (also referenced as a Secure Note Deed of Trust) for $40,000 provided by plaintiff toward the purchase price of the home on Mono Street that was to be repaid by Jackson. The document she signed looked the same as a note prepared by plaintiff to secure a loan from Jackson to plaintiff in 2018, and she signed the document with the notary, supporting her justifiable reliance on plaintiff's representation of the purpose of the document. The June 2019 note was not recorded in 2019 but was later recorded in 2022, stating it was granting plaintiff a one-half interest in the property. Upon learning of the existence of the 2022 grant deed, defendant alerted the Notary Public Division of the Secretary of State and confronted plaintiff, stating she did not sign a grant deed but signed a note securing the $40,000, and he responded that she should make an appointment with the Fresno County District Attorney's Office and he would show them she signed the alleged grant deed and that as a real estate broker they would believe him. Plaintiff's knowledge of the falsity of the 2022 grant deed and intent to defraud Jackson can be reasonably inferred from his conduct as alleged and response when confronted with defendant's accusation that the document was not what it was purported to be. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1168 [actual reliance in support of a fraud claim reasonably inferable from the plaintiff's complaint].)

The factual allegations of fraud within the amended answer when read as a whole and in context support Jackson's claim of fraud with sufficient specificity to apprise

plaintiff of the basis of the fraud in order to defend against it. The general demurrer to the Amended Answer is overruled.

Plaintiff's general demurrers to the specified affirmative defenses argue the "affirmative defenses" pled do not constitute a defense to the complaint. Plaintiff is correct in this respect; however, this does not render the "defense" subject to demurrer. Rather, the factual allegations within the "defenses" are simply allegations intended to show that the essential allegations of the complaint are not true. As such, each so-called "affirmative defense is not new matter, but is merely a traverse." (*Goddard v. Fulton* (1863) 21 Cal. 430, 436; See, *e.g., State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725 [defense of reliance on counsel is not new matter but merely controverts plaintiff's claim of bad faith and malice].)

Allegations by defendants which are mere "traverses" rather than affirmative defenses, are better characterized as "argumentative denials." The Witkin treatise on *California Procedure* notes that "California follows the liberal view that an affirmative statement, directly contrary to or inconsistent with an allegation in the complaint, is **equivalent to a specific denial and will raise an issue in the same manner.**" (See 5 Witkin, Cal. Proc. 6th (2024) Plead, § 1102, emphasis added.) In other words, a traverse can be held as a "good traverse" and thus held "sufficient as a denial. (See, *e.g., Burris v. People's Ditch Co.* (1894) 104 Cal. 248, 253; See also *Perkins v. Brock* (1889) 80 Cal. 320, 322 [discussing an "inconsistent allegation," the court noted that this form of pleading in the answer is "not to be commended," but sufficient].)

At best, then, on this motion plaintiff has pointed out that these are *mislabeled* as affirmative defenses when they are really argumentative denials, rather than proving that these statements do not belong in the Amended Answer *at all*. In ruling on a demurrer, the trial court is obligated to look past the form of the pleading to its substance; erroneous or confusing labels attached by the inept pleader are to be ignored if complaint pleads facts that would entitle plaintiff to relief. (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.) Therefore, the demurrers to these mislabeled "denials" are overruled.

Plaintiff highlights the first affirmative defense alleging the complaints fails to state facts sufficient to constitute a cause of action and the twelfth cause of action for "offset" as failing as a matter of law[3]. The defense that the complaint fails to state facts sufficient is not actually a defense but is an objection. "Failure to state facts sufficient to constitute a cause of action" is an objection that is not waived. It can be raised at any time, even if not asserted by demurrer or answer. (See Code Civ. Proc. § 430.80(a) and see *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 307.) The rationale is that this objection goes to the court's *power* to grant relief; and hence, can never be waived.

Since it is not a "defense," it is not necessary at this pleading stage for defendant to identify all facts or elements of plaintiff's causes of action at which this objection is directed. To the extent that plaintiff's argument is that this "defense" is subject to

[3] The court notes that the answer to the complaint filed by Defendant Mortgage Electronic Registration Systems, Inc. also includes as its first and ninth affirmative defenses "failure to state facts sufficient to constitute a cause of action" and "off-set" but their inclusion did not prompt a demurrer to the answer.

demurrer because it is tantamount to a general denial, the "defense" is followed by a summation of facts challenging the allegations of the complaint which, as discussed above, are not "new matter." While this may be another "mislabeled" item in the answer, this does not subject it to demurrer.

Plaintiff argues the twelfth affirmative defense of "offset" is subject to demurrer because, as a matter of law, a claim for set-off is not an affirmative defense. Additionally, the "offset" is provided for within the statutorily required final accounting. (Code. Civ. Proc. § 872.140.) To the extent that defendant includes this statement in her Amended Answer, it is mere surplusage, which might be subject to a motion to strike but cannot be reached by demurrer. (*Peak v. Republic Truck Sales Corp.* (1924) 194 Cal. 782, 790 [surplusage ignored on demurrer, even though it was subject to being struck out on motion].) Therefore, the demurrer to this "defense" is overruled.

Demurrer to Amended Cross-Complaint

In California, a complaint shall contain a statement of the facts constituting the cause of action, in ordinary and ***concise*** language; and a demand for judgment for the relief to which the pleader claims to be entitled. (Code Civ. Proc. §425.10.) If the recovery of money or damages is demanded, the amount demanded shall be stated unless it is an action brought to recover actual or punitive damages for personal injury or wrongful death, in which case the amounts sought shall not be stated. (*Ibid*.)

In other words, a cause of action must allege every fact which the plaintiff is required to prove in order to allege the facts, or elements, necessary to constitute a cause of action. Where plaintiff fails to allege essential facts, the pleading is subject to demurrer. (See Code Civ. Proc. §§ 425.10, 430.10.)

In testing a pleading against a demurrer, the facts alleged are deemed to be true, "however improbable they may be" (*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 604) as it is "not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which [plaintiff] describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 47.)

To be "demurrer-proof," a complaint must allege sufficient ultimate facts to state a cause of action under a statute or case law. (*People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1484; Code Civ. Proc. § 425.10(a).) Although California courts take a liberal view of inartfully drawn complaints, "[i]t remains essential...that a complaint set forth the actionable facts relied upon with sufficient precision to inform the defendant of what plaintiff is complaining[.]" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.) Courts indulge in great liberality in allowing amendments to a complaint in order that no litigant is deprived of its day in court due to pleading technicalities. (*Saari v. Superior Court* (1960) 178 Cal.App.2d 175, 178.) Where the complaint alleges facts showing that plaintiff is entitled to damages of some sort, amendment should be permitted. (*Ibid*.; see also *Smith v. Wells Fargo Bank, N.A*. (2005) 135 Cal.App.4th 1463, 1485.)

In the case at bench, cross-defendant demurs on the grounds the Amended Cross-Complaint and each cause of action therein fails to state sufficient facts to constitute a cause of action and is uncertain. (Code Civ. Proc. § 430.10, subd. (e) and (f).) The court intends to overrule the general demurrer and the special demurrer for uncertainty to the cross-complaint as a whole, but to sustain, with leave to amend the general and special demurrers to the first, third, fourth, fifth and eighth causes of action. The sixth, seventh, and ninth causes of action appear to be remedies sought, mislabeled as causes of action. As such, the demurrer to these "causes of action" is sustained, however cross-complainant is given leave to amend for purposes of adding these remedies to her prayer for damages.

The amended cross complaint consists of twenty-three pages of factual allegations, including a detailed chronology of the interactions between Mr. Hicks and Mrs. Jackson, and lists the following nine causes of action: (1) Indemnity, (2) Judicial Determination, (3) Breach of Oral Agreement, (4) Intentional Infliction of Emotional Distress, (5) Claims, (6) Off-Set Economic Damages, (7) Release of Grant Deed, (8) Restraining Order, (9) Compensatory Damages. The cross-complaint does not set forth what factual allegations within the preceding twenty-three pages form the basis of the causes of action listed and does not plead the elements of the causes of action.

First Cause of Action: Indemnity

A cross complaint is the proper vehicle for use by a defendant in an action for damages to adjudicate his or her right to comparative indemnity from a codefendant or a new party for any damages that the defendant may be compelled to pay to the plaintiff as the result of any damages, judgment, or other awards recovered by plaintiff. (*American Motorcycle Assn.* v. *Superior Court* (1978) 20 Cal.3d 578.)

The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible. (*Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033, 1041.) In an indemnity action, the trier of fact must determine whether the indemnitee was held legally responsible for damages to a third party, whether the indemnitor's conduct was a substantial factor in causing the harm, and if so, the indemnitee's and indemnitor's percentages of responsibility. (*Ibid*.)

The cross-complaint does not identify the basis for her claim for indemnity or how cross-defendant is responsible for damages paid or to be paid by cross-complainant.

Second Cause of Action: Judicial Determination

Cross-complainant has set forth what appears to be the subject of an claim for declaratory relief. Any person who desires a declaration of his or her rights or duties with respect to another may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action for a declaration of his or her rights and duties. (Code Civ. Proc § 1060.)

A complaint for declaratory relief should show the following: (1) a proper subject of declaratory relief within the scope of Code of Civil Procedure section 1060; and (2) an actual controversy involving justiciable question relating to the rights or obligations of a party. (*Tiburon* v. *Northwestern Pacific Railroad Co.* (1970) 4 Cal.App.3d 160, 170.)

Declaratory procedure operates prospectively and not merely for redress of past wrongs. (Code Civ. Proc. § 1060.)

Here, cross-complainant is seeking declarations as to her rights with respect to, in, over or upon property, which is a proper subject for declaratory relief. Within the factual allegations are allegations demonstrating an actual controversy as to the parties' respective rights to the Mono Street property. A cause of action for declaratory relief is sufficiently stated.

Third Cause of Action: Breach of Oral Agreement

A cause of action for damages for breach of contract is comprised of the following elements: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co.* v. *Security Pacific Business Center* (1990) 222 Cal.App.3d 1371, 1388.) These elements are the same when alleging an express contract (oral or written) and an implied contract, except with an implied contract, "the promise is not expressed in words but is implied from the promisor's conduct." (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.)

In pleading the existence of an oral contract, plaintiff must set forth the nature and material terms of the agreement, since "it is rarely possible to allege the exact words" of the agreement. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

Cross-complainant has not identified what oral agreement(s) are alleged to have breached, what actions constituted the breach, whether cross-complainant performed her obligations under the contract, or how she was damaged by the breach of contract.

Fourth Cause of Action: Intentional Infliction of Emotional Distress

The elements of a prima facie case of intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) intent to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of emotional distress. "Outrageous conduct" denotes conduct which is so extreme as to exceed all bounds of decency and which is to be regarded as "atrocious and utterly intolerable in a civilized community." (*Bartling* v. *Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 961, 969.)

The cross-complaint does not identify the outrageous conduct of cross-defendant that is the subject of the cause of action, facts demonstrating cross-defendants intent to cause emotional distress, and it does not allege specifically that the outrageous conduct was the actual and proximate cause of cross-complainant's severe emotional suffering.

Fifth Cause of Action: Claim

The cross-complaint identifies this cause of action as, simply, "claim." This is not enough to apprise the court or opposing party as to the nature of cross-complainant's claim.

Eighth Cause of Action: Restraining Order

The cause of action for "Restraining Order" references Code of Civil Procedure section 527.6 regarding the issuance of restraining orders. The court understands there is a related case pending for the issuance of a civil restraining order and will not interfere with the jurisdiction of that court.

However, to the extent cross-defendant seeks injunctive relief regarding the parties' rights to reside on the Mono Street property such a remedy may be available in this action.

Injunctive relief is a remedy, and not a cause of action. (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 800 [permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate]; *MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623.) However, "preliminary injunction" is frequently pled as a "cause of action" although technically subject to demurrer.

Injunctions are equitable in nature and the general purpose of preliminary, or prejudgment injunctive relief is to preserve the status quo pending a determination on the merits. For example, preservation of the status quo would allow Mrs. Jackson, as the party residing in the Mono Street property at this time, to continue to reside in the home during the pendency of this action. The procedure for such relief is found in Code of Civil Procedure section 527 and California Rule of Court, rules 3.1150-3.1152.

Remedies as Causes of Action

The cross-complaint's sixth, seventh, and ninth causes of action for "Off-Set Economic Damages," "Release of Grant Deed," and compensatory damages, respectively, are remedies normally found in the prayer for damages at the conclusion of the complaint or cross-complaint. As such, they are subject to demurrer as none constitute a cause of action, however, leave to amend is granted to allow cross-complainant to include these remedies in a Prayer at the conclusion of the cross-complaint.

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 4/29/2024.
(Judge's initials) (Date)