Tentative Rulings for June 27, 2024
Department 403

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.***

21CECG01254 ***Lee v. Lee***

23CECG00273 ***Hector Chavez v. Graciela Martinez***

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

24CECG00294 ***Patricia Ortega v. California Fair Plan Association*** **is continued to Thursday, July 25, 2024, at 3:30 p.m. in Department 403**

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Tentative Ruling

Re: ***Vang v. Cano***
Superior Court Case No. 21CECG01663

Hearing Date: June 27, 2024 (Dept. 403)

Motion: by Plaintiff for Terminating Sanctions

Tentative Ruling:

To deny.

Explanation:

Section 2023.010 defines "misuses of the discovery process" as including, "failing to respond or submit to an authorized method of discovery" and "disobeying a court order to provide discovery." (Code Civ. Proc. § 2030.010, subds. (d) & (g).) Section 2023.030 states, in relevant part:

> To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:
>
> * * *
>
> (d) The court may impose a terminating sanction by one of the following orders:
>
> * * *
>
> (3) An order dismissing the action or any part of the action, of that party.

(Code Civ. Proc. § 2023.030, subd. (d)(3).)

Accordingly, terminating sanctions must be authorized by a specific discovery statue; they are not available merely because they are an option listed in section 2023.030. In the case at bench, plaintiff moves pursuant to Code of Civil Procedure sections 2030.290, subdivision (c), and 2031.300 subdivision (c).

The failure to respond to interrogatories is controlled by Code of Civil Procedure section 2030.290, subdivision (c). That section provides that if a party 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, the court "shall" impose monetary sanctions. It is only when a party disobeys an order compelling responses that a terminating sanction is called for.

> If a party then fails to obey an order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(See Code Civ. Proc., § 2030.290, subd. (c).)

A party's failure to obey an order to respond to requests for production of documents is also subject to "the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010)." (Code Civ. Proc. § 2031.300, sub. (c).)

Courts generally follow a policy of imposing the least drastic sanction required to obtain discovery or enforce discovery orders, because the imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.) Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. Sanctions should not constitute a "windfall" to the requesting party; i.e. the choice of sanctions should not give that party more than would have been obtained had the discovery been answered. (Rylaarsdam & Edmon, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2019) § 8:1213.) "The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]" (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 304.)

Appellate courts have generally held that before imposing a terminating sanction, trial courts should usually grant lesser sanctions first. (Rylaarsdam & Edmon, *supra*, § 8:1215.) However this is not an "inflexible" policy, and it is not an abuse of discretion to issue terminating sanctions on the first request, where circumstances justify it (e.g. where the violation is egregious or the party is using failure to respond as a delaying tactic). (*Id*. at § 8:1215.1; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280 ["A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction. [Citation.]".)

Here, defendant Lazette Cano was ordered on March 2, 2023 to provide initial responses to interrogatories and requests for production and pay monetary sanctions to plaintiff's counsel. Defendant failed to serve responses as ordered by the court. (Bonakdar Decl. ¶ 13.) The moving papers indicate the monetary sanctions have been paid.

Plaintiff argues the failure of defendant to obey the court's March 2, 2023 order to provide discovery responses has prejudiced his ability to investigate the merits of her defenses and to prepare for the forthcoming trial on July 15, 2024. If so, an order striking the answer of defendant Cano asserting defenses and entering her default is a proportionate sanction. However, plaintiff also recognizes that on March 2, 2023 the court ordered Request for Admissions, Set One, admitted by defendant Lazette Cano. The effect of the admissions nullifies any defenses available to defendant with respect to liability and causation. As a result, the absence of defendant's discovery responses does not truly prejudice plaintiff's ability to prepare for trial.

Where, as here, there is no prejudice to the moving party in the absence of the discovery responses that are the subject of the court's order, the requested terminating sanction would be punitive rather than remedial. (*Morgan v. Ransom* (1979) 95 Cal.App.3d 664, 669-670.) As such, the court is not inclined to grant the plaintiff's motion for terminating sanctions.

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: JS on 6/24/2024.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Lopez v. Mitchell***
Case No. 21CECG02405

Hearing Date: June 27, 2024 (Dept. 403)

Motion: Plaintiffs' Application for Default Judgment

Tentative Ruling:

To deny plaintiffs' application for default judgment, without prejudice.

Explanation:

Plaintiffs have submitted evidence showing that defendants negligently constructed the pool and other backyard improvements, and that defendants were not properly licensed to construct the pool. Nor did defendants hire a properly licensed pool subcontractor to do the pool work. Therefore, plaintiffs are entitled to disgorgement of all payments made to defendants under the contract. (Bus. & Prof. Code, § 7301, subd. (b); *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 666.) In addition, plaintiffs are entitled to damages based on the cost of completing the work and repairing their home. (*Glendale Fed. Sav. & Loan Assn.* (1977) 66 Cal.App.3d 101, 123–124.)

Plaintiffs' evidence shows that they paid $78,600 to defendants to construct the pool and other backyard improvements. Therefore, they are entitled to disgorgement of this amount from defendants. They have also submitted evidence showing that they paid $32,577.81 to correct and repair the work that defendants performed in a negligent fashion. As a result, they have shown that they are entitled to damages of $32,577.81 for the repairs that they had to make in order to complete the work properly.

In addition, plaintiffs had an inspection done by the Contractors State License Board's expert, who concluded that plaintiffs would have to make further repairs to bring the backyard up to minimum standards in the amount of $81,475.10. This amount is on top of the cost of the other repairs, which had already been completed. It is unclear whether plaintiffs have actually paid for any of the additional repairs recommended by the CSLB yet. However, they will presumably have to pay for the repairs at some point, so they have shown that they are also entitled to damages of $81,475.10 to complete the work and repair the damage done by defendants' negligence.

Plaintiffs also later incurred another $1,875 to replace the pool filter, which was the wrong size for the pool installed by defendants.

Plaintiffs did receive $7,500 from the defendants' bond surety company as partial payment for defendants' shoddy work, so they have deducted this amount from the total damages. As a result, plaintiffs have proven up total principal damages is $187,027.91.

Plaintiffs are also entitled to their attorney's fees, as the contract contains an attorney's fees clause that provides for an award of attorney's fees to the prevailing party in the event of litigation arising out of the contract. Plaintiffs request $5,322 in fees, which

is consistent with the Local Rules, Appendix A, regarding attorney's fees in default contract actions.

Plaintiffs have also proven up their requested costs of $2,266.52.

In addition, the court imposed $3,859.50 in sanctions on defendants for their wilful refusal to cooperate with discovery. Defendants have so far failed to pay any of the sanctions ordered by the court. Therefore, the plaintiffs are entitled to sanctions as part of the judgment.

On the other hand, plaintiffs have not shown that they are entitled to prejudgment interest on the entire $187,027.91 in damages, as most of the damages were unknown and could not have been calculated by defendants at the time the complaint was filed.

Under Civil Code section 3287, subdivision (a), "[a] person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt."

Thus, in absence of a contract for interest, the law awards interest from the time money becomes due, if the time and sum are certain or ascertainable. (*Indemnity Ins. Co. of North America v. Watson* (1933) 128 Cal.App. 10; *Imperial County v. Adams* (1931) 117 Cal.App. 220; *Sohrakoff v. Zumwalt* (1932) 122 Cal.App. 768; *Yule v. Miller* (1927) 80 Cal.App. 609.) " '[T]he test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.' 'The statute ... does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor." ' " (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 729, citations omitted; see also, *Warren v. Kia Motors America, Inc*. (2018) 30 Cal.App.5th 24, 43-44.)

Here, plaintiffs seek prejudgment interest of $51,240 based on 10% of the principal damages of $187,027.91 for 1,000 days. However, most of the damages sought by plaintiffs were unknown at the time that they filed their complaint, and defendants could not have calculated them based on the information reasonably available to them. Defendants could have determined that they would owe plaintiffs $78,600, as that was the amount that plaintiffs paid them to complete the work and the amount was clearly alleged in the complaint. On the other hand, they had no information available to them to calculate the remaining damages, which were based on various payments to other contractors to complete or repair the shoddy work done by defendants, as well as the inspection and estimate provided by the CSLB's expert, which happened about a year after the complaint was filed. Therefore, plaintiffs have not shown that they are entitled to prejudgment interest of $51,240. Consequently, the court intends to deny the requested court judgment of $250,171.83.

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: JS on 6/25/2024.
(Judge's initials) (Date)