Tentative Rulings for June 27, 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

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(34)

Tentative Ruling

Re: ***Barban v. FCA US, LLC, et al.***
Superior Court Case No. 24CECG00358

Hearing Date: June 27, 2024 (Dept. 501)

Motion: by Plaintiffs for an Order Compelling Responses to Discovery and Deeming Admissions Admitted

Tentative Ruling:

To deny the motions as moot. To grant monetary sanctions in the amount of $940 against FCA US, LLC, and in favor of plaintiffs. (Code Civ. Proc., §§ 2023.030, subd. (d), 2030.290, subd. (c), 2031.310, subd. (d), 2033.280, subd. (c).) Sanctions are due and payable to plaintiffs' counsel within 30 days of service of this court's order.

Explanation:

On March 4, 2024, plaintiffs served Form Interrogatories, Set One, Special Interrogatories, Set One, Request for Production of Documents, Set One, and Request for Admissions, Set One, on defendant FCA US, LLC. Service was completed by mail and responses were due on April 8, 2024. On April 8, 2024, FCA US, LLC, timely served responses containing answers and objections, but no verifications[1]. As of the filing of the motions on May 1, 2024, defendant still had not served verifications. Verifications were served on June 12, 2024. (Brezovec Decl., ¶ 3.)

Responses containing answers must be verified by the responding party. (Code Civ. Proc., §§ 2030.250, 2031.250.) Where a verification is required, an unverified response is ineffective; it is the equivalent of no response at all. (See *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) In light of the verifications served, the court denies the merits of the instant motion as moot. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 409 (*Sinaiko*); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778 [Where the responding party serves its responses to requests for admissions before the hearing, the court "has no discretion but to deny the motion"].)

In addition to the verifications, plaintiffs request that the court order FCA US, LLC, to serve objection-free responses to the discovery. However, where the response contains *both* substantive responses *and* objections, the portion containing the objections need not be under oath. The response is effective to *preserve* the objections stated therein even though unverified. (*Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal.App.4th 651, 657.) The other portion of the response (answers and agreements to comply) should be verified, and the lack of verification renders the response untimely. But that only creates a right to move for orders and sanctions; there is

[1] The moving papers indicate the responses at issue were served on April 9, 2024, however all proofs of service for the responses state service was accomplished by email on April 8, 2024.

no waiver of the objections asserted. (*Id.* at p. 657.) Accordingly, objection-free responses will not be ordered.

Sanctions

The court may award sanctions even where the merits of a motion to compel are moot. (Cal. Rules of Court, rule 3.1348(a) ["The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though … the requested discovery was provided to the moving party after the motion was filed."]; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants, supra,* 148 Cal.App.4th 390, 409.) Nevertheless, a discovery sanction should be appropriate to the dereliction. (*Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 701; *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1217 ["Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party."].)

In particular, "[m]onetary sanctions are designed to recompense those who are the victims of misuse of the Discovery Act." (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438.) "Misuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so." (*Karlsson v. Ford Motor Co., supra,* 140 Cal.App.4th at p. 1214.)

Defendant served timely responses to all discovery on April 8, 2024, however the lack of verifications is attributed to oversight due to the large volume of Song-Beverly cases and substantial emails. (Brezovec Decl., ¶ 4.) Although the court is aware that oversights occur, the volume of cases in an office alone does not explain how responses were timely served but verifications were omitted until the filing of the motions to compel and deem admissions admitted were filed. The opposition is correct that plaintiffs suffered minimal prejudice in the delayed verifications to the substantive responses received.

The court finds it reasonable to award sanctions in the reduced amount of $940, reflecting two hours of attorney time to prepare moving papers and filing fees for the 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: DTT on 6/24/2024.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Victor Santos v. State of California, Department of Transportation***
Superior Court Case No. 23CECG02328

Hearing Date: June 27, 2024 (Dept. 501)

Motion: by Plaintiff for Relief to File a Late Claim

Tentative Ruling:

To deny. (Gov. Code, § 946.6.)

In light of the court's ruling on February 5, 2024, which sustained defendant's demurrer with leave to amend subject to plaintiff's compliance with Government Code section 946.6, defendant is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to defendant State of California, Department of Transportation (Caltrans).

Explanation:

The Government Claims Act articulates that a timely written claim must first be presented to a public entity prior to any lawsuit for money damages against it. (Gov. Code, § 810 et seq.; *N.G. v. County of San Diego* (2020) 59 Cal.App.5th 63, 72.) Government Code section 911.2, subdivision (a) provides that such a claim is to be presented no later than six months after the accrual of the cause of action. (Gov. Code, § 911.2; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776.) The policy behind the requirement to file a timely claim is threefold, as it 1) gives the entity an opportunity to promptly remedy the condition, 2) allows the entity to investigate while evidence is still available and witnesses' memories are fresh, and 3) gives the entity time to plan its budget accordingly. (*Munoz v. State of California*, *supra*, 33 Cal.App.4th 1767, 1776; *N.G. v. County of San Diego, supra*, 59 Cal.App.5th 63, 73; *Renteria v. Juvenile Justice, Department of Corrections & Rehabilitation* (2006) 135 Cal.App.4th 903, 909.)

Where a claim is not timely presented, a written application can be made to the public entity for leave to present the claim. (Gov. Code, § 911.4, subd. (a); *Munoz v. State of California*, *supra*, 33 Cal.App.4th 1767, 1777.) The application to present a late claim must be made to the public entity within one year of the accrual of the cause of action and state what caused the delay in presenting the claim. (Gov. Code, § 911.4, subd. (b); *Munoz v. State of California*, *supra*, 33 Cal.App.4th 1767, 1777.) Where the public entity denies the application to present a late claim, the party must petition the trial court for relief from the claim filing requirements. (Gov. Code, § 946.6; *Munoz v. State of California*, *supra*, 33 Cal.App.4th 1767, 1777.)

Petitioning Court for Relief

Where a public entity denies the timely application to file a late claim, then the petitioner has six months to petition the court for relief. (Gov. Code, § 946.6, subd. (b).) The statutory grounds for relief are 1) mistake, inadvertence, surprise, or excusable neglect, unless the entity would be prejudiced by such relief; 2) that the claimant was a minor during some of the claims-filing period, 3) that the claimant was physically or mentally incapacitated during some of the claims-filing period; or 4) that claimant died during the claims-filing period. (Gov. Code, § 946.6, subd. (c).) For relief based on mental or physical incapacity, the application must be presented the earlier of either 1) within six months of the person no longer being incapacitated, or 2) one year after the claim accrues. (Gov. Code, § 946.6, subd. (c)(5).)

The petitioner bears the burden of proving, by a preponderance of the evidence, that one of the statutory grounds for relief applies. (*Rodriguez v. County of Los Angeles* (1985) 171 Cal.App.3d 171, 175.) Plaintiff argues that the public entity defendant has not provided expert testimony to show that plaintiff was not mentally or physically incapacitated. However, this is not defendant's burden. Plaintiff bears the burden of showing that one of the statutory grounds for relief applies.

Here, petitioner asserts both excusable neglect and incapacity as grounds for relief. Excusable neglect is "defined as neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1383, quoting *Munoz, supra*, 33 Cal.App.4th at p. 1782.) Lack of knowledge of the claim against the public entity is insufficient where the claimant takes no action in pursuit of the claim within the six-month period. (*Ibid*.) Here, plaintiff had counsel. In fact, his former attorney obtained a settlement against the other driver, which was signed by plaintiff on October 12, 2021—just four months after the accident. (Gelis Decl., Exh. I.) Where counsel was able to obtain a settlement against another driver within the claims presentation period, there is no excusable neglect. Additionally, it appears that plaintiff has indicated a lack of trust with his former counsel which caused him to avoid pursuing the claim against the public entity defendant. The court does not see how a lack of trust in counsel would amount to excusable neglect under these circumstances.

For the incapacity claim, plaintiff must show that he was incapacitated during the entire claims-filing period and that this incapacity caused him to fail to present a timely claim. (*Barragan v. County of Los Angeles, supra*, 184 Cal.App.4th at p. 1384.) In assessing the issue of incapacity, the court considers the "extent of the injured person's disability and determine[s] whether it was so great as to preclude filing a timely claim or authorizing someone to do so." (*Draper v. City of Los Angeles* (199) 52 Cal.3d 502, 509.)

Here, plaintiff has alleged that he was incapacitated from the date of the accident on June 14, 2021, to September 1, 2022. However, plaintiff has not produced any evidence indicating incapacity through September 1, 2022. The moving papers indicate that plaintiff experienced hospitalizations for over one year. Yet, plaintiff has not provided his own declaration or a declaration from any of his medical providers chronicling his hospitalizations or describing how he was incapacitated. No one disputes that plaintiff was severely injured. However, the provided medical records and plaintiff's

own deposition testimony indicate that approximately 47 days after the accident, he was medically cleared. The court has insufficient information to find that any mental or physical disability or incapacity prevented plaintiff from timely presenting his claim. Notably, he was able to work with his former counsel, despite trust issues, to obtain a settlement from the other driver before the claims-filing period would have concluded against the public entity defendant. In the reply, plaintiff argues that his injuries were similar to those in *Draper*. However, in *Draper*, the court relied on declarations from the plaintiff's doctor regarding being severely injured and brain damaged. (*Id*. at p. 507.) Comparing plaintiff's injuries here to those sustained in the *Draper* case is not the same as presenting evidence of how plaintiff's injuries impacted *his* ability to function. Additionally, even if plaintiff had demonstrated incapacity, he still did not present his claim within one year after the claim accrued. (Gov. Code, § 946.6, subd. (c)(5).)

Where a claimant falls short of showing incapacity, excusable neglect may exist based on disability. (*Barragan v. County of Los Angeles, supra*, 184 Cal.App.4th at p. 1384.) Here, the court has insufficient information about how plaintiff's injuries impacted his ability to function beyond his initial hospitalization. Additionally, while plaintiff did not initiate hiring his former counsel, it appears that he was able to work with counsel to obtain a settlement against the other driver within the claims-filing period. Indeed, the claim that plaintiff did not trust his former counsel with pursuing the claim against the public entity defendant suggests that plaintiff's disabilities following the accident did not prevent him from meaningfully engaging, or rather resisting, his former counsel.

Plaintiff has not met his burden of proving, by a preponderance of the evidence, that either excusable neglect or incapacity warrant the relief requested.

Late Claim Accrual and Tolling

Accrual of a cause of action is the date from which the claimant's right to sue arises, or the date the statute of limitations would begin if there were no claim-filing requirement. (Gov. Code, § 901.) Notably, the statute of limitations begins to run when plaintiff becomes aware of the *facts* constituting his claim, even if counsel fails to or dissuades plaintiff from suing. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) Plaintiff's remedy for such a failure is not to extend the time for pursuing the public entity, but rather a legal malpractice claim against counsel. (*Ibid*.) The requirement to present a late claim no later than one year after accrual of the claim is jurisdictional. (Gov. Code, § 946.6, subd. (c); *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.)

Here, plaintiff has argued that the claim did not accrue until September 1, 2022. However, it is unclear what would have occurred on September 1, 2022 that would have caused the claim to accrue then, as opposed to the date of the accident, June 14, 2021. Plaintiff has not presented legal authority for his claim of a later accrual date.

The time to file a late claim against a public entity is tolled where the claimant is mentally incapacitated and does not have a conservator. (Gov. Code, § 911.4, subd. (c)(1).) As discussed above, plaintiff has not presented sufficient evidence to show that he was mentally incapacitated through September 1, 2022.

Plaintiff has not demonstrated that the cause of action accrued or should be tolled to September 1, 2022.

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

Tentative Ruling
Issued By: DTT on 6/25/2024.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Robert Solorio v. Fig Garden Home Owners Association***
Superior Court Case No. 21CECG03078

Hearing Date: June 27, 2024 (Dept. 501)

Motion: Demurrer to Second Amended Complaint by Defendant City of Fresno

Tentative Ruling:

To sustain the demurrer by defendant City of Fresno 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.

Explanation:

Plaintiffs in this action are Robert Solorio, Ana Solorio, Cirenia Lozono and Ian Solorio, a minor, through his guardian ad litem (collectively "Plaintiffs"). This case arises from a tragic collision (the "Collision") between a train and Plaintiffs' passenger vehicle (the "Vehicle"), which occurred on December 1, 2020, at the railroad crossing near the intersection of Shields Avenue and Wishon Avenue ("Railway Crossing") in the City of Fresno ("the City"). Before the Collision, Ana Solorio, her two minor children, and her mother were stopped in a long line of bumper-to-bumper traffic waiting for the Christmas Tree Lane event to open. (Second Amended Complaint ["SAC"], ¶¶ 1-5.) The Collision resulted in "catastrophic and, ultimately, fatal injuries to Decedent Anton Solorio, a Minor, and serious personal injuries to Plaintiffs Ana Solorio, Cirenia Lozono, and Ian Solorio, a Minor." (SAC, ¶ 6, p. 3:1-3, some capitalization omitted.) After the Collision, Plaintiffs sued the City for dangerous condition of public property, negligent infliction of emotional distress, and negligence.

The City demurs to the SAC on the grounds that the claim for dangerous condition of public property fails because failure to provide traffic control does not constitute a dangerous condition of public property and Plaintiffs fail to identify a statutory basis for the cause of action. The claims for negligent infliction of emotional distress fail because: (1) emotional distress is a form of damages, not a distinct cause of action; (2) the Tort Claims Act accounts for bystander emotional distress; and (3) Plaintiffs fail to identify a statutory basis for the cause of action. The negligence claim fails because Government Code sections 815.2 and 815.6 do not permit a negligence cause of action in this matter.

<u>Meet and Confer</u>

The City satisfied the obligation to meet and confer by corresponding with Plaintiffs by letter, email and telephonically.

Demurrer to Claim Based on Dangerous Condition of Public Property

Plaintiffs allege the City was aware of heavy traffic congestion created by the Christmas Tree Lane event and knew of at least one previous collision between a train and a vehicle that had occurred at the Railway Crossing. (SAC, ¶¶ 34-37.) They contend the City created a dangerous condition of public property by routing traffic over the railroad tracks while failing to provide traffic control or signage at or near the Railway Crossing. (SAC, ¶¶ 30, 31, 90, 91.)

The City demurs on two grounds. First, Plaintiffs fail to identify a statutory basis for their dangerous condition claim. Under California's statutory scheme, "all government tort liability must be based on statute." (*Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 409.) Unless there is a constitutional requirement, "public entities may be liable *only* if a statute declares them to be liable." (*Ibid.*, italics original.) To the extent Plaintiffs are relying on Government Code section 835, they fail to allege a dangerous condition of public property.

Government Code section 835 sets forth the conditions to hold a public entity liable for the dangerous condition of its public property. Government Code section 835 provides in part that '[e]xcept as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury[.]"

Plaintiffs have failed to allege a physical defect of the subject public property. As the City explains, a physical defect is required to establish the City's liability:

> [T]raffic congestion is not actionable as a dangerous condition of public property because it is not a physical characteristic of the public property. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 440 ["…***the volume and speed of vehicular traffic…would not permit a finding of a dangerous condition***…in the absence of some additional allegation that the ***physical characteristics*** of [the intersection] created a substantial risk that a driver using due care while traveling along [the intersection] would be unable to stop for pedestrians who were using due care while crossing…"] [emphasis added by the City]; *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 7 ["Many of the streets and highways of this state are heavily used by motorists and bicyclists alike. However, ***the heavy use of any given paved road alone does not invoke the application of Government Code section 835***."] [emphasis added by the City].)
>
> Likewise, the failure to provide certain traffic control devices and/or persons is not actionable as a dangerous condition of public property. The Court in *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1351, explained that "[a] condition is not dangerous ... merely because of the failure to provide regulatory traffic control signals…" Likewise, the *Cerna* court explained that "[t]he ***presence or absence of crossing guards is not a physical characteristic of the intersection and thus not actionable as a dangerous condition.*** A lack of human supervision and protection is not a deficiency

in the physical characteristics of public property." (*Id*. at p. 1352 [emphasis added by the City].)

(Rpy, p. 4:3-19.)

Plaintiffs acknowledge that an essential element they must prove based on Government Code section 835 is that the *subject property* was in a "dangerous condition at the time of the injury." (See also, CACI No. 1100.) Plaintiffs cite several cases to support their proposition that circumstances can create a dangerous condition without a physical defect existing on the public property. The City distinguishes the cited cases and notes that the cases finding a public entity liable involve a physical defect of public property, such as a hole cut in a fence, the lack of a median barrier, an improper drainage system, or a faded crosswalk. (See Rpy., pp. 5-6.) No case explicitly holds that a physical defect is not required to allege a dangerous condition of public property.

Therefore, the court sustains the demurrer to the cause of action for dangerous condition of public property on the grounds that Plaintiffs fail to identify a statutory basis for the cause of action in the SAC and Plaintiffs fail to allege a physical characteristic of the Railway Crossing that constituted a dangerous condition.

Demurrer Based on Negligent Infliction of Emotional Distress

The City demurs to the claims based on negligent infliction of emotional distress on the following grounds: (1) emotional distress is a form of damages, not a distinct cause of action; (2) the Tort Claims Act accounts for bystander emotional distress; and (3) Plaintiffs fail to identify a statutory basis for the cause of action.

"[The] *negligent* causing of emotional distress is not an independent tort but the tort of *negligence*[.] [Citation.]" (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588, italics original.) Damages for emotional distress are within the ambit of recoverable damages under Government Code section 835 based on the dangerous condition of public property. (*Downey v. City of Riverside* (2023) 90 Cal.App.5th 1033, 1050.) But to recover, Plaintiffs must plead the required elements against the public entity.

Plaintiffs rely on *Dillon v. Legg* (1968) 68 Cal.2d 728 to establish that they sufficiently have pleaded a cause of action for negligent infliction of emotional distress against the City. But that case involved a private party defendant. To assert a claim against a public entity, such as the City, rather than a private party, Plaintiffs must allege some statutory basis for the City's liability. (*Cochran v. Herzog Engraving Co., supra,* 155 Cal.App.3d at p. 409.) Thus, although damages for negligently causing emotional distress are potentially recoverable as part of the claim against the City for dangerous condition of public property, Plaintiffs fail to state a viable claim against the public entity based on a dangerous condition of its property, as discussed above. Therefore, the court sustains the City's demurrer to the causes of action for negligent infliction of emotional distress.

Demurrer Based on Negligence

The City demurs to the claims of negligence because the statutes cited by Plaintiffs fail to support a cause of action for negligence. Specifically, Plaintiffs rely on Government Code sections 815.2 and 815.6 as the statutory basis for negligence.

Government Code section 815.2 provides:

> (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
> (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Plaintiffs allege the City's employees, including Officer Wilson, negligently discharged their responsibilities to direct traffic waiting to enter Christmas Tree Lane.

In *Yee v. Superior Court* (2019) 31 Cal.App.5th 26, the court explained that "[a] public entity cannot be held vicariously liable for actions of its employees that are actually acts of the entity itself, albeit performed by necessity by employees or agents." (*Id.* at p. 40.) Thus, for the City to be held vicariously liable under Government Code section 815.2, its employees must be independently liable for the act or omission in question. (*Ibid.*) The City contends its employee cannot be held independently liability for failing to provide proper traffic control because the City's employees, in their individual capacities, have no authority or responsibility to provide traffic control. The court agrees and sustains the demurrer on this ground.

With respect to liability under Government Code section 815.6, Plaintiffs allege the City failed to perform a mandatory duty under that section and various local ordinances. Plaintiffs do not contest the City's position that the cited code sections and ordinances do not confer a mandatory duty upon the City. Therefore, the court sustains the demurrer to the negligence claim on the additional ground that Plaintiffs fail to allege an enactment that creates a mandatory, as opposed to discretionary or permissive, duty.

Leave to Amend

It is a well-settled rule that it is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility the defect can be cured by amendment. The corollary is also true—when a complaint shows upon its face that there is no reasonable possibility to cure the defect, the court should deny 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.) Thus, Plaintiffs have the burden to demonstrate how the SAC might be amended.

Here Plaintiffs request leave to amend, but they fail to suggest any facts they could allege to identify a *physical characteristic* that would constitute a dangerous condition

or a statutory basis for their claims. Accordingly, the court sustains the demurrer to the SAC without leave to amend because Plaintiffs fail to establish a reasonable likelihood that they can cure the defects by amendment.

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

Tentative Ruling
Issued By: DTT on 6/25/2024 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Oracle Anesthesia, Inc. v. Central Valley Advanced Nursing Practice, Inc.***
Superior Court Case No. 22CECG02097

Hearing Date: June 27, 2024 (Dept. 501)

Motions: (1) by Plaintiffs Oracle Anesthesia, Inc., and John Juve to Compel a Response to a Bill of Particulars

(2) by Plaintiffs Oracle Anesthesia, Inc., and John Juve for Order to Show Cause re Contempt and Request for Sanctions

Tentative Ruling:

To deny both motions.

Explanation:

Bill of Particulars

A bill of particulars serves to amplify the complaint, to aid the defendant in preparing a responsive pleading in a contract (particularly a common counts) action. (*Dobbins v. Hardister* (1966) 242 Cal.App.2d 787, 794-795.) In other words, "[w]hile modern discovery devices may serve the same purpose as a bill of particulars, it should be noted that the primary purpose of discovery is the production of evidence for use at the *trial* while that of a bill of particulars is to amplify the complaint 'in order to make it easier for the defendant to prepare his *pleading*.'" (*Ibid*. citations omitted.)

Plaintiffs and cross-defendants Oracle Anesthesia, Inc., and John Juve (together "plaintiffs") rely, primarily, on two cases where bills of particulars had been supplied - *Butler Bros. v. Connolly* (1962) 204 Cal.App.2d 22 (*Butler*) and *Douglas v. Foster* (1951) 103 Cal.App.2d 744 (*Douglas*). (See Mot. at p. 5:11.) These cases are inapposite because both were actions specifically to recover money. (*Butler, supra*, 204 Cal.App.2d at p. 23 [common counts]; *Douglas, supra*, 103 Cal.App.2d at p. 745.) Furthermore, the *Butler* court solely examined the sufficiency of a bill of particulars already produced (*Butler, supra*, 204 Cal.App.2d at pp. 23-25) and *Douglas* only passingly commented that the bill of particulars specified the funds allegedly furnished. (*Douglas, supra,* 103 Cal.App.2d at p. 747 [the *Douglas* court ultimately affirmed the trial court's judgment against the plaintiff]). Here, in contrast, plaintiffs seek a bill of particulars to tactically prepare for evidentiary exclusions at trial. (See Mot. at p. 2:10-12.) In other words, plaintiffs stated intent is directed toward trial strategy, not preparation of a responsive pleading.

Therefore, the motion for a bill of particulars is denied.

Contempt

Contempt actions require: (1) issuance of a valid order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful disobedience of the order. (*Conn. v. Superior Court* (2000) 196 Cal.App.3d 774, 784.) Once these elements are satisfied, an order to show cause re contempt (Code Civ. Proc. § 1212) is scheduled with notice personally served on the party to be found in contempt. (*Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1286-87.)

Plaintiffs' proposed order essentially requests an additional order compelling responsive documents to a subpoena served on non-party Nelson Hardiman, LLP. Plaintiffs contend that, in effect, Nelson Hardiman "willfully" "disobey[ed]" this court's March 11, 2024, order compelling further documents responsive to the subpoena. (See Mot. at p. 10:11-12.)

Despite the conclusion of willful disobedience, however, plaintiffs acknowledge that Nelson Hardiman produced "thousands" of pages of documents after the March 11 order. (See Mot. at pp. 2:25 – 3:6; Rep. at p. 7:23, 9:4.) Plaintiffs' reply specifically notes that only a handful of invoices, an email chain, and unspecified text messages possibly remain missing. (Rep. at p. 7:25 – p. 8:8.) Plaintiffs alternatively seek an affidavit detailing the efforts expended to search for these missing documents, to the extent they exist. (*Id*. at p. 10-15.)

Ultimately, considering plaintiffs' admission that Nelson Hardiman produced over three thousand pages of documents after the court's March 11 order, it does not appear that the handful of potential residual documents demonstrates willful disobedience sufficient to move forward with contempt proceedings. (Cf. *In re Grayson* (1997) 15 Cal.4th 792, 794 [willful disobedience sufficient for contempt found when appointed death penalty appellate counsel completely failed to file an opening brief after seven extensions parsed over 14 months].) Furthermore, although plaintiffs request Nelson Hardiman supply a new affidavit detailing the efforts expended to search for these missing documents (Rep. at p. 10-15), "[p]unishment for contempt 'can only rest upon clear, intentional violation of a specific, narrowly drawn order.'" (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1016, citations omitted.) Here, a new affidavit, as contemplated in plaintiffs' reply, was not a part of any previous order.

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