Tentative Rulings for April 30, 2024
Department 501

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

21CECG00398 ***Javaherie v. Nunez***

23CECG00997 ***Lane v. Abel's Towing & Roadside Service, Inc.***

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 501

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(35)

Tentative Ruling

Re: ***Morgan v. De La Cruz et al.***
Superior Court Case No. 21CECG01747

Hearing Date: April 30, 2024 (Dept. 501)

Motion: by Plaintiff Joseph Morgan for an Award of Attorney Fees

Tentative Ruling:

To deny.

Explanation:

Plaintiff Joseph Morgan ("Plaintiff") seeks an order awarding attorney fees under Civil Code section 3336.[1]

The general rule is that attorney fees are not a proper item of recovery from the adverse party, either as costs, damages or otherwise, unless there is express statutory authority or contractual liability therefore. (Code Civ. Proc. § 1021.)

Civil Code section 3336 states:

> The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> First – the value of the property at the time of the conversion, with interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which is a proper degree of prudence on his part would not have adverted; and
>
> Second – a fair compensation for the time and money properly expended in pursuit of the property.

The language of Civil Code section 3336 on its face is an order of operations. (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116.) The first of two measures is the value of the property. (Civ. Code § 3336.) The second of two measures is an alternative provision, resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust. (*Myers v. Stephens*, *supra*, 233 Cal.App.2d at p. 116.)

[1] Plaintiff's Request for Judicial Notice is granted.

Here, the order on summary adjudication, upon which Plaintiff sought entry of judgment[2] specifically found that the first measure was applicable, and applied the value of the property to evaluate damages. Accordingly, the alternative measure of valuation, upon which Plaintiff now relies to seek an award of attorney fees, is not applicable. Moreover, even had the alternative measure been used, it has long been held that attorney fees are not within the rule of damages provided for by Civil Code section 3336. (*Russell v. United Pac. Ins. Co.* (1963) 214 Cal.App.2d 78, 91.) Plaintiff identifies no other basis upon which he seeks an award of attorney fees.

For the above reasons, the court finds that Plaintiff has failed to identify an express statutory basis to seek an award of attorney fees. The motion is denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order 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: DTT on 4/24/2024.
(Judge's initials) (Date)

[2] The court notes that though judgment has been entered, four causes of action of the Complaint improperly remain at issue. There shall be but one final judgment. (*Doudell v. Shoo* (1911) 159 Cal. 448, 454.) Judgment is final when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. (*Id.* at p. 453.) In the present instance, where Plaintiff has sought entry of judgment, all other matters not then concluded should have been dismissed.

(03)

Tentative Ruling

Re: ***Peterson v. Nationwide Agribusiness Insurance Company***
Case No. 24CECG00667

Hearing Date: April 30, 2024 (Dept. 501)

Motion: Defendant's Demurrer and Motion to Strike Complaint

Tentative Ruling:

To grant the motion to strike the Complaint to the extent Ms. Peterson is attempting to state claims on behalf of the Trust and Mr. Peterson. To deny the motion to strike to the extent Ms. Peterson is stating claims on her own behalf. To grant the motion to strike the prayer for attorney's fees from the Complaint. To grant leave to amend the Complaint to state claims by the Trust, provided it retains a licensed California attorney to represent it. To grant leave to amend the Complaint as to Mr. Peterson, provided that he either represents himself or has a licensed attorney represent him. To deny leave to amend to request attorney's fees.

To overrule the demurrer to the first cause of action. To sustain the demurrer to the second, third and fourth causes of action. To grant leave to amend the second cause of action. To deny leave to amend the third and fourth causes of action.

Plaintiffs shall file and serve their First Amended Complaint within 20 days of the date of this order. All new allegations shall be in **boldface**.

Explanation:

Motion to Strike: First, the court finds that Ms. Peterson is not authorized to represent any of the named plaintiffs other than herself in the action because she is not an attorney. Thus, to the extent Ms. Peterson has brought the Complaint on behalf of the Trust and Mr. Peterson, the Complaint has been improperly filed and does not conform to California law, so it will be stricken. (Code Civ. Proc., § 436.)

Under Business and Professions Code section 6125, "No person shall practice law in California unless the person is an active licensee of the State Bar." Thus, section 6125 bars the unlicensed practice of law in the State of California, and violation of that section is a misdemeanor. (Bus. & Prof. Code, § 6126, subd. (a).) As a result, while a non-attorney may represent themselves in a civil action, they may not represent any other persons or entities, as doing so would be engaging in the unlicensed practice of law. (*Hansen v. Hansen* (2003) 114 Cal.App.4th 618, 621; *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1261.) Likewise, a non-attorney trustee cannot represent a trust in a legal proceeding, as they would be engaging in the unauthorized practice of law. (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 549.) The only exception to this rule is where the trustee is the sole beneficiary, settlor, and trustee of the trust, and thus they are essentially only representing their own interests in the action rather than the interests of others. (*Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1525.)

In the present case, Ms. Peterson purports to represent the Carol A. Peterson Separate Property Trust dated April 23, 2015, as well as "Peterson, Robert J. and Carol A. - DBA Peterson Ranch." However, Ms. Peterson does not allege that she is an attorney licensed to practice law in the state of California, and she states that she is appearing "in pro per", which indicates that she is not a licensed California attorney. She has not denied that she is not a licensed California attorney in her opposition. Therefore, to the extent that Ms. Peterson purports to represent the Trust, she would only be allowed to do so if she is the sole settlor, beneficiary and trustee of the Trust. (*Aulisio, supra*, at p. 1525.) However, plaintiffs do not allege in their complaint that Ms. Peterson is the sole settlor, beneficiary or trustee of the Trust. Thus, Ms. Peterson's attempt to represent the Trust is improper and is subject to being stricken, as she is engaging in the unauthorized practice of law. (*Ziegler, supra*, at p. 549.)

In their opposition, plaintiffs argue that Ms. Peterson is authorized to represent the Trust, as she is the trustee and the "Certification of Trust" authorizes her to commence and settle litigation on behalf of the Trust. (Exhibit A to Opposition, Certification of Trust, ¶ 8 K.) However, the Certification of Trust is not attached or incorporated into the complaint nor is it a proper subject of judicial notice, so the court cannot consider it when ruling on the demurrer. (*Kerivan v. Title Ins. & Tr. Co.* (1983) 147 Cal. App. 3d 225, 229.) In any event, the Certification of Trust only authorizes Ms. Peterson to commence, defend, or settle litigation on behalf of the Trust, not to represent the Trust in the litigation despite the fact that she is not a licensed California attorney. As discussed above, allowing Ms. Peterson to represent the Trust would permit the unlicensed practice of law, which would violate California law. Therefore, the court intends to grant the motion to strike the complaint to the extent that it is brought by Ms. Peterson on behalf of the Trust.

Likewise, the court will also strike the Complaint to the extent Ms. Peterson has attempted to bring it on behalf of Robert Peterson. The Complaint is somewhat vague and confusing with regard to the identity the other plaintiffs, as it is brought on behalf of "Peterson, Robert J. and Carol A. – DBA Peterson Ranch." However, it appears that the plaintiffs are two individuals, Robert J. Peterson and Carol A. Peterson, who are also the owners of the fictitious business entity Peterson Ranch.[3] While Ms. Peterson can properly appear and represent herself without being a licensed attorney, she cannot represent Robert Peterson because she is not licensed to practice law and represent others. Doing so would be engaging in the unlicensed practice of law. (Bus. & Prof. Code, § 6125; *Hansen v. Hansen*, *supra*, 114 Cal.App.4th at p. 621.) As a result, the court intends to grant the motion to strike the Complaint to the extent that Ms. Peterson has brought it on behalf of Robert Peterson.

[3] Defendant claims that the Petersons have entered into a partnership called "Peterson Ranch", and thus Ms. Peterson is improperly attempting to represent the partnership without being a licensed attorney. However, defendant's interpretation of the complaint seems strained. The complaint is somewhat vague and confusing, but it does allege that "Peterson Ranch" is a dba of Robert and Carol Peterson. In other words, it is a fictitious business name rather than a separate legal entity like a partnership, LLC, or corporation. As such, the Petersons are apparently appearing as individuals who also happen to be doing business as Peterson Ranch. Therefore, Ms. Peterson does not appear to be attempting to improperly represent a separate legal entity.

On the other hand, the court intends to deny the motion to strike the Complaint to the extent it is brought on behalf of Carol Peterson, since Ms. Peterson is allowed to represent herself without being a licensed attorney. (*Hansen, supra,* at p. 621.)

Finally, the court intends to grant the motion to strike the prayer for attorney's fees from the Complaint. Since Ms. Peterson is not a licensed attorney, she is not entitled to recover attorney's fees for her work on the case. "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." (*Hardy v. San Fernando Valley C. of C.* (1950) 99 Cal.App.2d 572, 576.) Thus, a non-attorney who represents him or herself in an action is not entitled to an award of attorney's fees for their work in the case. (*Atherton v. Board of Supervisors* (1986) 176 Cal.App.3d 433, 436-437.) Even a licensed attorney who chooses to represent him or herself in pro per is not entitled to an award of attorney's fees for their time spent on the case. (*Trope v. Katz* (1995) 11 Cal.4th 274, 292.)

Here, Ms. Peterson is not a licensed attorney, and even if she were, she would not be entitled to an award of attorney's fees for representing herself in the litigation. Nor can she recover attorney's fees for representing the Trust or Robert Peterson, as she is not licensed to practice law in the State of California. In addition, even if Ms. Peterson were a licensed attorney, plaintiffs have not cited to any contractual provision or statute that would permit them to recover fees here. Without a contract or statute that provides for an award of attorney's fees in the action, there is no basis for plaintiffs to seek fees here. (Code Civ. Proc., § 1021; Civil Code, § 1717; *Reynolds Metal Co. v. Alperson* (1979) 25 Cal. 3d 124, 127.) Therefore, plaintiff's prayer for attorney's fees is improper and will be stricken from the Complaint.

Finally, the court intends to grant leave to amend the Complaint in part and deny in part. It is possible that plaintiffs might be able to cure some of the defects in their Complaint, as they could retain an attorney to represent them and the Trust. Plaintiff Robert Peterson could also appear in pro per and represent himself in the action. Therefore, the court will allow the plaintiffs to amend their Complaint to cure the problem caused by Ms. Peterson's improper attempt to represent the Trust and Mr. Peterson.

On the other hand, the court intends to deny leave to amend the Complaint to allege a prayer for attorney's fees, as plaintiffs have made no attempt to show that there is any contractual or statutory provision that would allow them to recover their attorney's fees here. Also, they have no right to recover their attorney's fees unless they first retain an attorney to represent them in the action. Therefore, the court will deny leave to amend to the extent plaintiffs seek an award of attorney's fees.

Demurrer: First, to the extent that defendant demurs to the Complaint on the ground that Ms. Peterson lacks the capacity to sue on behalf of the other plaintiffs, this argument has been addressed in the court's ruling on the motion to strike. As discussed above, the court intends to strike the Complaint to the extent Ms. Peterson attempts to bring claims on behalf of parties other than herself. Therefore, the demurrer based on Ms. Peterson's alleged lack of capacity to sue is moot.

Next, to the extent that defendant demurs to the Complaint on the ground that the identities of the other plaintiffs are uncertain, it does not appear that the plaintiffs'

identities are so uncertain as to render the Complaint subject to a demurrer. "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616; see also *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) In the present case, the complaint names "Peterson, Robert J. and Carol A. – DBA Peterson Ranch" as plaintiffs. While the wording is somewhat confusing, it appears that the plaintiffs are two individuals, Robert J. Peterson and Carol A. Peterson, who are doing business as Peterson Ranch. Since demurrers for uncertainty are disfavored and any ambiguities can be clarified in discovery, the court intends to overrule the demurrer on this ground.

With regard to the first cause of action for breach of fiduciary duty, defendant contends that it cannot be held liable for breach of fiduciary duty because an insurance company is not a fiduciary of its insureds. "An insurer is not a fiduciary, and owes no obligation to consider the interests of its insured above its own. 'An insurer ... may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured.'" (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973–974, citations omitted.)

While there are special duties owed by an insurance company to its insureds, including duties to thoroughly investigate claims, not to deny coverage based on unduly restrictive policy interpretations or improper standards, and not to unreasonably delay in processing or paying claims, an insurance company is not a true fiduciary of its insureds. (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148.) "While these 'special' duties are akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, *not* because an insurer *is* a fiduciary." (*Ibid*, italics in original.) "Because of these differences, and in the absence of Supreme Court precedent declaring an insurer to be a *true* fiduciary, we decline to import uncritically the entire cargo of fiduciary obligations into the port of insurance law." (*Id*. at p. 1149, italics in original.) Therefore, since an insurance company does not owe fiduciary duties to its insureds, defendant argues that plaintiffs have not and cannot state a valid claim for breach of fiduciary duty against defendant for failing to properly and promptly investigate their claim and pay the claim fully.

However, while defendant is correct that plaintiffs cannot state a claim for breach of fiduciary duty against it as it is an insurance company and it does not owe a true fiduciary duty to its insureds, here plaintiffs' allegations do support a claim for bad faith denial of insurance coverage. When ruling on a general demurrer, the court must determine whether the complaint states *any* valid cause of action under the facts alleged, even if it is not properly labeled and it is not the claim intended by the plaintiff. (*Quelimane Co. v. Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 38-39.) Here, plaintiffs allege that defendant unduly delayed in investigating their claim, failed to conduct a proper investigation, and ultimately partially denied their claim even though their home suffered significant damage that was covered by the policy. (Complaint, ¶¶ 13-20.) Thus, plaintiffs' first cause of action, while improperly labeled as "breach of fiduciary duty", alleges enough facts to support a claim for bad faith denial of insurance coverage. Therefore, the court intends to overrule the demurrer to the first cause of action.

Next, the court intends to sustain the demurrer to the second cause of action for breach of contract. In order to state a claim for breach of contract, plaintiffs must allege "the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307, citations omitted.) "To state a cause of action for breach of contract, it is absolutely essential to plead the terms of the contract either in haec verba or according to legal effect." (*Twaite v. Allstate Ins. Co.* (1989) 216 Cal.App.3d 239, 252.) Failure to allege the contract's terms verbatim or according to their legal effect renders the complaint defective and subject to general demurrer. (*Id*. at p. 253.)

Here, plaintiffs allege that they were beneficiaries of an insurance policy issued by defendant that covered their home, that they performed their obligations under the policy, that their home was damaged in a storm on March 10, 2021, that defendant had a duty to investigate and pay their damage claim, and that defendant breached its duty by failing to conduct a prompt and proper investigation and fully pay their claim. (Complaint, ¶¶ 6-10, 23.) Plaintiffs also allege that the policy provided coverage for dwellings owned by them, as well as structures attached to the dwellings and materials located at the dwellings intended for use in building, altering, or repairing the dwellings. (*Id*. at ¶ 18.) Defendants breached their duties under the insurance policy by taking over a year to investigate and process the claim, partially denying the claim, and ultimately paying only $1,2450 on the claim, which did not cover any damage to the interior of the home. (*Id*. at ¶¶ 10, 17, 19.) Plaintiffs suffered damages as a result of defendant's failure to pay their full claim. (*Id*. at ¶ 26.)

Thus, plaintiffs have alleged in general terms the existence of a contract, as well as facts showing breach by defendant, and resulting damage to plaintiffs. However, plaintiffs have not attached and incorporated a copy of the policy to the complaint, nor have they alleged its key terms either verbatim or by their legal effect. Therefore, they have failed to adequately allege their claim for breach of the written contract. While plaintiffs contend in their opposition that the insurance policy is too lengthy to attach to the complaint and that they can produce it in discovery, they need to at least allege the material terms of the contract in their complaint, either verbatim or by their legal effect. Since they have failed to do so, the second cause of action fails to state a valid cause of action for breach of contract. (*Twaite v. Allstate Ins. Co.*, *supra*, 216 Cal.App.3d at p. 252.) Therefore, the court will sustain the demurrer to the second cause of action, with leave to amend.

Next, the court intends to sustain the demurrer to the third cause of action for declaratory relief, without leave to amend, as plaintiffs cannot state a claim for declaratory relief where their claims have already crystallized into claims for monetary damages. "In our research of the subject we have found no authority for the proposition that declaratory relief is proper procedure when the rights of the complaining party have crystallized into a cause of action for past wrongs, all relationship between the parties has ceased to exist and there is no conduct of the parties subject to regulation by the court. Rarely has the declaratory procedure been resorted to in such a situation and never, we believe, with success." (*Travers v. Louden* (1967) 254 Cal.App.2d 926, 929.)

" '[T]he character of the action must be determined from an examination of the facts pleaded, rather than from the title or prayer for relief, and when, upon such examination, it appears that the cause of action has already accrued and the only question for determination is the liability or relief for or to which the respective parties are charged, "the nature of the action is not a cause for declaratory relief but is defined by the subject matter of the accrued cause of action."'" (*Id.* at pp. 930–931, quoting *Standard Brands of California v. Bryce* (1934) 1 Cal.2d 718, 721.) "There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." (*Travers, supra,* at p. 931.) "Where, as here, a party has a fully matured cause of action for money, the party must seek the remedy of damages, and not pursue a declaratory relief claim." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497, citation omitted.)

Here, plaintiffs are alleging that they have already suffered money damages due to the defendant's failure to promptly and fully investigate and pay their insurance claim. There does not appear to be any ongoing controversy between the parties and the only relief that plaintiffs seek is to have defendants pay for their damages. Therefore, plaintiffs' claim has already fully matured into a claim for money damages and declaratory relief is not available here. As a result, the court will sustain the demurrer to the third cause of action for declaratory relief, without leave to amend.

Finally, the court intends to sustain the demurrer to the fourth cause of action for negligence, without leave to amend. "Although recent cases have indicated a coalescence of the bad faith and negligence tests… , we are convinced that only bad faith should be the basis of the insured's cause of action. Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 688–689.) "[N]egligence is not among the theories of recovery generally available against insurers." (*Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 254, citations and italics omitted.) "[A]n insured has no separate claim against a title insurer based on negligence or negligent misrepresentation." (*Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73 Cal.App.4th 668, 675–676, citations omitted.) Thus, while plaintiffs can state a claim against defendant for bad faith denial of their claim, they cannot state a claim for negligence as well. As a result, the court intends to sustain the demurrer to the fourth cause of action for failure to state facts sufficient to constitute a cause of action, without leave to amend.

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

(27)

Tentative Ruling

Re: ***Kevin Moore v. HSRE Pacifica Fresno OPCO LP***
Superior Court Case No. 23CECG04737

Hearing Date: April 30, 2024 (Dept. 501)

Motion: (1) by Defendant HSRE-Pacifica I GP, LLC to Quash Service of Summons

(2) by Defendant HSRE-Pacifica I TRS GP, LLC to Quash Service of Summons

(3) by Defendant HSRE-Pacifica I TRS, LLC to Quash Service of Summons

(4) by Defendants for an Order Compelling Arbitration and Staying the Proceedings

Tentative Ruling:

To deny the motions to quash.

To grant the motion to compel arbitration and order plaintiffs to arbitrate their claims against defendants. The action is stayed pending completion of arbitration.

Explanation:

Motion(s) to Quash

Moving defendants deem themselves passive "Single Purpose Entities," with insufficient contacts with California to confer jurisdiction. However, the motions all admit that the respective defendants are some degree of partner to the in-state defendants. (See Motions, at p. 2.) Accordingly, given the admitted partnership role, the respective defendants could reasonably expect to be involved in litigation implicating the instate partnership interests such that exercising jurisdiction would not offend "traditional notions of fair play and substantial justice." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.) Consequently, the motions to quash are denied.

Compelling Arbitration against Non-Signatories

California courts, like federal courts, traditionally have maintained a strong preference for arbitration as a speedy and inexpensive method of dispute resolution, and thus both California and federal law "favor[] the enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) Accordingly, 'arbitration agreements should be liberally construed', with 'doubts concerning the scope of arbitrable issues [being] resolved in favor of arbitration

[citations].'" (*Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal. App. 3d 1095, 1098, internal citations omitted.)

Nevertheless, arbitration is a " 'matter of consent, not coercion,'" and " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; see also *Marcus & Millichap Real Est. Inv. Brokerage Co.* (1998) 68 Cal.App.4th 83, 89 [no agreement to arbitrate where the arbitration provision contained in a purchase agreement was not initialed by a party].) In addition, a court *may* refuse to compel arbitration against a third party who is not bound by the underlying arbitration agreement. (Code Civ. Proc., § 1281.2, subd. (c); *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 679.)

A trial court is required to grant a motion to compel arbitration "if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) However, there is "no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate." (*Garlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505.) Thus, when a motion to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine: (1) whether the agreement exists, and (2) if any defense to its enforcement is raised, whether it is enforceable. The moving party bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. The party claiming a defense bears the same burden as to the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

Defendants' motion attaches the subject arbitration agreement and plaintiffs neither dispute its authenticity nor the authenticity of Janet Moore's[4] signature. In addition, although asserted for a different purpose, plaintiffs' declaration by nonparty April Moore admits personal presence with Janet at the time of signing. (April Moore, Decl. ¶ 7.) Plaintiffs also do not challenge the effect of the transfer between defendants and their predecessor, including the unambiguous transfer of "all current resident agreements."

Instead, plaintiffs argue that defendants' motion "should be denied because they were not parties to the arbitration agreement," and rely on authority noting the "general[]" rule regarding contractual enforcement. (Opp. at p. 8:1-3; citing *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353.) However, that same authority also noted that there are several exceptions to the general rule, including incorporation by reference and assumption, and that the inquiry turns on the relationship between the parties. (*Ibid*.) Considering defendants' assumption of the Janet's care upon the transfer from the original signatory, and the absence of opposition to the existence of the arbitration agreement and efficacy of the transfer of "all current resident agreements," plaintiffs have not met their burden to present facts necessary to establish their contractual standing defense.

[4] For clarity and to avoid confusion, plaintiff and decedent Janet Moore is referred to by her first name. No disrespect is intended.

Similarly, as it relates to plaintiffs Kevin and Steven Moore, Article II of the arbitration agreement specifies that heirs are bound for "any claim or action … arising out of or relating to care [] received …." (Cf. *Daniels v. Sunrise Senior Living, Inc., supra,* 212 Cal.App.4th at p. 679 [the express language of the subject arbitration clause specified that it was limited to the resident].)

Civil Code section 1953

Plaintiffs construe the subject arbitration agreement as part of a "lease agreement" analogous to the continuing care agreements in *Harris v. University Village Thousand Oaks, CCRC, LLC* (2020) 49 Cal.App.5th 847 (*Harris*) which were held to be protected by the prohibitory provisions of Civil Code section 1953. However, the aggrieved residents in *Harris* "lived in independent living units and not the adjacent assisted living units[]" (*Id*. at p. 854) and their causes of action addressed conditions attendant to tenancy rather than the providing of services. (*Id*. at p. 852 [the residents alleged "false representations regarding facility security, the amount of future increases in monthly fees, and whether monthly fees included the cost to charge electric vehicles."].) In other words, the Second District looked to the residents' right to live in their units (i.e. the unsatisfactory lodging and tenancy features which dominated the dispute) to find protection under section 1953. (*Id*. at p. 856.)

Unlike the residents' causes of action in *Harris, supra*, 49 Cal.App.5th 847, here the nature of plaintiffs' claims is focused on defendants' alleged neglect (see e.g. Comp. ¶¶ 33-34), and each cause of action is framed around aspects of neglectful provision of services rather than underperforming features of tenancy. Furthermore, even the opposition evidence tends to demonstrate this distinction as the declaration of April Moore specifically notes that, *during her two-week long search*, unsuitable facilities had been rejected because they could not offer the necessary level of "*active assistance and protection*." (April Moore, Decl. ¶6, emphasis added.) This tends to demonstrate that it was the level of services to be provided, rather than tenancy features promised, that determined the selection of defendants' facility. Finally, to the extent any doubt exists as to whether plaintiffs' claim is premised on tenancy features or the providing of services, in determining arbitrability the court is required to resolve those doubts in favor of arbitration. (*Market Ins. Corp. v. Integrity Ins. Co*., *supra*, 188 Cal.App.3d at p. 1098.)

Unconscionability

"Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement …." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 114.) Unconscionability has both a procedural and a substantive element. While both must be present, they need not be present in the same degree and are evaluated on a sliding scale. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc*., *supra*, 24 Cal.4th at p. 114.)

Procedural unconscionability involves " ' "oppression or surprise due to unequal bargaining power." ' " (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1243.) It exists where there is " ' " ' "an absence of meaningful choice on the part of one of the parties" ' " ' " to a contract, such as with a contract of adhesion. (*Ibid*.) Plaintiff contends that the circumstances here are analogous to those of *Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93 (*Dougherty*), where the court held a particular arbitration agreement was unconscionable and thus unenforceable. In *Dougherty*, the resident, suffering from dementia, had been removed from two other facilities due to "aggressive behaviors." His daughter, who was "crying" and "emotionally exhausted," but "relieved" to find placement, toured the defendant's facility then was presented with 70 pages of admission documents, including an arbitration agreement.

The *Dougherty* court found procedural unconscionability because the two other facilities deeming the resident unsuitable for placement and the plaintiff's communicating her lack of bargaining power to the defendant's marketing director, were peculiar circumstances showing an unfair degree of "adhesiveness." (*Dougherty, supra,* 47 Cal.App.5th at p. 104.) The agreement was "imposed on a 'take it or leave it' basis and evinced a high degree of procedural unconscionability." (*Ibid*.)

Here, unlike the clear signs of distress discernible in *Daugherty*, the opposition evidence (largely consisting of declarations by the Janet's family members) notes that defendants' facility was selected after a two-week search for its level of services (April Moore, Decl. ¶ 6) and the subject arbitration agreement conspicuously and plainly confirmed that furnishing of services was not contingent upon signing. (See Dudensing, Decl. Ex. A.) Furthermore, although admissions personnel were informed of Janet's confusion and disorientation, there is no evidence that April Moore, who was personally present at signing, was unable to understand the subject matter of the admission documents. Finally, plaintiff' cite no legal authority to support their contentions that the subject arbitration agreement is substantively unconscionable due to the cost sharing requirements. Consequently, plaintiffs have not demonstrated a defense on the basis of unconscionability.

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

(24)

Tentative Ruling

Re: ***Goodleap, LLC v. Safonov***
Superior Court Case No. 23CECG02107

Hearing Date: April 30, 2024 (Dept. 501)

Motions:
1) by Plaintiff for an Order Deeming Admitted Requests for Admission, Set One, Directed to Defendant Marina Davidova
2) by Plaintiff for an Order Deeming Admitted Requests for Admission, Set One, Directed to Defendant Guram Safonov

Tentative Ruling:

To grant both motions. The truth of the matters specified in the Requests for Admission, Set One, are to be deemed admitted unless each defendant serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c).)

Explanation:

Failure to timely respond to Requests for Admissions results in a waiver of all objections to the requests. (Code Civ. Proc. § 2033.280, Subd. (a).) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) "The law governing the consequences for failing to respond to Requests for Admission may be the most unforgiving in civil procedure. There is no relief under section 473. The defaulting party is limited to the remedies available in [Code of Civil Procedure Section 2033.280]...." (*Demyer v. Costa Mesa Mobile Home Estates* ("*Demyer*")(1995) 36 Cal.App.4th 393, 394-395, brackets added, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.) The only exception to this is where the responding party serves responses before the hearing which are in substantial compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c).) "If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion[.] Everything, in short, depends on submitting responses prior to the hearing." (*Demyer, supra,* 36 Cal. App. 4th at pp. 395-396.) No evidence has been submitted that defendants have served code-compliant responses to the requests for admissions.

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