Tentative Rulings for June 18, 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.

23CECG02332 ***Marisela Perea v. County of Fresno*** **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

(24)

Tentative Ruling

Re: ***Johnson & Wood Construction Inc. v. Nickens***
Superior Court Case No. 23CECG00661

Hearing Date: June 18, 2024 (Dept. 503)

Motion: Default Prove-Up Hearing

Tentative Ruling:

To grant. The court intends to sign the judgment and the order allowing use of copy of the contract in lieu of the original contract, both submitted on May 15, 2024.

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 6/14/24.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Beck v. Mid-Way Pump, LLC, et al.***
Superior Court Case No. 19CECG04199

Hearing Date: June 18, 2024 (Dept. 503)

Motion: by Cross-Complainant Carbajal for Summary Judgment of Cross-Complaint

Tentative Ruling:

To deny.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c(c).) The moving party bears the initial burden of production to make a prima facie showing of the "nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Where the moving party meets this initial burden, the burden shifts to the resisting party to make a prima facie showing of the existence of a triable issue of material fact by producing admissible evidence. (*Ibid*.)

Labor Code section 2802 provides:

> (a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

The duty of an employer to indemnify its employee pursuant to Labor Code section 2802 requires an employer to defend or indemnify an employee who is sued by third persons for conduct in the course and scope of his employment. (*Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449, 460.) In determining whether for purposes of indemnification an employee's acts were performed within the course and scope of employment, courts have looked to the doctrine of respondeat superior wherein employers can be held liable for the risks incidental to the enterprise undertaken by the employer. (*Jacobus v. Krampo Corp*. (2000) 78 Cal.App.4th 1096, 1101.) The question of whether an employee's acts are within the scope of employment is ordinarily a question of fact, however, the issue may be a questions of law when the material facts are undisputed and no conflicting inferences are possible. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)

In the present case, cross-complainant Pedro Carbajal was driving a vehicle owned by cross-defendant Mid-Way Pump, LLC when he was involved in a motor vehicle accident involving plaintiff Kristi Beck. In his cross-complaint, Carbajal alleges Mid-Way Pump, LLC, as his employer, is required to indemnify and defend him in the action brought

against him by Beck pursuant to Labor Code section 2802. Carbajal moves for summary judgment of his cross-complaint, arguing there is no dispute of material fact as to whether any affirmative defense bars his claims for indemnification and declaratory relief. Mid-Way Pump, LLC opposes the motion for summary judgment on the basis that Carbajal was not within the scope of his employment but was commuting from his home to work at the time of the accident and disputes that Carbajal was performing an errand for the benefit of Mid-Way Pump, LLC during this commute. (UMF Nos. 2-3.) Mid-Way Pump, LLC does not dispute that it employed Carbajal.

Carbajal argues that where, as here, an employee is required to operate a vehicle as part of his employment duties, the employee's involvement in a collision is reasonably foreseeable and thus falls within the scope of employment. (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 96.) Carbajal has included evidence that his job duties for Sran Ag, Inc. include tasks that necessarily require operating a vehicle. (Dobbins Decl., ¶ 2[1], Exh. A.) The separate statement of undisputed facts does not include a representation of whether or not Carbajal's job duties for Mid-Way Pump, LLC require him to operate a vehicle.

Generally, an employee's commute to and from work is not considered within the course and scope of his employment. (*Halliburton*, *supra*, 220 Cal.App.4th at p. 95-96.) However, there is an exception to this "coming and going" rule where the commute involves an incidental benefit to the employer. (*Id*. at p. 96.) This incidental benefit exception has been applied where the employer furnishes, or requires the employee to furnish, a vehicle for use in his employment and the collision occurs while the employee is commuting in that vehicle. (*Ibid*.) Although this may support finding that Carbajal's travel at the time of the incident provided a benefit to his employer, the separate statement is silent as to whether Carbajal was required to use the Mid-Way Pump, LLC vehicle for his employment and whether use of a vehicle was required for his duties as an employee of Mid-Way Pump, LLC. The required use of the company vehicle is disputed in the evidence submitted with the opposition. (Sran Decl., ¶ 8.)

Within the material facts of the separate statement, there is a clear dispute as to whether Carbajal completed an errand or other incidental benefit to Mid-Way Pump, LLC during Carbajal's commute to work on the day of the accident. (UMF Nos. 2-3.) Pedro Carbajal attests to stopping at Interstate Seal to check on a purchase order of "o" rings used for field kits during the harvest season. (Carbajal, ¶ 1.) Carbajal does not identify a specific employer as receiving the benefit of this stop or the field kits. Lakhvir Sran on behalf of Mid-Way Pump, LLC states in his declaration that Carbajal provided no invoice for reimbursement of the "o" rings allegedly purchased and was not on an errand on behalf of Mid-Way Pump, LLC, NS Farms, Inc. or Sran Ag, Inc. (Sran Decl., ¶ 9.) Sran adds that Mid-Way Pump does not have an account with Interstate Seal but another defendant company, NS Farms, Inc. has an account and Carbajal is aware of the account. (*Id*. at ¶ 10.) The only purchase order made on the Interstate Seal account was for "o" rings in September 2018, four months following the May 2018 automobile accident. (*Ibid*.)

[1] Cross-defendant's Objection to Mr. Dobbins' declaration identifying and attaching the job description, also attached as Exhibit C to the Declaration of Lakhvir Sran, is overruled.

The court's role in summary judgment is not to determine which declarant is more credible, only to determine whether there is a dispute. Here, there is a dispute with regard to Carbajal's purported errand for the benefit of Mid-Way Pump, LLC during his commute to work on the day of the auto accident. This dispute precludes summary judgment 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: jyh on 6/14/24.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Olawale Olatunde v. Ajit Bains***
Superior Court Case No. 23CECG03961

Hearing Date: June 18, 2024 (Dept. 503)

Motion: Plaintiff Zikora Akah's Motions to Compel Defendant Bains to Provide Responses to Form Interrogatories, Set One, Special Interrogatories, Set One, Requests for Production of Documents, Set One, and to Deem Defendant to Have Admitted the Truth of the Matters in the Requests for Admissions, Set One, and for Monetary Sanctions

Tentative Ruling:

Unless defendant serves verified responses prior to the hearing on this motion, the court intends to grant plaintiff Zikora Akah's motions to compel defendant Bains to serve verified responses to the form interrogatories, set one, special interrogatories, set one, and requests for production of documents, set one. The court also intends to grant the motion to deem defendant Bains to have admitted the truth of the matters in the requests for admissions, set one. The court also intends to grant monetary sanctions against defendant Bains, in the amount of $470.

Defendant shall serve verified responses to the discovery requests within 20 days of the date of service of this order. Defendant shall pay monetary sanctions within 30 days of the date of service of this order.

Explanation:

Under Code of Civil Procedure section 2030.290, "If a party to whom interrogatories are directed fails to serve a timely response, the following rules apply: (a) The party to whom the interrogatories are directed waives … any objection to the interrogatories, including one based on privilege or on the protection for work product… (b) The party propounding the interrogatories may move for an order compelling response to the interrogatories. (c) The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2030.290, subds. (a)-(c), paragraph breaks omitted.)

Section 2031.300 contains similar language regarding persons who fail to respond to requests for production of documents. (See Code Civ. Proc., § 2031.300, subds. (a)-(c).)

Also, where a party fails to provide verified responses to requests for admissions within 30 days, the party is subject to an order deeming them to have admitted the truth of the matters in the requests as well as an order for monetary sanctions, unless the party

serves verified responses prior to the hearing on the motion. (Code Civ. Proc., § 2033.280, subds. (b), (c).)

In the present case, defendant Bains has failed to serve verified responses to plaintiffs' form interrogatories, special interrogatories, requests for production of documents, and requests for admissions, despite being given multiple extensions of time to respond. While Bains did eventually serve unverified responses, such unverified responses are tantamount to no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636; *Allen-Pacific, Ltd. v. Superior Court* (1997) 57 Cal.App.4th 1546, 1551, disapproved on other grounds by *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973.) However, while it is generally true that unverified responses are equivalent to no response at all, here defendant served responses with a mix of objections and substantive responses, so only the substantive responses needed to be verified and the objections that defendant did raise have been preserved. (*Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal.App.4th 651, 656-658.) Therefore, the court intends to compel defendant to serve verified responses to the form interrogatories, special interrogatories, and requests for production of documents, but it also intends to find that he has not waived the objections that he raised in his unverified responses.

Unless the defendant serves verified response before the hearing, the court also intends to enter an order finding that defendant has admitted the truth of the matters in the requests for production of documents, as he has failed to serve timely, verified responses to the requests. His unverified responses are equivalent to no response at all. Again, however, defendant did raise some objections in the responses which were not required to be verified. Therefore, he did not waive the objections that he has raised. Still, unless he serves verified responses before the hearing, he will be deemed to have admitted the truth of the unverified substantive responses.

Finally, the court intends to grant the plaintiff Zikora Akah's request for monetary sanctions, but it will reduce the amount of sanctions to a more reasonable number. As discussed above, defendant is subject to monetary sanctions for his unjustified failure to respond to the discovery requests. However, plaintiff seeks $470 for each of the four motions to compel, which is an excessive amount of sanctions given the relatively simple and straightforward nature of each motion. Plaintiff's counsel also fails to state how much time she spent on each motion or what her hourly rate is, which makes it nearly impossible to determine a reasonable amount of sanctions here. Nevertheless, assuming that counsel incurred $470 to draft one motion as she claims, and since the motions are virtually identical to one another, the court intends to award only $470 in total sanctions for all four motions.

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 6/14/24.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In Re: Mateo Delgadillo***
Superior Court Case No. 24CECG02200

Hearing Date: June 18, 2024 (Dept. 503)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To grant. Order signed. No appearances necessary.

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 6/14/24.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Bonnette v. Osborne, et al.***
Superior Court Case No. 19CECG04431

Hearing Date: June 18, 2024 (Dept. 503)

Motion: (1) by Plaintiffs to Withdraw Dismissal
(2) by Defendants for Sanctions

Tentative Ruling:

To deny the motion to withdraw the dismissal of this action filed February 22, 2024.

To grant the motion for sanctions. (Code Civ. Proc. § 128.7, subd. (b).) Monetary sanctions in the amount of $1,000.00 are ordered against plaintiffs Linda Jones and Phillip Bonnette, payable to Chapman Law, P.C. no later than 20 days from the date of this order, with the time to run from the service of this minute order by the clerk.

Explanation:

Motion to Withdraw Dismissal

Plaintiff and cross-defendant Linda Jones, trustee of the PB & LJ Ranch Joint Holding Trust Ranch filed a "Motion to Withdrawal of Request Motion for Dismissal with Prejudice" providing the date, time and department in which the motion would be heard. The papers filed provide no factual or legal basis for the request to withdraw the request for dismissal filed on February 22, 2024.

On May 23, 2024, Ms. Jones filed several responses to documents received from defendants indicating several bases for her motion to withdraw the request for dismissal. Ms. Jones states she signed the settlement agreement under duress. The dismissal of the lawsuit with prejudice following the signing of the settlement agreement was not disclosed to her. Ms. Jones believes her case should be heard by the court, the easement created as a result of the settlement agreement was illegal, and desires for defendants to stop trespassing on her property. Plaintiff has provided no evidence to support her claim that the settlement agreement was signed under duress. The correspondence attached to her affidavit indicates she and her attorney viewed the merits of her case differently as of October 2023 but she ultimately signed the settlement agreement, also attached to her affidavit, on January 2, 2024. Similarly, there is no evidence that the easement recorded pursuant to the settlement agreement is illegal or that defendants have violated the conditions for use of the easement following the signing of the settlement agreement.

On May 24, 2024, defendants filed their opposition to the motion to withdraw the dismissal, which was served on April 30, 2024. Given the lack of any basis for the requested withdrawal in the motion filed by plaintiffs, the opposition was limited to arguments as to the technical failure of the motion.

The court agrees that the motion to withdraw the request for dismissal suffers from fatal flaws and does not sufficiently provide a basis for the relief sought to allow the court to assess the merits of the motion or for defendants to oppose the merits of the motion. (Code .Civ. Proc. §1010; Cal. Rules of Court, rule 3.113.) The motion is denied.

Motion for Sanctions

Defendants and cross-complainants Brenda K. Sorondo, Russell Dick, Julie Dick Tex, Florence Dick, and Gladys McKinney seek an order finding plaintiffs and cross-defendants Linda Jones and Phillip Bonnette violated Code of Civil Procedure section 128.5 and Code of Civil Procedure section 128.7, subdivision (b) by filing a frivolous and/or solely intended to harass defendants by filing a "Motion to Withdrawal of Request Motion for Dismissal with Prejudice."

Under section 128.5, "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).)

"'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading." (Code Civ. Proc., § 128.5, subd. (b)(1).) "'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).)

Under Code of Civil Procedure section 128.7, subdivision (b),

> By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:
>
> (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Thus, a court may impose sanctions if the pleading was filed for an improper purpose or was indisputably without merit, either legally or factually. (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 189.)

"Code of Civil Procedure section 128.7 provides for a 21-day period during which the opposing party may avoid sanctions by withdrawing the offending pleading or other document. By providing this safe harbor period, the Legislature designed the statute to be 'remedial, not punitive.' When a party does not take advantage of the safe harbor period, the 'statute enables courts to deter or punish frivolous filings which disrupt matters, waste time, and burden courts' and parties' resources.'" (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 441, internal citations omitted.)

If, after notice and a reasonable opportunity to respond, the court determines that there was a violation of one or more of the above conditions, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that are responsible for the violation. (Code Civ. Proc., § 128.7, subd. (c).)

A sanction imposed for a violation shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. (Code Civ. Proc. § 128.7, subd. (d).) Subject to limitation, the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation. (*Ibid.*)

"Code of Civil Procedure section 128.7 imposes a lower threshold for sanctions than is required under Code of Civil Procedure section 128.5. This is because Code of Civil Procedure section 128.7 requires only that the conduct be 'objectively unreasonable,' while Code of Civil Procedure section 128.5 also requires 'a showing of subjective bad faith.'" (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167, internal citation omitted.)

In the present case, the purported motion to withdraw the request for dismissal filed and entered on February 22, 2024 appears to be the type of filing wholly without merit intended for such sanctions. The dismissal in questions was entered about one month following the filing of a Notice of Settlement of the entire case and in response to the filing of a request for dismissal. This is not a dismissal entered as a result of a failure to appear, rather it was affirmatively requested. Nevertheless, Ms. Jones filed a "motion" to withdraw the dismissal citing no factual or legal basis for the request. When the deficiencies of the motion were brought to Ms. Jones' attention she declined to withdraw the motion.

The response to the motion for sanctions from Ms. Jones does not address the merits of the motion for sanctions but instead appears to attempt to provide the basis for the underlying motion to withdraw. Although plaintiff feels justified in making the underlying motion, the motion suffers from fatal technical flaws and lacks evidence to

support the argued bases of the motion. The court finds the underlying motion to have been frivolous and made in violation of Code of Civil Procedure section 128.7, subdivision (b).

Defendants seek monetary sanctions in the amount of $6,097.50 for time billed by counsel and her paralegal necessary to respond to the motion to withdraw and to prepare the motion for sanctions. (Chapman Decl., Exh. B.) Defendants additionally request nonmonetary sanctions in the form of an order prohibiting plaintiffs from filing future motions or actions with regarding to the disputed easement. This request is based on the long history of continued disputes between the parties as to the use of the road, now formally recorded as an easement. (Defendant's Requests for Judicial Notice Nos. 1-12[2].)

As discussed above, sanctions under section 128.7 must be imposed with restraint, and must be only sufficient to deter further misconduct. Even if the plaintiff's claims are arguably frivolous, sanctions are not mandatory. (*Peake v. Underwood*, *supra*, 227 Cal.App.4th at p. 448; *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 422.)

Here, the court finds monetary sanctions in the amount of $1,000 awarded in favor of defendants and against plaintiffs Bonnette and Jones sufficient to deter the making of future frivolous and unmeritorious motions. The nonmonetary sanction requested would inhibit plaintiffs' ability to seek relief in the event there is a breach of the terms of the easement. (Chapman Decl., Exh. A, Settlement Agreement, § 3.1, Exh. B, § 7.1 "Breach of Obligation Other Than Maintenance.") As such, the restriction on plaintiff's ability to file future motions or actions with regard to the subject property is unduly harsh. To the extent plaintiffs believe there is a breach of the conditions imposed with regard to use of the easement they should have the agreed upon remedies available.

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 6/14/24.
(Judge's initials) (Date)

[2] The requests for judicial notice are granted.

(35)

Tentative Ruling

Re: ***Andrews v. Chleborad***
Superior Court Case No. 21CECG02909

Hearing Date: June 18, 2024 (Dept. 503)

Motion: By Plaintiffs Julie Andrews, Tami R. Chleborad, and Lori Welch for an Award of Attorney Fees

Tentative Ruling:

To deny, without prejudice.

Explanation:

Plaintiffs Julie Andrews, Tami R. Chleborad, and Lori Welch (collectively "Plaintiffs") seek an award of attorney fees following the entry of interlocutory judgment of partition.

The costs of partition include reasonable attorney fees incurred or paid by a party for the common benefit. (Code Civ. Proc. § 874.010, subd. (a).) However, costs or attorneys' fees may not be allowed until the final judgment is entered, and should not be included in the interlocutory decree. (*Williams v. Wells Fargo Bank & Union Trust Co*. (1941) 56 Cal.App.2d 645, 652.) Moreover, attorney fees awardable are for those acts that are for the common benefit of the interested parties, and in proportion to their respective interests, therein. (*Id. citing* Code Civ. Proc. § 874.010, subd. (a) [formerly section 796].) Finally, the fees, as costs to partition, are to be paid only after payment of the expenses of the sale, for which, no evidence was submitted. (Code Civ. Proc. § 873.820, subd. (b).)

For the above reasons, the motion is premature, and therefore denied without prejudice.

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 6/14/24.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Lucinda Barnett v. Kevin Cook***
Superior Court Case No. 22CECG02622

Hearing Date: June 18, 2024 (Dept. 503)

Motion: Defendant's Demurrer to the Second Amended Complaint; Motion to Strike

Tentative Ruling:

To sustain the defendant's' demurrer to the second amended complaint without leave to amend. The prevailing party is directed to submit to this court, within seven days of service of the minute order, a proposed judgment dismissing the second amended complaint as to the demurring defendant.

To find moot defendant's motion to strike the prayer for punitive damages in light of the ruling sustaining the demurrer to the second amended complaint.

Explanation:

Demurrer

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. (*Id*.)

In other words, a cause of action must allege every fact that the plaintiff is required to prove in order to allege the facts, or elements, necessary to constitute a cause of action. Where the 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 [the 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, subd. (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 the 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, this is the third attempt by plaintiff Lucinda Fern Barnett to plead various torts against her brother, defendant Kevin Robert Cook, based on events regarding their late mother, Rubyalys Cook (sometimes referred to as "decedent"). Plaintiff alleges defendant fraudulently transferred their mother's condominium to defendant. Plaintiff also alleges the spiteful manner in which decedent's personal belongings were packed and stored made it hard for plaintiff to retrieve the "leftovers," which caused plaintiff emotional distress and possibly contributed to strokes plaintiff suffered in April 2021, January 2023, and July 2023.

Defendant demurs on the grounds the first and third causes of action are time-barred, and the first and second causes of action fail to state a claim.

First Cause of Action: Fraud

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.)

In her form SAC, plaintiff checks the boxes for three types of fraud: intentional or negligent misrepresentation, concealment, and promise without intent to perform. She alleges defendant defrauded her on August 24, 2019. As in her previous attempts, none of the representations are pleaded sufficiently to support the fraud cause of action.

In the attachment for intentional or negligent misrepresentation (SAC, ¶ FR-2.a.), plaintiff condenses her previous allegations to two paragraphs. In the first paragraph she alleges defendant informed her by text message on August 7, 2017, that she "needed to move out of our mother's condominium . . . so that it could be sold to provide for her care as she had run out of money, and to avoid losing it to taxes." She vacated the condominium by late November 2017 and "our mother passed January 2018." (SAC, ¶ FR-2.a.) In the second paragraph plaintiff describes a meeting with defendant at Denny's on August 24, 2019, where defendant displayed false documents to plaintiff to validate a claim defendant made on June 9, 2019, that their impoverished mother never owned the condominium, and that defendant had been providing for their mother all along.

The substance of these allegations adds nothing to the more-detailed allegations in the original complaint and the first amended complaint (FAC).

The allegations of fraud based on concealment rearrange the words in the FAC to allege a condensed version of the same basic facts. Specifically, plaintiff alleges defendant concealed the fact that "he never intended to sell the condominium for our mother's care," and he "fraudulently quitclaimed the condominium into his name." (SAC, ¶ FR-3.a.) Likewise, the allegations in the SAC for promise without intent to perform are a condensed version of the allegations in the FAC. Plaintiff deletes the allegations about the defendant's promises to divide their mother's assets and simply states the promise without intent to perform as follows:

> [Defendant] never intended to sell the condominium for our mother's care, or for tax purposes. [Defendant] knew the condo was not behind on taxes, and that he had fraudulently quitclaimed into his name for personal gain, as well as to avoid California Intestate Succession Law.

(SAC, ¶ FR-4.a.)

Plaintiff had previously alleged that before her mother moved to a care home, she had been living with defendant and his wife in their home since 2008. (FAC, ¶ FR-2.a.) She also alleged her mother "had been helping" plaintiff after health issues kept plaintiff from working since 2014. (FAC, ¶ FIR-7) Plaintiff infers she had been living in the condominium rent-free when defendant asked her to move, because plaintiff describes a conversation at her mother's care home (no later than 2017), where it was discussed that "once [plaintiff] returned to work, something that seemed eminent, [plaintiff] would start paying rent on the condo." (FAC, ¶ FR-2.1.) Plaintiff has never alleged she had a right (contractual or otherwise) to stay in the condominium, whether owned by defendant or decedent.

Continuing the trend to delete or condense allegations from her two previous pleadings, plaintiff attempts to allege justifiable reliance by stating she was induced to act as follows:

> Move out of our mother's condominium in late November 2017, my home since 2009, and wait patiently for the condominium to sell, fully trusting [defendant] implicitly based on him being both my brother as well as an officer of the law.

(SAC, ¶ FR-5.)

Because plaintiff has simply condensed her allegations, the same rationale applies to the FAC and the SAC. In ruling on the demurrer to the FAC, this court addressed the alleged June 9, 2019 misrepresentation, the statute of limitations, and the delayed discovery rule as follows:

> The third identifiable misrepresentation alleged occurred on June 9, 2019 when [plaintiff] was told by defendant their mother was very poor, on social security and that he had been making loan payments [on the

condo]. (FAC, ¶ FR-2a.) There is no action from plaintiff alleged to have been induced by these statements. To the extent the alleged misrepresentation relates to earlier misrepresentations regarding their mother's financial status requiring the sale of the condo this would not be a separately actionable misrepresentation.

The actions forming the basis of the plaintiff's fraud allegations, including her moving out of the condominium in reliance on defendant's misrepresentation and the damages caused by the failure to provide her with her share of proceeds from a sale that did not occur, took place in August 2017 and possibly January 2018 after their mother's death when her assets would have been divided. (FAC, FR-5, FR-6.) Any action for fraud based on these events would have needed to have been filed by June 2021. This action was filed on August 2022. However, plaintiff alleges she did not confirm her suspicions that he had no intention of selling the condo until August 24, 2019. (FAC, ¶FR-2a.)

The accrual of a cause of action for fraud can be delayed until the fraud is discovered. A plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer. (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1536–1537.) Ordinarily, the period of limitations will begin to run without regard to whether the plaintiff is aware of the specific facts necessary to establish his claim, provided that he has a "suspicion of wrongdoing," which he is charged with once he has "notice or information of circumstances to put a reasonable person on inquiry." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109–1111.)

The allegations of plaintiff's first amended complaint do not support the application of the discovery rule to delay the accrual of the cause of action for fraud. Plaintiff includes references to "having seen evidence to the contrary" of her brother's representations of making loan payments in the context of a June 9, 2019 text message exchange. (FAC, ¶ FR-2a.) This would support a date of discovery earlier than August 24, 2019, thus the time and manner of discovery has not been alleged but rather the date suspicions were confirmed. Further, there are no allegations to support plaintiff's inability to discover the condo was not listed for sale following her having vacated the residence in August 2017 or after her mother's death in 2018.

(02/08/24 Minute Order and copy of Tentative Ruling, pp. 11-12.)

As defendant notes, "[t]rust and ignorance do not demonstrate reasonable diligence to have discovered the alleged fraud." (Def. Memo., p. 6:13-14, citing *WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 157; *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 192-194.) In her SAC,

plaintiff pleads less facts than the facts included in her FAC. Specifically, she fails to allege the time and manner of discovery and facts to show she was reasonably diligent in discovering the condominium had never been listed for sale as represented.

Furthermore, plaintiff leaves the space for damages blank. (SAC, FR-6.) The failure to allege the essential element of damages caused by the misrepresentations alone is sufficient to sustain the demurrer. Therefore, the court sustains the demurrer to the fraud cause of action because the claim lacks an essential element and it is time-barred.

Second Cause of Action: Intentional Tort

The elements of a cause of action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' " (*Id.* at pp. 1050-1051.) "Liability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." ' " (*Id*. at p. 1051.)

Whether conduct is outrageous "is 'usually' a question of fact, [but] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356.)

In the SAC, plaintiff rearranges her allegations and adds even more peripheral details, but the gist of plaintiff's allegations of outrageous conduct remains the same. Plaintiff alleges the poor job of packing decedent's belongings and the difficulties in scheduling a retrieval time caused undue stress, many hours of therapy, and broken familial relations. (SAC, ¶ IT-1.) Plaintiff also alleges the incident caused her to fear for her life because of defendant's profession in law enforcement.

Defendant argues the conduct complained of does not, as a matter of law, rise to the level of outrageous conduct beyond the bounds of that tolerated in the community. Defendant previously noted the FAC included no allegations that defendant packed the storage unit or that in so doing defendant intended to cause plaintiff injury. Plaintiff now alleges the packing "had to be done" by defendant because "this was obviously not a packing job of a professional mover," and only defendant had access to decedent's belongings. (SAC, IT-1, p. 2.) Plaintiff also alleges defendant packed things in a manner that "would probably cause damage[.]" (*Ibid.*) The SAC still lacks an allegation that defendant intended to cause emotional distress to plaintiff. The "new" allegations and the repeated previously-alleged information regarding plaintiff's health issues do not rise to the level of pleading that is required for this intentional tort. Thus, plaintiff fails to allege the necessary allegations to establish that defendant's actions were outrageous beyond the bounds of that tolerated in the community and the actions were the proximate cause of plaintiff's alleged emotional distress. Accordingly, the demurrer to the second cause of action is sustained.

Third Cause of Action: General Negligence

Defendant demurs to the third cause of action based on the two-year statute of limitations for negligence. (Code Civ. Proc., § 335.1.) Plaintiff alleges she was finally given access to her mother's belongings in a storage unit in July 2020. But she also alleges she began to inquire about decedent's estate a few months after the date of death in January 2018 because decedent "had been very verbally specific about her wishes." (SAC, ¶ GN-1.) Based on her own allegations, plaintiff knew or should have known that defendant had not divided decedent's assets as promised within months after January 2018, when she began inquiring about the estate. Thus, the two-year statute of limitations for negligence expired, at the latest, in 2020. The filing of the original complaint on August 23, 2022, is far beyond the expiration of the statute of limitations for negligence. Therefore, the court sustains the demurrer to the negligence cause of action because it is time-barred.

Leave to Amend

It is the opposing party's responsibility to request leave to amend, and to show how the pleading can be amended to cure its defects. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Ordinarily, given the court's liberal policy of amendment, the court will grant leave to amend an original complaint. (See *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304 ["[l]iberality in permitting amendment is the rule" unless complaint "shows on its face that it is incapable of amendment."])

Here by failing to oppose defendant's demurrer, plaintiff also fails to show how the untimeliness of the SAC can be cured by amendment. (See *Heritage Pacific Financial, LLC. v. Monroy* (2013) 215 Cal.App.4th 972, 994 [court did not abuse discretion in denying leave to amend where plaintiff failed to show it could cure defect].) After three attempts, plaintiff has failed to overcome the deficiencies in her complaints raised by defendant's demurrers. Therefore, the court sustains the demurrer to the SAC without leave to amend.

Motion to Strike

Given the ruling on defendant's demurrer to the SAC, the motion to strike is moot.

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 6/17/24.
(Judge's initials) (Date)