Tentative Rulings for June 25, 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.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(03)

Tentative Ruling

Re: ***Petco Animal Supplies Stores, Inc. v. Ochinero Development Co., L.P.***
Case No. 22CECG03911

Hearing Date: June 25, 2024 (Dept. 503)

Motion: Defendant's Motion for Summary Judgment, or in the Alternative Summary Adjudication

Tentative Ruling:

To deny defendant's motion for summary adjudication of plaintiff's first cause of action for breach of lease. To grant defendant's motion for summary adjudication of plaintiff's second and third causes of action for breach of the implied covenant of good faith and fair dealing and declaratory relief. To grant defendant's motion for summary adjudication of its cross-claim for declaratory relief.

If oral argument is timely requested, it will be entertained Tuesday, July 9, 2024, in Department 503.

Explanation:

First Cause of Action: Defendant notes that the sublease sets forth the formula for calculating plaintiff's share of the common area maintenance (CAM) charges, which is based on the ratio between the actual total square footage of the shopping center and the square footage leased by the plaintiff. (Sublease, § 1.19.) Plaintiff has alleged that defendant overcharged it for CAM costs by using a lower figure for the total square footage of the shopping center than the actual square footage when it calculated plaintiff's share of the CAM charges, which resulted in plaintiff paying a higher percentage of the total CAM charges than it should have paid. (Complaint, ¶¶ 8-14.) In particular, plaintiff has alleged that the total square footage of the shopping center is between 147,110 to 148,418 square feet, not 115,600 square feet as set forth in the lease. (*Id*. at ¶¶ 9, 11.) However, defendant points out that the language of the sublease clearly states that the actual total square footage for the shopping center is determined to be 115,600 and plaintiff's square footage is determined to be 30,658. (Sublease, §§ 1.7, 1.8.) Defendant alleges that it used these figures to calculate the CAM charges, which is consistent with the plain terms of the sublease. Thus, defendant concludes that it did not overcharge plaintiff for CAM charges, and therefore plaintiff cannot prevail on its breach of lease cause of action.

However, regardless of whether defendant properly charged plaintiff for CAM expenses according to the formula set forth in the sublease, defendant has not addressed plaintiff's other theories set forth in the first cause of action. Plaintiff has alleged not only that defendant overcharged it for CAM costs by using the wrong square footage for the shopping center, but also that it improperly charged plaintiff for repair costs that were not proper CAM expenses and overcharged for real estate taxes.

(Complaint, ¶¶ 11-14.) "The Overcharges fall into three categories. The first totaling $27,162.97 results from the inclusion of costs and repairs that are not proper CAM expenses. The second totaling $29,042.52 results from the application of an inflated Proportionate Share percentage as set forth above. The third consists of the Tax Overcharges." (*Id*. at ¶ 12.) Defendant's motion does not address the plaintiff's claims that defendant overcharged it for repair costs that were not properly included as CAM expenses, or that it overcharged it for real estate taxes, other than to argue that all of the plaintiff's claims are based on the same theory that defendant used the wrong square footage to calculate plaintiff's share of the CAM charges.

Yet, according to plaintiff's evidence, the real estate taxes are based on a different formula than the CAM charges, since the taxes are calculated based on the total square footage of the center, excluding the space occupied by Walmart. (See Plaintiff's Separate Statement, Fact No. 16, citing John Kryznefski decl., pp. 5:8-17, 7:20-22.) Plaintiff claims that defendant improperly charged it for 68.23% of the real estate taxes rather than 66.40% of the taxes, which resulted in a total overcharge of $2,698.30. (Kryznefski decl., pp. 5:8-17, 7:20-22.) Defendant's motion does not provide any evidence or argument to rebut plaintiff's contention that it was overcharged for real estate taxes. Nor does defendant discuss plaintiff's claim that defendant charged it for repair costs that were not properly part of the CAM charges. Therefore, defendant has not met its burden of showing that it is entitled to summary adjudication of the first cause of action. In the alternative, even assuming that defendant has met its burden, plaintiff has raised a triable issue of material fact with regard to the tax overcharge claim. Therefore, the court intends to deny the motion for summary adjudication of the first cause of action.

Second and Third Causes of Action: Plaintiff's second and third causes of action rely solely on the theory that defendant overcharged plaintiff for CAM charges because defendant used the wrong figure for the square footage of the shopping center when it calculated plaintiff's share of the CAM charges. (Complaint, ¶¶ 19-24.) Plaintiff alleges that the actual square footage of the shopping center is not less than 148,926, and therefore defendant should have used this number to calculate plaintiff's share of the CAM charges, rather than the fixed, static number of115,600 square feet stated in the sublease. (*Id*. at ¶ 22.) Plaintiff contends that its share of the CAM charges should be no more than 20.58%, and that defendant's use of the wrong square footage to calculate CAM charges has resulted in overcharges of not less than $29,042.52. (*Id*. at ¶¶ 20, 22(e).)

However, defendant has met its burden of showing that plaintiff cannot prevail on its breach of implied covenant and declaratory relief claims regarding the CAM charges, since the plain language of the sublease establishes that defendant has not overcharged plaintiff for its share of the CAM expenses based on the formula and square footage figures set forth in the sublease. Where the language of a written agreement is clear and unambiguous, the court must follow it and cannot consider extrinsic evidence or prior or contemporaneous oral representations that attempt to vary the terms of the written agreement. (Civil Code, § 1638; *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

Here, the sublease states that, "[u]nless otherwise stated in this Sublease, whenever Lessee is required under the terms of this Sublease to pay Lessee's Proportionate Share of any cost, tax, assessment, or any other expense or charge, that share shall be computed in the ratio that Lessee's Gross Floor Area bears from time to time to the Gross Floor Area in the Building." (Sublease, § 1.19.) The "gross floor area" for

the entire building is defined as "[t]he actual number of square feet of floor space in the Building **which is determined to be 115,600 square feet**, including the Subleased Premises. **In the event the Building is expanded, the Gross Floor Area shall be re-calculated as of the date of the Certificate of Occupancy for the additional Building or expansion area.**" (Sublease, § 1.7, emphasis added.) Under section 1.8 of the sublease, the plaintiff's "gross floor area" is defined as "[t]he actual number of square feet of the Gross Floor Area in the Subleased Premises occupied by Lessee, which for purposes of this Sublease is determined to be 30,658 square feet." (Sublease, § 1.8.) Plaintiff also executed several amendments to the lease, including the fourth amendment, which ratified that plaintiff would pay CAM charges based on the same formula and square footages set forth in the prior versions of the sublease. (See defendant's UMF Nos. 17-29.)

Thus, according to the clear and unambiguous language of the sublease, the plaintiff must pay CAM charges based on the ratio between the plaintiff's floor space and the total gross floor area of the building, with plaintiff's gross square footage defined as being 30,658 and the total gross square footage of the building defined as 115,600. There is no dispute that defendant has calculated plaintiff's share of the CAM expenses based on the formula and gross square footages set forth in the lease. Also, plaintiff has admitted that it has no evidence that the square footage of the building increased and a certificate of occupancy for the expansion was issued at any time, which would have resulted in a duty to recalculate the plaintiff's share of the CAM charges under section 1.7 of the sublease. (Defendant's UMF Nos. 32-34, 73-75, 114-116, 155-157.) As a result, defendant has met its burden of showing that it did not overcharge plaintiff for CAM expenses, as it followed the formula and square footage numbers provided in the lease.

Nevertheless, plaintiff argues that defendant had a duty to recalculate its share of the CAM charges because defendant has admitted that the actual square footage of the building is greater than 115,600, and is actually somewhere between 147,110 and 149,418 square feet. (Plaintiff's UMF Nos. 6, 12.) Plaintiff notes that the sublease states that plaintiff's share of the CAM charges "shall be computed in the ratio that Lessee's Gross Floor Area bears **from time to time** to the Gross Floor Area in the Building." (Sublease, § 1.19, emphasis added.) The sublease also states that the calculation of CAM charges shall be based on the "**actual number of square feet** of the floor space in the Building." (Sublease, § 1.7, emphasis added.) Plaintiff contends that this language means that the defendant has a duty to recalculate the plaintiff's share of the CAM charges periodically based on the actual square footage of the building, not the fixed number of square feet stated in the sublease. Since there is no dispute that the actual area of the building is over 115,600 square feet, plaintiff concludes that there is at least a triable issue of material fact with regard to whether defendant overcharged plaintiff for its share of the CAM charges.

However, the plain language of the sublease states that the "gross floor area" of the building is "[t]he actual number of square feet of floor space in the Building **which is determined to be 115,600 square feet**, including the Subleased Premises." (Sublease, § 1.7, emphasis added.) Thus, the sublease establishes that the gross floor area of the property is 115,600 square feet, that plaintiff's share of the property is 30,658 square feet, and that the CAM charges paid by plaintiff will be calculated by the ratio between plaintiff's portion of the property and the total area of the property. The parties later confirmed that the same figures would be used in the subsequent amendments to the sublease. Plaintiff most recently agreed in the June 2020 fourth amendment to the

sublease that it would pay the outstanding CAM charges, which were based on the same formula and numbers in the prior versions of the sublease. There is no evidence that plaintiff objected to the CAM charges at the time it executed the fourth amendment. As a result, the terms of the sublease and the subsequent amendments signed by the parties established that the building's total square footage was 115,600, regardless of any later statements by defendant.

The sublease also sets forth a specific procedure for recalculating the CAM charges to be paid by plaintiff. However, the defendant only has a duty to recalculate the CAM charges where the building is expanded and a certificate of occupancy issues for the new space. "In the event the Building is expanded, the Gross Floor Area shall be re-calculated as of the date of the Certificate of Occupancy for the additional Building or expansion area." (Sublease, § 1.7.) Here, there is no evidence that the building was ever expanded, and plaintiff has stated in its opposition that it is not contending that the building was ever expanded. Thus, plaintiff has not shown that defendant's duty to recalculate the CAM charges was ever triggered.

While plaintiff contends that defendant had a duty under the sublease to recalculate plaintiff's share of the CAM charges "from time to time" (sublease, § 1.19), the sublease does not require a recalculation of the CAM charges except when the building square footage increases and a new certificate of occupancy for the expansion is issued. (Sublease, § 1.7.) The sublease does state that plaintiff's share of the CAM charges "shall be computed in the ratio that Lessee's Gross Floor Area bears from time to time to the Gross Floor Area in the Building". (Sublease, § 1.19.) However, this language does not appear to require the defendant to recalculate the plaintiff's share of the CAM charges unless the total building area expands and a certificate of occupancy for the new space is issued. There is certainly no specific requirement in the sublease that defendant must recalculate plaintiff's share of the CAM charges on an annual basis, as plaintiff alleges in the complaint. (Complaint, ¶ 19(c).) The reference to calculation of the CAM charges "from time to time" seems to be simply an acknowledgement that the building space may expand over time, and that plaintiff's share of the CAM charges should be adjusted accordingly as needed. However, since there is no evidence that the building has expanded since the lease was negotiated, the defendant had no duty to recalculate the CAM charges. Consequently, the court intends to grant summary adjudication of the second and third causes of action in plaintiff's complaint.[1]

Defendant's Cross-Claim: Defendant has also moved for summary adjudication of its cross-claim for declaratory relief, which seeks a declaration that defendant has properly calculated plaintiff's share of the CAM charges based on a divisor of 115,600. Since the court intends to find that the clear and unambiguous language of the sublease states that the gross floor area of the building is 115,600, and that this figure shall be used to calculate plaintiff's share of the CAM charges, the court also intends to grant the motion for summary adjudication of the defendant's cross-claim for declaratory relief.

[1] [1] Plaintiff has objected to paragraphs 12 and 15 to the declaration of Craig Frieders on the grounds of lack of foundation and lack of personal knowledge, as well as the best evidence rule. The court intends to sustain the objections. However, the court's ruling does not change the outcome of the motion.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: jyh on 6/24/24.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Nares v. Penny Newman Grain Co.***
Superior Court Case No. 24CECG00430/LEAD

Hearing Date: June 25, 2024 (Dept. 503)

Motion: By Defendant Penny Newman Grain Company, Inc. to Compel Arbitration; Dismiss Class Claims; and Request for Stay

Tentative Ruling:

To continue to August 7, 2024, 3:30 p.m. in Department 503. To the extent that defendant Penny Newman Grain Company, Inc. intends to rely on a declaration by either Matt Nicoletti or Marjorie Bynion, that declaration must be served and filed on or before July 5, 2024, 5:00 p.m. A supplemental opposition may be served and filed on or before July 22, 2024, 5:00 p.m. A supplemental reply brief may be served and filed on or before July 29, 2024, 5:00 p.m.

If oral argument is timely requested, it will be entertained Tuesday, July 9, 2024, in Department 503.

Explanation:

Plaintiff Carlos Nares ("Plaintiff") brings an action for nine causes of action for various violations of the Labor Code, one cause of action for unfair competition, and one cause of action under the Private Attorney General Act ("PAGA") as defined by Labor Code section 2698 *et seq*., on behalf of himself and all aggrieved employees. Defendant Penny Newman Grain Company, Inc. ("Defendant") now seeks an order compelling Plaintiff to private arbitration of his individual claims, to dismiss the class action components, and to stay the representative portion of the PAGA claim.[2]

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.)

[2] Defendant's notice of motion only speaks to seeking an order compelling arbitration. However, in its moving papers, Defendant additionally seeks to dismiss the class claims, and stay the remainder action. In opposition, Plaintiff addresses these additional requests. Accordingly, the court proceeds.

Unless there is a dispute over authenticity, the mere recitation of the terms is sufficient for a party to move to compel arbitration. (*Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 793.) Here, Defendant submits a written agreement to arbitrate. (Ramirez Decl., ¶¶ 3, 4, and Ex. A, B.) In opposition, Plaintiff does not contest the existence of a written agreement.

Plaintiff contests enforcement of the written agreement. Plaintiff opposes on the grounds that some or all of the allegations of the First Amended Complaint are exempt from being compelled to arbitration as a matter of California law. (*E.g.*, Lab. Code § 229.) An individual arbitration agreement does not apply to an action to enforce statutes governing collection of unpaid wages, which may be maintained without regard to any private agreement to arbitrate. (*Ibid.*) The intent is to assure a judicial forum where there exists a dispute as to wages, notwithstanding the strong public policy favoring arbitration. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 43.) An exception to that general rule occurs when there is federal preemption by the Federal Arbitration Act ("FAA"), as applied to contracts evidencing interstate commerce. (*Perry v. Thomas* (1987) 482 U.S. 483, 490.) Where the Federal Arbitration Act ("FAA") applies, state law that outright prohibits arbitration is displaced by federal law. (*AT&T Mobility, LLC v. Concepcion* (2011) 563 U.S. 333, 341.)

Plaintiff argues that the written agreement applies the Federal Arbitration Act only to the extent applicable, and California law otherwise controls. Plaintiff submits that the FAA does not apply here because the FAA only to those contracts that involve interstate commerce. The FAA applies to a contract evidencing a transaction involving commerce. (9 U.S.C. § 2; *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1120.) Commerce is defined in Title 9 of the United States Code, section 1 as:

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (9 U.S.C. § 1.)

In sum, commerce includes commerce among the several States, and has been interpreted broadly within the United States Congress' authority under the Commerce Clause. (*Citizens Bank v. Alafabco, Inc.* (2003) 593 U.S. 52, 56.) These words cover more than only persons or activities within the flow of interstate commerce. (*Allied-Bruce Terminix Cos. V. Dobson* (1995) 513 U.S. 265, 273.) They cover transactions that involve interstate commerce, even if the parties did not contemplate an interstate commerce connection. (*Id.* at p. 281.) A party seeking to enforce an arbitration agreement has the burden of showing FAA preemption. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 687.) In effect, the party seeking to compel arbitration must show

that the subject matter of the agreement involves interstate commerce. (*Id.* at pp. 687-688.)

Here, the moving papers refer to the FAA only in the introduction. Rather, the body of arguments made in the moving papers are under the California Arbitration Act ("CAA"). The issue is raised for the first time in opposition. On reply, and for the first time, Defendant argues that the FAA applies to all of Plaintiff's claims. Defendant cites to the written agreement in support. (Bynion Decl., ¶ 5, Ex. A.) However, the written agreement references both the FAA and the CAA in a contradicting manner:

> 2. By signing this Agreement, the Parties are voluntarily giving up their respective rights to a jury trial. The arbitrator shall apply the substantive law (and the law of remedies, if applicable) in the state in which the claim arose, or federal law, or both as applicable to the claim(s) asserted. The arbitrator shall conduct the arbitration proceedings pursuant to the [CAA]…
>
> 3. This Agreement shall be governed by the [FAA] to the extent applicable; if the FAA is not applicable, the CAA shall govern this Agreement.

On the one hand, the terms explicitly dictate that the arbitral process be guided and governed by California law. On the other hand, the next paragraph declares that the FAA shall govern to the extent applicable.

The court does not resolve this ambiguity, nor could it based on the present briefing. As the language of the imposition of the FAA is only to the extent applicable, it fell to the moving party to demonstrate the applicability of the FAA. Contrary to the assertions on reply, the moving papers, and supporting evidence fail to demonstrate that "there is no reasonable dispute that Penny Newman's business affects interstate commerce." Moreover, Defendant submits new evidence on reply to address the issue, which is generally inappropriate. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 ["The general rule of motion practice… is that new evidence is not permitted with reply papers."]) Furthermore, the supplemental declaration is incomplete, and starts as the Declaration of Matt Nicoletti but ends in a signature by Marjorie Bynion.

Because the above issue materially affects some or all of the motion to compel arbitration, the matter is continued for further briefing. To the extent that Defendant intends to rely on a declaration by either Matt Nicoletti or Marjorie Bynion, that declaration must be served and filed on or before July 5, 2024, 5:00 p.m. A supplemental opposition may be served and filed on or before July 22, 2024, 5:00 p.m. A supplemental reply brief may be served and filed on or before July 29, 2024, 5:00 p.m.

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