Tentative Rulings for June 26, 2024
Department 501

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section

24CECG01108 ***Olsen v. LED Greenlight International, LLC***

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Vang v. Alixa RX, LLC***
Case No. 23CECG04138

Hearing Date: June 26, 2024 (Dept. 501)

Motion: by Plaintiff for Order Compelling Compel the Depositions of Cydney Wachi and Parham Bazrafshan

Tentative Ruling:

To deny the motion. To deny plaintiff's request for monetary sanctions against defendant. To deny defendant's request for sanctions against plaintiff.

Explanation:

Under Code of Civil Procedure section 2025.450, subdivision (a), "[i]f, after service of a deposition notice, a party to the action or an officer, director, managing agent, or employee of a party, or a person designated by an organization that is a party under Section 2025.230, without having served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, … the party giving the notice may move for an order compelling the deponent's attendance and testimony..."

"A motion under subdivision (a) shall comply with both of the following: (1) The motion shall set forth specific facts showing good cause justifying the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice. (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040…" (Code Civ. Proc., § 2025.450, subd. (b), paragraph breaks omitted.)

"If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court 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., § 2025.450, subd. (g)(1).)

Also, under Fresno Superior Court Local Rule 2.1.17, "[n]o motion under sections 2017.010 through 2036.050, inclusive, of the California Code of Civil Procedure shall be heard in a civil unlimited case unless the moving party has first requested an informal Pretrial Discovery Conference with the Court and such request has either been denied and permission to file the motion is granted via court order or the discovery dispute has not been resolved as a result of the Conference and permission to file the motion is expressly granted. This rule shall not apply the following: 1. Motions to compel the deposition of a duly noticed party or subpoenaed person(s) who have not timely served an objection pursuant to Code of Civil Procedure section 2025.410…" (Fresno Sup. Ct. Local Rule 2.1.17 A.)

Here, defendant served timely objections to the subject deposition notices. Therefore, plaintiff had to file a request for a pretrial discovery conference and receive permission from the court before filing the instant motions. However, while plaintiff did file a pretrial discovery conference request, the court denied the request and did not grant leave to bring the motions, as it found that plaintiff's counsel had not adequately met and conferred before filing the request. (See May 3, 2024 Order on Request for Pretrial Discovery Conference.) Therefore, plaintiff's counsel has not obtained leave of court to bring the motions. As a result, the court will not grant the motions.

In addition, even if plaintiff had obtained permission from the court to bring the motions, the court would still deny the motions because defendant has now agreed to produce the witnesses for their depositions. Defense counsel has offered to have the witnesses deposed in August 20, 21, 22 or 23 of 2024. (Goodman decl., ¶ 10.) Thus, since defendant has agreed to produce the witnesses on specific dates, there is no need for a court order compelling the witnesses to appear for their depositions. Under section 2025.450, subdivision (a), the court can only compel the deposition of a party or party-affiliated witness who fails to appear at their deposition without first serving a valid objection. Here, defendant has served objections, and has now offered to make the witnesses available for their depositions in August, so there is no basis for ordering the witnesses to appear at their depositions.

Plaintiff's counsel claims that defendant is unreasonably delaying the depositions in an attempt to obtain a second deposition of plaintiff, and that defendant is "playing games." He claims that, since defense counsel is a worldwide firm with dozens of attorneys, there is no reason that another attorney from the firm could not defend the depositions if they go forward immediately rather than waiting until August to take them. However, plaintiff cites to no legal authority that requires a party to produce a witness for deposition within a specific timeframe unilaterally set by the party who noticed the deposition. Here, Ms. Goodman and Ms. Agharezaei have stated that they are unavailable until late August to defend the depositions, and the court will take them at their word. While defense counsel may be part of a large firm with other attorneys, they are the attorneys who are assigned to the case and are familiar with the issues it raises, so defendant should not be forced to defend the deposition with another attorney who may not be familiar with the case.

Also, there is no evidence that defendant is deliberately delaying the depositions in order to gain a tactical advantage over plaintiff, or that plaintiff will suffer any prejudice if the depositions are not taken before August. The case is not yet set for trial and there is no discovery cutoff or summary judgment motion looming, so plaintiff should not be harmed if the depositions are not taken immediately. Nor has plaintiff pointed to any specific harm that she would suffer if she has to wait until August to take the depositions. While plaintiff contends that defendant is trying to obtain a "litigation timeout" by delaying the depositions, there is no evidence that defense counsel has any improper motive here. Defense counsel is simply busy with other matters until August and is not available to defend the depositions before then. As a result, the court intends to deny the motions to compel the depositions, as defendant has agreed to produce the witnesses for their depositions.

Finally, the court will deny plaintiff's request for sanctions against defendant, and also deny defendant's request for sanctions against plaintiff. As discussed above, "If a motion under subdivision (a) is granted, the court shall impose a monetary sanction … in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court 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., § 2025.450, subd. (g)(1).) There is no provision that allows the court to impose sanctions against the party who noticed the deposition, however, even if that party unsuccessfully moves to compel the deposition.

Here, the court intends to deny the motions to compel the depositions, so there is no basis for granting sanctions in favor of plaintiff. Also, since there is no statutory authority for granting sanctions against the plaintiff for bringing an unsuccessful motion to compel, the court cannot grant sanctions against plaintiff here. As a result, the court intends to deny defendant's request for sanctions against plaintiff.

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

Tentative Ruling
Issued By: DTT on 6/21/2024 .
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Leon v. Davis & Roberts Construction, Inc.***
Superior Court Case No. 22CECG00407

Hearing Date: June 26, 2024 (Dept. 501)

Motion: by Plaintiff for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

Certification of Class for Settlement

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected, although there is less scrutiny of manageability issues. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240; see *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1803, fn. 9, 19.a) The trial court has a "fiduciary responsibility" as the guardian of the absentee class members' rights to decide whether to approve a settlement of a class action. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

A precertification settlement may stipulate that a defined class be conditionally certified for settlement purposes. The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (Cal. Rules of Court, rule 3.769(d).) Before the court may approve the settlement, however, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem Products, Inc. v. Windsor* (1997) 521 US 591, 625-627.)

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, 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." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.)

Plaintiff bears the burden of establishing the propriety of class treatment *with admissible evidence*. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [trial court's ruling on certification supported by substantial evidence generally not disturbed on appeal]; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1107-1108 [plaintiff's burden to produce substantial evidence].)

Plaintiff's counsel represents defendant has represented that there are approximately 119 class members. However, no admissible evidence is submitted as to

this number. Nor is there any evidence of ascertainability, such as a showing that the class members are identifiable from defendant's own records. Conclusory statements to this effect are insufficient. In a future motion for preliminary approval, a declaration from defendant should be submitted, establishing the number of class members and ascertainability.

Under the community of interest requirement, the class representative must be able to represent the class adequately. (*Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 669.) "[I]t has never been the law in California that the class representative must have identical interests with the class members . . . 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.)

Usually, in wage and hour class actions or PAGA class claims, the distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs, and the employer treats all in that discrete group in the same allegedly unlawful fashion. In *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1017, "no evidence of common policies or means of proof was supplied, and the trial court therefore erred in certifying a subclass."

Plaintiff has submitted no evidence that the proposed class representative has claims typical of the class, or that she can adequately represent the class. While plaintiff filed a declaration, it is focused solely on describing how she assisted her attorneys so as to justify the incentive award. There is no showing that all employees would have common claims or be subjected to the same policies and practices, or that plaintiff's claims are typical of the class.

The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. " 'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '… To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.]' [Citation.]" (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212.)

"[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.) This consideration is satisfied, as counsel has substantial class action experience.

Settlement Approval

"[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." (*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.)

Clark v. America Residential Services (2009) 175 Cal.App.4th 785 vacated approval of a class settlement coupled with class certification, an award of $25,000 each to two named plaintiffs, and more. The problem was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at p. 793.)

Class Counsel estimated that defendant's maximum potential liability is $5,668,574.79 (consisting of $572,900.00 in unpaid wages, $286,450.00 in missed meal period premium wages, $572,900.00 in missed rest break premium wages, $0.00 in unreimbursed expenses, $32,316.61 for wage statement penalties, $151,487.23 for waiting time penalties, and $5,482,853.84 for civil penalties under PAGA. (Spivak Decl., ¶ 40, Exh. 8.)

The settlement represents 2.94% of the theoretical maximum potential recovery, discounted most significantly by defendant's *Pick Up Stix* campaign. However, none of these agreements have been submitted in evidence. Plaintiff states that defendant also represented that it had interviewed current employees regarding plaintiff's claims, all of whom would provide declarations that were favorable to defendant with respect to the relevant factual issues at issue in plaintiff's action. However, there is no explanation of what issues or considerations would be impacted by these declarations.

The valuation was also discounted due to defendant's financial condition[1]. Plaintiff's counsel states that during the first mediation, defendant explained that its business was in dire shape and had to lay off all but 12 employees due to a significant drop in revenue. Counsel states that he reviewed defendant's financial records in settlement negotiations, and "[t]he information provided was sufficient to demonstrate the financial condition of the Defendant and that it will unlikely be able to afford payment of a larger amount than the Settlement amount." (Spivak Decl., ¶ 21.) However, there is no declaration from defendant explaining its financial condition; plaintiff's counsel's declaration is hearsay and lacks foundation.

The court cannot find at this stage that the settlement is fair, adequate and reasonable, as the above considerations are lacking in admissible evidence.

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[1] The "poor financial health of [the defendant will] seriously increase [] the chance that Plaintiffs would be left with nothing if they continued to litigate their claims." (*Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 [the financial condition of defendant predominated in assessing the reasonableness of settlement].)

Insufficient information is provided to enable the court to preliminarily approve the award of attorney's fees and costs. Plaintiff's counsel seeks up to $55,571 in attorney's fees, which is one-third of the total gross settlement, plus costs of up to $20,000. One-third is within the range of fees that have been approved by other courts in class actions, which frequently approve fees based on a percentage of the common fund. (*City & County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-11; *Quinn v. State* (1975) 15 Cal.3d 162, 168; see also *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1270; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26.)

While it is true that courts have found fee awards based on a percentage of the common fund are reasonable, the California Supreme Court has also found that the trial court has discretion to conduct a lodestar "cross-check" to double check the reasonableness of the requested fees. (*Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480, 503-504 [although class counsel may obtain fees based on a percentage of the class settlement, courts may also perform a lodestar cross-check to ensure that the fees are reasonable in light of the number of hours worked and the attorneys' reasonable hourly rates].)

The court prefers to do a lodestar analysis as a cross-check on the reasonableness of the fees. Counsel provides no information about the billing rates or time expended on the matter. Counsel must provide their billing rates, show that the rates are reasonable, and detailed information about the time spent on the matter (billing records). Counsel also must document the costs incurred.

The motion seeks preliminary approval of a $15,000 enhancement payment to plaintiff. Plaintiff and counsel include in their declarations general information regarding plaintiff's services to the class. (Leon Decl.; Spivak Decl., ¶ 63.) Plaintiff's declaration is quite generalized, with no real information about the work he has put into this action or the time spent. There is insufficient information to determine how much of an incentive payment is warranted. The court is unlikely to award more than $5,000, but even for that plaintiff must make a better showing.

The settlement provides that class administrator Simpluris will be paid up to $6,000. Counsel shows that this was the lowest bid received from multiple experienced settlement administrators. This can be approved.

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

Tentative Ruling
Issued By: DTT on 6/24/2024 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Gallardo v. Falco Freight Trans et al.***
Superior Court Case No. 22CECG00728/LEAD

Hearing Date: June 26, 2024 (Dept. 501)

Motion: by Defendant J.B. Hunt Transport, Inc., for Summary Judgment

Tentative Ruling:

To grant. Defendant J.B. Hunt Transport, Inc., is directed to submit a proposed judgment consistent with this order within five days of service of the minute order by the clerk.

Explanation:

On February 27, 2023, plaintiffs Arturo Mendoza Gallardo and Maricela Mendoza (together "Plaintiffs") filed the instant action for two causes of action: (1) negligence; and (2) negligent hiring/retention/supervision/training. The Complaint is brought against defendants Falcon Freight Trans, Harjot Singh, and J.B. Hunt Transport, Inc. Plaintiffs alleged that on March 7, 202, Plaintiffs were struck by the defendants while traveling southbound on State Route 99. Defendant J.B. Hunt Transport, Inc. ("Defendant") now seeks summary judgment of the Complaint.[1]

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); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) The issue to be determined by the trial court in consideration of a motion for summary judgment is whether or not any facts have been presented which give rise to a triable issue, and not to pass upon or determine the true facts in the case. (*Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 775.)

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; if he or she carries this burden, the burden shifts to plaintiff to make a prima facie showing of the existence of a triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) A defendant has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Ibid.*) Once the defendant has met that burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to the cause of action or a defense thereto. (*Ibid.*)

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[1] Defendant further sought summary judgment against a consolidated action, Case No. 23CECG00844. On June 20, 2024, the plaintiff in the consolidated action dismissed Defendant. Accordingly, the motion is considered only as to the lead action.

Defendant submits that there is no triable issue of material fact in general as to itself. The Complaint raises no specific allegations as to Defendant, except that Defendant was involved in the March 7, 2021, collision. (Defendant's Separate Statement, No. 1.) Defendant submits that it entered into an Outsource Carriage Agreement with defendant Falcon Freight Trans ("FFT") wherein FFT agreed to supply services to Defendant. (*Id.*, No. 4.) The agreement allowed FFT to hire independent contractors. (*Id.*, No. 5.) The agreement provided that FFT would be responsible for those contractors. (*Id.*, No. 6.) The agreement provided that FFT would hold Defendant harmless for injuries arising out of the transportation services FFT provided to Defendant. (*Id.*, No. 8.) A later amendment to the agreement did not alter the above relationship. (*Id.*, Nos. 9-12.) Defendant was only a broker to the transaction that led to FFT engaging defendant Harjot Singh ("Singh") to carry a load as an independent contractor. (*Id.*, Nos. 13-15.) Defendant had no knowledge of Singh, who was not Defendant's employee. (*Id.*, Nos. 16, 18.) Defendant was not involved in the accident otherwise. (*Id.*, No. 17.)

Based on the above, Defendant has met its burden to show no triable issues of material fact as to the first and second causes of action for negligence and negligent supervision/hiring/training/training. Accordingly, the burden shifts to Plaintiffs to demonstrate a triable issue. Plaintiffs did not oppose.

The motion for summary judgment is granted in favor of Defendant J.B. Hunt, Transport, Inc., and against plaintiffs Arturo Mendoza Gallardo and Maricela Mendoza.

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

Tentative Ruling
Issued By: DTT on 6/24/2024 .
(Judge's initials) (Date)