Tentative Rulings for April 30, 2024
Department 503

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.

18CECG00682 ***Leonna Appling v. Larry Chambers*** **is continued to Wednesday, June 5, 2024, at 3:30 p.m. in Department 503**

21CECG01992 ***Miles Scrivener v. Real Time Information Services, Inc.*** **is continued to Tuesday, July 2, 2024, at 3:30 p.m. in Department 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(03)

Tentative Ruling

Re: ***Gutierrez v. Joe S. Sozinho Dairy #5***
Case No. 16CECG02071

Hearing Date: April 30, 2024 (Dept. 503)

Motion: Plaintiffs' Motion to Enforce Settlement Agreement and Enter Judgment against Defendant, and Request for Attorney's Fees

Tentative Ruling:

To grant plaintiffs' motion to enforce settlement agreement and enter judgment against defendants. To grant plaintiffs' request for an award of attorney's fees incurred in enforcing the settlement agreement, in the amount of $875.

Explanation:

Under Code of Civil Procedure section 664.6, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

"If the court determines that the parties entered into an enforceable settlement, it should grant the motion and enter a formal judgment pursuant to the terms of the settlement. The statute expressly provides for the court to 'enter judgment pursuant to the terms of the settlement.'" (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182-1883, internal citations omitted.)

Here, there is a written settlement agreement signed by the parties that appears to be fully enforceable. (See Settlement Agreement attached as Exhibit 1 to Moya decl.) Defendants agreed to pay plaintiffs $137,500 in 58 monthly payments. (*Id*. at ¶ 2.2.) The named plaintiffs were to receive $78,000 to settle their individual claims. (*Ibid*.) Defendants were also to pay $17,000 to settle the PAGA claim, with all $17,000 allocated as penalties under Labor Code section 558. (*Ibid*.) Another $42,500 was allocated to plaintiffs' attorney's fees. (*Ibid*.) The settlement also includes a provision for an award of attorney's fees and costs if a party has to sue to enforce the settlement. (*Id*. at ¶ 7.5.) The agreement includes language in which the parties agreed to submit to the court for the purpose of enforcing the settlement. (*Id*. at ¶ 7.2.) The court approved the PAGA settlement on August 31, 2021. (Moya decl., ¶ 7.)

Defendants have made about 49 payments pursuant to the settlement, but stopped making payments in May of 2023. (Moya decl., ¶ 18.) Defendants currently owe $20,624.84, which includes the $17,000 allocated to paying the PAGA claim and $3,624.84 for plaintiffs' attorney's fees. (*Ibid*.)

Thus, plaintiffs have shown that there is an enforceable written settlement agreement, and that defendants breached the agreement by failing to make all payments due under the settlement. As a result, they are entitled to an order enforcing the settlement and entering judgment based on its terms.

Also, plaintiffs have now corrected their motion to state that the court should enter a judgment that allocates 75% of the PAGA portion of the settlement to the LWDA and 25% to the aggrieved employees, Mr. Tinoco and Mr. Rosales. Thus, of the $17,000 allocated to the PAGA claims, $12,750 will go to the LWDA and $4,250 will go to the aggrieved employees. Mr. Tinoco will receive $2,975 and Mr. Rosales will receive $1,275. This apportionment is consistent with the language of Labor Code section 2699, subdivision (i) and the settlement agreement. As a result, the court intends to grant the motion to enforce the settlement agreement and enter a judgment ordering defendants to pay $17,000 on the PAGA claims, with $12,750 paid to the LWDA and $4,250 going to the aggrieved employees.

The court also intends to grant plaintiffs' request for an award of attorney's fees. As discussed above, the settlement agreement contains an attorney's fees clause that provides that, in the event that any party has to sue to enforce the terms of the settlement, the prevailing party in such suit shall be entitled to recover his or her attorney's fees and costs incurred in connection with such suit. (Settlement Agreement, ¶ 7.5.) Here, plaintiffs had to bring a motion to enforce the settlement agreement after defendants stopped making payments on the settlement as they had agreed to do. Therefore, plaintiffs are entitled to an award of reasonable attorney's fees and costs incurred in bringing their motion.

However, the amount of fees requested by plaintiffs is excessive. Plaintiffs seek $3,850 in fees based on 22 hours of attorney time billed at $175 per hour. (Moya decl., ¶ 31.) Plaintiffs' counsel states that she spent over 20 hours in efforts related to enforcing the settlement, conducting legal research, and drafting the motion to enforce the settlement. (*Ibid*.) She also anticipates spending another two hours in drafting a reply brief and attending the hearing. (*Ibid*.) Yet there is no opposition to the motion to enforce the settlement, so there is no need for a reply brief, nor is there likely to be a hearing on the motion. Also, the request for over 20 hours of attorney time for a relatively simple motion to enforce the settlement is excessive and unreasonable. Plaintiffs' counsel sent several letters and emails requesting payment of the remaining part of the settlement in June and September of 2023, but there is no evidence of any other work done on the issue of enforcing the settlement. (Moya decl., ¶¶ 24-27.) Plaintiffs' counsel did have to file a supplemental brief and declaration after the motion was continued, but the supplemental brief was only necessary because counsel had incorrectly allocated the PAGA settlement proceeds. She should not be compensated for this task, which would not have been necessary but for her mistake. Therefore, the court intends to reduce the total attorney's fees to $875 based on five hours of attorney time billed at $175 per hour.

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: jyh on 4/23/24.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Perry v. Cencal Wings II, Inc.***
Case No. 21CECG03205

Hearing Date: April 30, 2024 (Dept. 503)

Motion: Plaintiff's Motion for Preliminary Approval of Class Settlement

Tentative Ruling:

To grant plaintiff's motion for preliminary approval of class settlement.

Explanation:

1. General Principles: A settlement of a class action requires court approval after a hearing. (Cal. Rules of Court, rule 3.769, subd. (a).) The approval of the settlement also requires certification of a preliminary settlement class. (Cal. Rules of Court, rule 3.769, subd. (d).) "If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing. (Cal. Rules of Court, Rule 3.769, subd. (e).)

"If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement. (Cal. Rules of Court, Rule 3.769, subd. (f).) "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (Cal. Rules of Court, Rule 3.769, subd. (g).)

2. Certification of the Class: The court must first determine whether the class should be certified before deciding whether the settlement should be preliminarily approved.

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court…' The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *(Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The burden of proof is on the plaintiff to show the above factors weigh in favor of class certification by a preponderance of the evidence. (*Id.* at p. 322.)

"As to the necessity for an ascertainable class, the right of each individual to recover may not be based on a separate set of facts applicable only to him. [¶] The

requirement of a community of interest does not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper. The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class. [¶] Substantial benefits both to the litigants and to the court should be found before the imposition of a judgment binding on absent parties can be justified, and the determination of the question whether a class action is appropriate will depend upon whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809–10, internal footnotes omitted.)

An agreement of the parties is not sufficient to establish a class for settlement purposes. There must be an independent assessment by a neutral court of evidence showing that a class action is proper. (*Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (rev. denied); see also Newberg, Newberg on Class Actions (T.R. Westlaw, 2017) Section 7:3: "The parties' representation of an uncontested motion for class certification does not relieve the Court of the duty of determining whether certification is appropriate.")

a. Numerosity and Ascertainability

A proposed class is sufficiently numerous when it would be impractical to bring all members of the class together before the court. (Code Civ. Proc., § 382.) "[A] class [is] ascertainable when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' We regard this standard as including class definitions that are 'sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description.'" (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980, citations omitted.)

Here, the proposed class is sufficiently numerous to be certified, since there are approximately 589 members of the proposed class. The class is also ascertainable, since the class definition is specific and the class members can be readily identified using objective criteria and facts, including referring to the defendants' personnel records. Therefore, the proposed class meets the numerosity and ascertainability requirements for certification.

b. Community of Interest

i. Class Representatives with Typical Claims

"The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.)

Here, plaintiff has shown that all of the proposed class members have the same claims, since plaintiff alleges that he and the other class members all suffered the same types of harm due to defendants' unlawful policies, which resulted in various Labor Code wage and hour violations such as failure to pay minimum wage, failure to pay overtime, failure to provide meal and rest breaks, etc. As a result, plaintiff has satisfied the requirement of showing that his claims are typical of the other class members.

ii. Predominant Questions of Fact and Law

"As a general rule, if defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (B*rinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1022.)

Here, there are predominant questions of fact and law that are common to all members of the putative class, as plaintiff has alleged that he and all of the class members were subjected to the same types of wage and hour violations and suffered the same type of harm. Plaintiff's and the other class members' claims all share common issues of fact and law, and all class members will need to prove the same types of facts in order to prevail. They all seek the same legal remedies as well. It would be preferable to resolve all of the claims in a single action as opposed to litigating them separately, especially considering that each individual claim is likely to be worth relatively little and the expense of litigating the individual claims would probably exceed the potential recovery. Therefore, plaintiff has shown that there are predominant questions of fact and law that favor class certification.

c. Adequacy of Counsel and Class Representative

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669.)

Here, plaintiff and class counsel have submitted their declarations showing that they are adequate representatives for the proposed class. Plaintiff is a former employee of the defendants during the class period and has alleged that he suffered the type of Labor Code violations that the other class members suffered. He also has no conflicts that would prevent him from representing the class, and he has promised to represent their interests vigorously in the case as he has already been doing. Also, class counsel is highly experienced in class litigation and appears to be very qualified to represent the proposed class here. Therefore, plaintiff has met his burden of showing that he and the attorneys will be adequate class representatives.

d. Superiority of Class Litigation

Plaintiff has also shown that litigating the case as a class action would be superior to resolving the class members' claims individually, since it would be highly inefficient to force the class members to file and litigate individual cases rather than resolving all of the claims in a single action. It would also be impractical to have the individual class

members litigate their claims separately given the relatively small amounts at stake in each individual case and the cost of litigating each case. It would be far more practical and efficient to resolve all of the class members' claims at once in a single case rather than holding potentially dozens of separate trials. As a result, the court intends to find that the plaintiffs have met their burden of showing the superiority of litigating the case as a class action.

e. Conclusion

The court intends to grant certification of the class for settlement purposes.

3. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 129.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the... court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Ibid*.)

b. Fairness, Reasonableness, and Adequacy of the Settlement

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240.) The court has a fiduciary responsibility as guardian of absent class members' rights to ensure that the settlement is fair. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

Generally speaking, a court will examine the entirety of the settlement structure to determine whether it should be approved, including, as relevant here, fairness, the

notice, the manner of notice, the practicality of compliance, and the manner of the claims process. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (fairness reviewed at final approval); (*Wershba, supra,* 91 Cal.App.4th at pp. 244-45 (court is free to balance and weigh factors depending on the circumstances of the case).) "[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk*, *supra*, at p.1802, citation omitted.)

In the present case, plaintiff has presented sufficient evidence to show that the settlement is fair, reasonable, and adequate. The settlement was negotiated during arm's length mediation before a neutral mediator. The parties also engaged in written formal and informal discovery and expert analysis and testimony before resolving their claims. While plaintiff's counsel expresses confidence that they would have prevailed at trial, they nevertheless acknowledge that defendants raised potentially valid defenses and that their success at trial was not guaranteed. Plaintiff also ran the risk of having the trial court deny his motion for certification. Even if he succeeded in certifying the class and prevailed at trial, he would not necessarily have obtained as much in damages as his expert estimated. The gross settlement here is about 50% of the total estimated realistic liability of defendants if plaintiff did prevail at trial, which is an excellent result, especially considering the expense and risk of going to trial versus the guaranteed payment that plaintiff will receive for the class through the settlement. Therefore, the court intends to find that plaintiff has met his burden of showing that the settlement is fair, reasonable and adequate.

c. Attorney's Fees

Plaintiffs' counsel request fees of $210,000, which is one-third of the total gross settlement. Plaintiff's counsel has now provided a declaration explaining the work done by the attorneys on the case. (Suppl. Moon decl.) He states that he performed 63.5 hours of work billed at $725 per hour, Allen Feghali did 39.6 hours of work billed at $675 per hour, Roy Suh did 83.2 hours of work billed at $675 per hour, and Charlotte Mikat-Stevens did 35.9 hours of work billed at $375 per hour. (Moon decl., ¶ 6.) Thus, counsel's total lodestar fees are $142,390 based on 222.2 hours of attorney time. (*Ibid*.) Counsel also provides a copy of a report regarding the work done by his firm on the case. (Exhibit 1 to Moon decl.) Counsel also expects to incur at least another 50 hours working on the case before it is concluded. (*Id*. at ¶ 8.) Thus, counsel will likely incur another $36,250 in lodestar fees on the case. (*Ibid*.) Counsel requests that the court approve a multiplier of 1.47 based on the fees already incurred on the case, or 1.18 based on the fees that counsel expects to incur to complete the litigation. (*Id*. at ¶ 9(iii).)

It does appear that the requested fees of $210,000 are reasonable. Counsel incurred about $142,390 in lodestar fees so far in the case, and expects to incur another $36,250 by the end of the case. The fees are based on 222.2 hours of attorney time billed at between $375 to $725 per hour. The hours appear to be reasonable given the complexity and length of the case. The hourly rates are high compared to Fresno rates, but appear to be in line with what other class action attorneys in Los Angeles charge. Also, the request for a multiplier of 1.47 seems reasonable to compensate counsel for the risk of taking the case on a contingent basis, the skill of counsel, the difficulty of the issues,

the fact that counsel could not take some other clients while they litigated this case, and the excellent results achieved in the case. Therefore, the court intends to grant preliminary approval of the requested fees.

d. Costs

Plaintiffs have requested an award of court costs of up to $20,000. Plaintiff's counsel has now provided his declaration in which he states that his office incurred $20,481.52 in costs during the case. (Suppl. Moon decl., ¶ 12.) Counsel also expects to incur another $580.11 in filing costs related to the motion for preliminary approval and remote appearance at the hearing. (*Id*. at ¶ 13.) Therefore, counsel has provided sufficient evidence to support the requested amount of costs. In fact, according to counsel, his firm has already incurred more than the requested $20,000 in costs. As a result, the court intends to preliminarily approve the request for an award of $20,000 in costs.

e. Class Administrator's Fees

Plaintiff requests approval class administrator's fees of up to $15,000. Counsel states that administrator's fees are estimated to be about $10,550 at this time, but they seek approval of up to $15,000 in administrator's fees. Plaintiff has now provided a declaration from the class administrator's representative, Lisa Mullins, who states that the administration costs are not expected to exceed $10,950 unless the class size increases or other services are requested. (Mullins decl., ¶ 10.) Therefore, plaintiff has provided adequate evidence to support the request for class administrator's fees of up to $15,000, and the court intends to preliminarily approve the requested administration fees.

f. Incentive Award to Class Representative

Plaintiff also requests that the class representative be awarded an incentive fee of $5,000.

"While there has been scholarly debate about the propriety of individual awards to named plaintiffs, '[i]ncentive awards are fairly typical in class action cases.' These awards 'are discretionary, [citation], and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'" (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393–1394, quoting *Rodriguez v. West Publishing Corp.* (9th Cir.2009) 563 F.3d 948, 958.)

" '[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.' These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit." (*Id*. at pp. 1394–1395, internal citations omitted.)

Here, named plaintiff Peter Ferry has filed a declaration in support of his request for an incentive fee, in which he discusses in general terms his involvement in the case. (Ferry decl., ¶ 14.) Class counsel has also stated in his declaration that Mr. Ferry has done considerable work on the case as well as taking the risk of being "blackballed" by other employers for suing his former employer, which supports the request for an incentive award. (Moon decl., ¶¶ 32-35.) An award of $5,000 for plaintiff's work on the case and the risk he took in agreeing to be a named plaintiff appears to be reasonable and in line with the service awards granted in other class settlements. Therefore, plaintiff has met his burden of showing that the $5,000 incentive award is fair and reasonable here, and the court intends to preliminarily approve the requested award.

g. Class Notices

Under Rule of Court 3.766(d), "If class members are to be given the right to request exclusion from the class, the notice must include the following: (1) A brief explanation of the case, including the basic contentions or denials of the parties; (2) A statement that the court will exclude the member from the class if the member so requests by a specified date; (3) A procedure for the member to follow in requesting exclusion from the class; (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel." (Cal. Rules of Court, Rule 3.766(d), paragraph breaks omitted.)

"In regard to the contents of the notice, the 'notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.' The purpose of a class notice in the context of a settlement is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members. Here again the trial court has broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 251–252, citations omitted, disapproved on other grounds by *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260.)

In the present case, the class notices give the class members notice of the nature of the litigation, the terms of the settlement, how they may submit a claim for payment under the settlement, how and when they may object or opt out of the settlement, when the final approval hearing will be, that they will be bound by the settlement if they do not opt out of it, and that they have the right to appear at the final approval hearing either personally or through their lawyer. (Exhibit 1 to Class Settlement, attached as Exhibit A to Moon decl.) Thus, the proposed notice does provide the basic information required under Rule of Court 3.766. Therefore, the court intends to grant preliminary approval of the class notice form.

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: jyh on 4/25/24.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Williamson v. Jensen***
Case No. 23CECG00701

Hearing Date: April 30, 2024 (Dept. 503)

Motion: Defendant's Demurrer to First Amended Complaint

Tentative Ruling:

To overrule the defendant's demurrer to the first amended complaint. To order defendant to file and serve her answer within 10 days of the date of service of this order.

Explanation:

First Cause of Action: Defendant demurs to the first cause of action for partition of the subject property, contending that the allegations of the first amended complaint show that she has an absolute defense to the claim because she has been in adverse possession of the subject property for over five years before the complaint was filed and thus plaintiff has no right to partition the property.

Adverse possession may be the basis for either a cause of action or an affirmative defense. (*Family Service Agency of Santa Barbara v. Ames* (1958) 166 Cal.App.2d 344, 348.) In order to state a claim for adverse possession, the holding party must allege: (1) actual occupation by the holding party under such circumstances as to constitute reasonable notice to the owner; (2) the holding party's possession that is hostile to the owner's title; (3) the holder must claim the property as his or her own, under either color of title or claim of right; (4) possession that is continuous and uninterrupted for five years; and (5) payment by the holder of all the taxes levied and assessed upon the property during the period. (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421.)

Adverse possession by one joint owner against another joint owner may be established if the holding party can show that the other owner had notice of the adverse possession. (*Id*. at p. 422.) On the other hand, if the other co-tenant did not have actual or constructive notice of the hostile possession, then the holding tenant is not entitled to adverse possession, since the exclusive occupancy by one co-tenant is deemed to be permissive and not hostile to the other tenants. (*Ibid*, quoting *West v. Evans* 29 Cal.2d 414, 418.) "As between cotenants it is necessary to the acquisition of such a title that some act or acts be shown which amount in effect to an ouster of the one by the other from the common property." (*White v. McManus* (1924) 69 Cal.App. 50, 59.)

Here, plaintiff's first amended complaint alleges that he and defendant both own an undivided 50% interest in the subject property. (FAC, ¶¶ 4, 5.) He also alleges that, "[s]ince in and around May 2017, Defendants have maintained exclusive possession, custody, control and occupancy of the Subject Property, and have remained in exclusive possession, custody, control and occupancy thereof since that time." (*Id*. at ¶ 17.) Furthermore, "Defendants have failed and refused and continue to fail and refuse to pay rent for their exclusive possession, custody, control and occupancy of the Subject

Property." (*Id*. at ¶ 18.) "Nor will Defendant remove themselves therefrom. Nor will Defendants allow Plaintiff admission thereto." (*Ibid*.) Plaintiff alleges that he has been denied his fair share of the income and rents from the property, which he estimates to be at least $3,500 per month. (*Id*. at ¶ 19.) He claims to have sustained damages as a result of defendants' exclusive possession of the property without payment of rent. (*Ibid*.)

While defendant contends that these facts show that she has a valid affirmative defense[1] based on adverse possession, the allegations of the amended complaint do not conclusively establish that she has adversely possessed the property against plaintiff for five years and that he was on actual or constructive notice of her adverse and hostile claim since May of 2017. The facts alleged show that defendant was in exclusive possession, custody, control and occupancy of the subject property since May of 2017, but they do not state when plaintiff became aware or should have been aware of the fact that defendant's possession was hostile to his ownership rights. He has alleged that he and defendant had equal 50% ownership rights in the property, so defendant's exclusive occupancy of the property was not enough to show that her claim was hostile to his ownership. (*Dimmick v. Dimmick, supra*, at p. 422.) There must have been some other act by defendant that effectively ousted plaintiff from the property and thus placed him on notice of her adverse claim. (*White v. McManus*, *supra*, at p. 59.)

Here, plaintiff has not alleged that defendant did anything to oust him from the property until December of 2019, when she refused to let him on the property to recover his personal property. (FAC, ¶ 28.) Defendant also allegedly called the Sheriff when plaintiff entered the property in October of 2020 to attempt to retrieve his personal property. (*Id*. at ¶ 29.)[2] Plaintiff has also alleged that defendant has not allowed him "admission" onto the property, but it is unclear when defendant first denied him access to the property. (*Id*. at ¶ 18.) Thus, according to the facts alleged in the FAC, plaintiff was not on notice of defendant's intent to adversely possess the property in a manner that was hostile to his ownership rights until December of 2019. Since plaintiff filed his original complaint on February 23, 2023, less than five years after he was first ousted from the property, defendant has not established that the first cause of action is barred by her affirmative defense of adverse possession. Therefore, the court intends to overrule the demurrer to the first cause of action.

Third Cause of Action: Next, defendant argues that the accounting claim is time-barred because plaintiff failed to bring his claim within five years of the time defendant took sole and exclusive custody, control, and possession of the property, which was in May of 2017. (FAC, ¶ 17.) Defendant contends that she perfected her right to the property through adverse possession five years after she first took sole possession of the

[1] It is questionable whether an affirmative defense like adverse possession is a valid basis for a general demurrer, as it does not necessarily show that plaintiff has failed to allege a valid claim. Affirmative defenses are usually raised in an answer, not by way of a general demurrer.

[2] Plaintiff claims in his opposition that he left the property voluntarily in May of 2017 after his relationship with defendant ended, and that he consented to defendant's occupation of the property until December of 2019, when the parties had an argument and defendant kicked him off the property. However, these facts are not alleged in the FAC, so they are not properly before the court for the purpose of ruling on the demurrer. Therefore, the court will disregard plaintiff's factual assertions in his opposition as immaterial to the demurrer.

property in May of 2017, so plaintiff's accounting claim is barred by the statute of limitations.

However, as discussed above, it is not clear from the allegations of the complaint when defendant first adversely possessed the property in a manner that was hostile to plaintiff's rights as a co-owner of the property. Plaintiff alleges that defendant has had sole and exclusive possession, custody, control and occupancy of the property since May of 2017. (FAC, ¶ 17.) Yet one co-owner having sole possession and occupancy of a property does not establish hostile possession against a co-owner. There must also be some affirmative act that shows that the holder is asserting rights that are adverse to the other owner by ousting him from the property. (*White v. McManus*, *supra*, at p. 59.) Plaintiff does not allege that defendant committed any act that ousted him from the property until December of 2019, when she refused to allow him to access his personal property. (FAC, ¶ 28.) Since plaintiff filed his complaint on February 23, 2023, less than five years after he was ousted from the property, his claim for accounting is not necessarily barred by the applicable statute of limitations. As a result, the court intends to overrule the demurrer to the third cause of action.

Fourth Cause of Action: Again, defendant argues that the conversion cause of action is barred by the statute of limitations, as plaintiff filed the action more than five years after defendant took control over the subject property where the plaintiff's personal property was located. Defendant again points out that the FAC alleges that she has had exclusive custody and control of the subject property since May of 2017. As a result, she contends that plaintiff's claim for conversion of his personal property accrued in May of 2017, and thus it is barred by the three-year statute of limitations. (Code Civ. Proc., § 338, subd. (c)(1).)

Yet, as discussed above, the FAC does not allege that defendant did anything to oust plaintiff from the subject property and deny him access to his personal property until December of 2019. (FAC, ¶ 28.) While plaintiff does allege that defendant has had sole and exclusive custody, control, occupation and possession of the subject property since May of 2017, there is no allegation that shows that she denied plaintiff access to the property or refused to return his personal property to him until December of 2019. (*Id*. at ¶¶ 17, 28.) Therefore, the allegations of the FAC do not establish that the conversion claim accrued in May of 2017. Instead, the allegations indicate that the claim accrued in December of 2019. Since plaintiff filed his complaint less than three-and-a-half years[3] later on February 23, 2023, his claim is not time-barred. As a result, the court intends to overrule the demurrer to the fourth cause of action and order defendant to file her answer.

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.

[3] The statute of limitations for conversion actions is three years (Code Civ. Proc., § 338(c)(1)), but plaintiff had another six months to bring his claim due to the tolling period under Emergency Rule 9.

Tentative Ruling
Issued By: jyh on 4/25/24.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re:	***Michael Raven v. Lisa Anderson*** Superior Court Case No. 22CECG00720
Hearing Date:	April 30, 2024 (Dept. 503)
Motion:	By Defendant Lisa Anderson to Set Aside Default Entered June 3, 2022

Tentative Ruling:

To grant. (Code Civ. Proc., § 473.5.)

Explanation:

Code of Civil Procedure section 473.5 articulates that a default may be set aside where service of summons has not resulted in actual notice. Relief under this section must be sought within a reasonable time, not to exceed the earlier of either 1) two years after entry of default *judgment* or 2) 180 days after service of written *notice* of default entry or judgment. (Code Civ. Proc., § 473.5, subd. (a).) In seeking such relief, the declarations accompanying the motion must show the lack of notice and that such lack was not caused by the party's avoidance of service or inexcusable neglect. (Code Civ. Proc., § 473.5, subd. (b).)

Here, defendant has provided her declaration stating that she did not receive actual notice of this matter, did not receive the Request for Default, and did not receive notice of the Entry of Default. (Anderson Decl., ¶¶ 2, 8-10.) She asserts that the proof of service indicating substituted service on a John Doe at her residence cannot be accurate as the description does not match that of her only male cohabitant. (Id. at ¶ 5.) Her cohabitant has also provided a declaration stating he did not receive any documents on the date which the proof of service indicates such was accomplished. (See Castello Decl.) Defendant also asserts that she did not receive anything by mail. (Anderson Decl., ¶ 10.) Defendant claims that plaintiff has made false representations in the proof of service. (Id. at ¶ 11.)

While default was entered on June 3, 2022, plaintiff has not filed any Notice of Entry of Default or any Request for Default Judgment. As such, defendant's request is timely. Additionally, this motion is unopposed. Consequently, the court will set aside the default entered June 3, 2022.

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: jyh on 4/29/24.
(Judge's initials) (Date)