Tentative Rulings for July 23, 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.

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 403

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(36)

Tentative Ruling

Re: ***Cox v. Centene Corp., et al.***
Superior Court Case No. 21CECG00944

Hearing Date: July 23, 2024 (Dept. 403)

Motion: by Plaintiff to Tax Costs

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To grant and to strike defendants' memoranda of costs filed on March 26, 2024 and April 19, 2024.[1]

Explanation:

Government Code section 12965 authorizes an award of attorney's fees and costs to the prevailing party in any action brought under the California Fair Employment and Housing Act (FEHA). That section provides in pertinent part: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity." (Gov. Code § 12965, subd. (b).)

In *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, the United States Supreme Court set forth the standard trial courts must use in exercising discretion in awarding attorney's fees and costs to a defendant prevailing on a FEHA claim. A prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' . . ." (*Id*. at pp. 416-417.) However, a defendant should be awarded attorney's fees " 'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.' . . ." (*Id*. at p. 421.) (See *Bond v. Pulsar Video Prods*. (1996) 50 Cal.App.4th 918, 921-922; *Cummings v. Benco Bldg. Servs*. (1992) 11 Cal.App.4th 1383, 1387.) The California Supreme Court acknowledged that California courts have adopted rule enunciated in *Christiansburg* in *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970. (*Id*. at p. 985.) In *Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, the California Supreme Court applied the *Christiansburg* rule to ordinary litigation costs. Accordingly, if the plaintiff's action is not found to be "unreasonable, frivolous, meritless or vexatious," a FEHA defendant can recover neither fees nor costs.

Even those rare cases when the high standard of *Christiansburg* been satisfied, nothing in Government Code section 12965, subdivision (b), or the case law interpreting that provision requires an award of attorney fees or costs to the prevailing defendant. To

[1] For unexplained reasons, a duplicate memorandum of costs was filed on April 19, 2024.

the contrary, the use of the terms "permitted" and "may in its discretion" in section 12965, subdivision (b), make it plain fee and cost awards to prevailing defendants are permissive, not mandatory. A finding that plaintiff's case was frivolous, unreasonable or without foundation is a prerequisite to an award of attorney fees and costs to a prevailing defendant, but it in no way compels such an award.

In *Saret–Cook v. Gilbert, Kelly, Crowley & Jennet* (1999) 74 Cal.App.4th 1211, 1229, the court noted that a plaintiff's claim need only be one of the following for an award of fees to be proper: unreasonable, frivolous, meritless, or vexatious. A prevailing defendant can demonstrate that it should be awarded fees by showing that the plaintiff's suit was "obviously contrary to undisputed facts or well established legal principles specifically precluding the type of injury alleged." (*Cummings*, *supra*, 11 Cal.App.4th at p. 1390.) Attorney fees are awarded to a prevailing defendant where "the plaintiff's conduct was egregious or ... patently baseless for objective reasons." (*Id*. at p. 1389.)

In *Cummings*, a FEHA discrimination case, the court reversed an order of attorney fees to a defendant who prevailed on summary judgment. (*Cummings*, *supra*, 11 Cal.App.4th at p. 1391.) The plaintiff presented some evidence substantiating her claims, just not enough to support a triable issue of material fact. (*Id*. at p. 1389.) The court noted that a divided panel affirmed summary judgment to the defendant, indicating that reasonable minds differed about the merits of the case. (*Ibid*.) Thus, it would have been improper in that case to hold the plaintiff's claim to be frivolous, unreasonable, or without foundation. (*Ibid*.)

Here, plaintiff provided at least circumstantial evidence of disability discrimination based on the close proximity of plaintiff's leave and termination. In its ruling granting defendants' motion for summary judgment, the court found that "plaintiff provided prima facie evidence [sufficient] to satisfy her initial burden and to shift the burden to defendant to show a legitimate, nondiscriminatory reason for her termination." (Request for Judicial Notice, Ex. 2, p. 15.) Accordingly, it cannot be said that plaintiff's claims were frivolous, meritless, or vexatious. Further, although plaintiff ultimately was not successful in opposing the motion, i.e., by failing to present substantial evidence of pretext, this is not ground for awarding costs to the prevailing defendants in a FEHA action.

Therefore, the motion is granted.

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 7/22/2024.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Emery v. Cheng***
Superior Court Case No. 23CECG04214

Hearing Date: July 23, 2024 (Dept. 403)

Motion: Demurrer to Cross-Complaint

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To overrule cross-defendant Brandon Emery's demurrer. (Code Civ. Proc. § 430.10, subd. (c).) Cross-defendant Brandon Emery is granted 10 days' leave to file his responsive pleading to the cross-complaint. The time in which the response can be filed will run from service by the clerk of the minute order.

Explanation:

Meet and Confer

The supplemental declaration filed by the demurring party reflects meet and confer efforts that comply with the requirements of Code of Civil Procedure section 430.41, subdivision (a). The meet and confer efforts were unsuccessful and the court will proceed on the merits.

Demurrer

Cross-defendant Brandon Emery brings this demurrer on the basis that there is another action pending between the same parties on the same cause of action. (Code Civ. Proc. §430.10, subd. (c).) Emery argues an action filed in Italy on behalf of Cheng includes the same causes of action between the same parties and requires abatement of this cross-complaint. "A statutory plea in abatement requires that the prior pending action be 'between the *same parties on the same cause of action*.'" (*People ex rel. Garamendi v. American Autoplan, Inc*. (1993) 20 Cal.App.4th 760, 770, quoting *Plant Insulation Co. v. Fibreboard Corp*. (1990) 224 Call.App.3d 781, 787, emphasis original.)

Emery requests the court take judicial notice of the complaint filed in Italy on behalf of Kyle Cheng and has included a translation of the document from Italian to English which was provided by counsel for Cheng in this action. (RJN No. 1; Jung Decl., ¶¶ 3-4, Exh. F.) Over objection, the court will grant the request for judicial notice of the pleadings filed in Italy, limited to the existence of the Italian complaint as a fact not reasonably subject to dispute. (Evid. Code, §452, subd. (h); see, *TSMC North America v. Semiconductor Manufacturing Internat. Corp*. (2008) 161 Cal.App.4th 581, 597, fn. 7 [taking judicial notice of the ruling from Beijing court and the parties' related filings].)

The cross-defendant is incorrect that the concurrent action in Italy requires the abatement of the cross-complaint filed by Cheng. The two actions can proceed concurrently.

> "The reason why the pendency of an action in the courts of one sovereignty will not abate an action in the courts of another sovereignty is twofold: First, because a foreign judgment depending on foreign law may be unjust, and could not be enforced beyond the jurisdiction of the foreign court without a new suit on it as only prima facie evidence; and second, and chiefly, because the remedy in the country where the last suit is brought may be more adaptable and safe, and means for effectuating a judgment may be found in the latter and not in the former country."

(*Pesquera del Pacifico v. Superior Court* (1949) 89 Cal.App.2d 738, 740.)

The cross-defendant is also incorrect that the two actions are predicated on the same causes of action. Although the two actions share the same background factual allegations, the Italian action is limited to the rescission of the written agreement to transfer 75% ownership of Cheng's property in Sanremo, Italy to Emery on the basis that the contract was signed under duress and is voidable. The action seeks money damages in the alternative. The Sanremo property agreement is not the subject of any cause of action within the cross-complaint at bench.

As such, the demurrer is overruled.

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 7/22/2024.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Floyd v. David S. Siegel & Co., Inc., et al.***
Superior Court Case No. 23CECG00084

Hearing Date: July 23, 2024 (Dept. 403)

Motion: by Defendant City of Fresno to Strike Portions of the Third Amended Complaint

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny the motion to strike.

Explanation:

Defendant City of Fresno moves to strike the allegations of paragraphs 26, 36 and 42 and Exhibits D and E attached to the third amended complaint. As an alternative to striking paragraph 36 entirely, defendant seeks to strike lines 9-12 and 18-21. These allegations are pled to support constructive notice and issues of control of both the City and Noble Federal Credit Union with regard to the sidewalk. Paragraphs 26, 36, and 42 quote from correspondence, also attached as Exhibits D and E, post-dating the plaintiff's incident and indicate the sidewalk did not comply with Americans with Disabilities Act standards.

Defendant contends that these allegations are improper and should be stricken because they are evidence of subsequent remedial measures and they will be inadmissible to prove plaintiff's case. However, the court intends to deny the motion to strike these allegations on the ground that they are inadmissible evidence. Identifying the allegations and exhibits at issue as "subsequent remedial measures" is an evidentiary objection, not a basis for a motion to strike. The court must assume that the allegations of the complaint are true for the purposes of ruling on a motion to strike, no matter how unlikely or difficult to prove the allegations may be. (*Blakemore* v. *Superior Court* (2005) 129 Cal.App.4th 36, 53.) The fact that the quoted documents and the documents themselves may be evidence of subsequent remedial measures by the City and ultimately inadmissible at trial does not mean that they are improperly alleged in the complaint. Therefore, the court will deny the motion to strike the allegations of paragraphs 26, 36 and 42 and Exhibit D and E on the basis of the defendant's evidentiary objection.

Defendant also moves to strike allegations of paragraphs 31, 34, and 43 lines 6-8 of the third amended complaint. Defendant's alternative request with regard to paragraph 43 is to strike the words "mandatory" and "sections 815.4, 815.6, 830.8 and 835.4." Paragraphs 31, 34, and 43 assert the City was under a mandatory duty as it relates to the maintenance of the sidewalk.

Defendant contends the references to a "mandatory" duty in the third amended complaint are improper because any duty owed by the City was discretionary or permissive. Additionally, defendant argues the identified sections of the Government Code have no relevance to plaintiff's claims. These arguments go to the merits of the plaintiff's claims which will not be considered on a motion to strike. Accordingly, the court will deny the motion to strike paragraphs 31, 34 and lines 6-8 of paragraph 43.

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 7/22/2024.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Ernesto Morales v. Robert Bergstrom***
Superior Court Case No. 24CECG00633

Hearing Date: July 23, 2024 (Dept. 403)

Motion: By Defendant John B. Craig to Strike Anti-SLAPP or in the Alternative Demurrer to the Complaint

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny defendant's special motion to strike and to overrule the demurrer. Demurring defendant shall file a responsive pleading within thirty (30) days from the date of this order.

Explanation:

Special Motion to Strike (Strategic Lawsuit Against Public Participation "SLAPP")

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)

Anti-SLAPP motions involve a two-step analysis: the first step requires the defendant "establish the challenged allegations arise from activity protected under [Code of Civil Procedure] section 425.16." (*Starr v. Ashbrook* (2023) 87 Cal.App.5th 999, 1018 (*Starr*).) If met, "the burden shifts to the plaintiff to demonstrate the claims have at least " ' "minimal merit" ' " by making " 'a prima facie factual showing sufficient to sustain a favorable judgment.'" (*Ibid*, citations omitted.)

In addition to a now-dismissed elder abuse claim, plaintiff's complaint asserts six causes of action alleging failure to pay wages due. In essence, plaintiff's complaint summarizes that defendant John B. Craig's ("defendant") filing of two probate petitions reflect his "dispute[] that plaintiff is entitled to payment of wages as alleged herein, and refus[al] to permit the successor trustee to make payment to plaintiff." (Complaint, ¶ 18.)

Defendant contends that "[b]ringing and funding litigation, including a petition in probate court to disallow the distribution of trust assets, is a protected activity even if the no distribution results in a person not receiving claimed wages." (Mot. at p. 7:25-27.) However, although "'[a]ny act' includes communicative conduct such as the filing, funding, and prosecution of a civil action[]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056), "[m]isconduct in the administration of a trust and preservation of trust assets is not

action 'in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution.'" (*Starr, supra,* 87 Cal.App.5th at p. 1021, citation omitted.) In other words, the essence of plaintiff's complaint is the misuse of trust assets by failing to pay wages due - and misuse of trust assets, even when cloaked within litigation, does not satisfy the protected activity prong of the anti-SLAPP analysis. (*Ibid*.)

Furthermore, plaintiff's causes of action one thru six appear to fall within statutory provisions imposing personal liability, under particular conditions, on a trust beneficiary to a creditor. (Prob. Code, § 19400; *Arluk Medical Center Industrial Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324, 1333.)

Consequently, defendant's motion does not establish protected activity, and can be denied on that ground alone without addressing the probability of prevailing. (*Starr, supra,* 87 Cal.App.5th at p. 1005.)

Demurrer

In deciding a demurrer, the court is guided by well-established principles that the test is whether the plaintiff has succeeded in stating a cause of action - the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of their complaint. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572; *Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) The complaint is liberally construed (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517; Code Civ. Proc., § 452), which "means that the reviewing court draws inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.)

A special demurrer, though disfavored, is nevertheless sustained where a pleading is so uncertain that the defendant cannot reasonably respond to the subject pleading. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616; *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 694.) In other words, "[a] demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (Khoury v. Maly's of Calif., Inc., supra, 14 Cal.App.4th at p. 616.)

Plaintiff's unpaid wage claims (causes of action one thru six) are not untimely, at least in relation to those claims payable from and after February 13, 2021, and plaintiff seeks recovery of a proportion of trust funds as those funds were allegedly wrongfully depleted by defendant. (Prob. Code, § 19402.) In addition, plaintiff alleges the factual basis of employment and services provided. (Complaint, ¶¶ 27-48.) Accordingly, plaintiff's complaint is sufficient to state the unpaid wage causes of action and to notify defendant of the allegations he must defend.

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 7/22/2024.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re:	***Mohamed Hersi v. Does 1 to 20*** Superior Court Case No. 20CECG02193
Hearing Date:	July 23, 2024 (Dept. 403)
Motion:	For Summary Judgment by Defendant Penske Truck Leasing Co., LP

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To deny defendant's motion for summary judgment.

Explanation:

Defendant Penske Truck Leasing Co., LP (Doe 1, erroneously sued as Penske Truck Leasing Corporation ["Penske"]) moves for summary judgment on the grounds that plaintiff Mohamed Hersi cannot establish the essential element of breach or causation in his causes of action for general negligence and products liability.

Penske Fails to Meet Its Initial Burden of Persuasion and Production

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.)

A defendant must show not only that a plaintiff has no evidence on an essential element, but "the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence[.]" (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889, italics original [trial court erred in granting summary judgment in defendant's favor where defendant failed to present evidence to show plaintiff could not reasonably obtain the needed evidence].)

In his form complaint for personal injury based on general negligence and products liability, plaintiff alleges he sustained severe injuries and damages on August 1, 2018, when he slipped and fell in water leaked from the refrigeration unit of a truck and refrigerated trailer combination (the "Vehicle") onto the floor of the refrigerated trailer (the " Trailer") while plaintiff was in the process of delivering and unloading merchandise from the Trailer in the course and scope of his employment.

The first issue the court must determine is whether Penske met its initial burden of production to show, as a matter of law, that plaintiff cannot prove the essential element of breach of duty and cannot reasonably obtain the needed evidence.

Penske contends, and plaintiff does not dispute, that CACI No. 401 states the basic standard of care in a negligence action, which provides in part:

> Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

(CACI No. 401, rev. May 2020.)

Plaintiff points out inconsistencies in Fact No. 7 of Penske's separate statement, wherein Penske states plaintiff's employer, Core-Mark, owned the Trailer, but the supporting declaration of Penske's agent, Jamie Perfetto, describes a different arrangement. At paragraphs 3 and 4, Ms. Perfetto describes a Vehicle Lease Service Agreement ("VLSA") dated October 12, 2006. The VLSA purportedly is attached to Penske's Notice of Lodging as exhibit H. In fact, exhibit H is a Vehicle Maintenance Agreement ("VMA") dated August 1, 1990, which is a different agreement for a different vehicle that Core-Mark owned, rather than leased. In paragraph 4 of her declaration, Ms. Perfetto correctly states the Vehicle was leased to Core-Mark and maintained by Penske under the VLSA on the date of the accident. In the next sentence she makes a reference to the inapplicable VMA, which appears to be a "cut-and-paste" failure to revise a previous document.

In its reply, Penske points out that under either contractual relationship, it is undisputed that plaintiff was working for Core-Mark, Penske had a duty to maintain the Vehicle, and the Trailer was "brand new" when it went into service on December 29, 2017 (see rpy., p. 4, fn. 1). Therefore, although Penske's evidence fails to support Fact No. 7, the failure relates to an immaterial fact for purposes of Penske's motion.

Plaintiff alleges the defendants (including Penske as Doe 1) "were negligent and careless in all that they did in connection with the ownership, operation, maintenance, inspection, and repair of [the Vehicle]," which includes the refrigeration unit, thereby causing plaintiff's injuries. Plaintiff correctly argues that Penske failed to meet its burden to negate the allegations of the complaint. Penske relies primarily on Fact No. 9, which states "[p]rior to August 1, 2018, Penske had no notice or knowledge of the alleged leaking refrigeration unit inside the subject vehicle." The only evidence to support this fact is paragraph 7 of Ms. Perfetto's declaration, in which she states:

> Prior to August 1, 2018, Core-Mark did not report any malfunction, leak or other problems related to the refrigeration unit in the [] Vehicle to Penske. Prior to August 1, 2018, Penske had no notice or knowledge of the alleged leaking refrigeration unit inside the [Vehicle].

Ms. Perfetto describes herself as Penske's "authorized agent," with no additional facts about her position or duties. At best, her declaration might support a fact that

Care-Mark did not notify Penske of any leak. But this is not enough. When the court strictly construes her declaration, it has no factual support to show how she concluded that before plaintiff's accident, "Penske had no notice *or knowledge* of the alleged leaking refrigeration unit inside the [Vehicle]." (Perfetto decl., p. 2:20-21.)

Furthermore, Fact No. 9 does not conclusively negate Penske's alleged breach. It is undisputed that Penske had the duty to inspect and repair the Vehicle. Therefore, Penske also must show that it reasonably performed its duties of inspection and maintenance, and that it did not know, and it should not have reasonably known, of any defect that might have caused the refrigeration unit to malfunction or leak on August 1, 2018. Just because Core-Mark did not report any problem with the refrigeration unit before the accident, this does not prove there was no defect. The prior uneventful use of the Vehicle "may mean only that the condition did not manifest itself at an earlier time." (*See Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1604 [although before accident tenant never noticed or reported any problems with handrail that came loose, this does not prove there was no defect in handrail]; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 850 [fact that riding coach *received no complaints* that horse was unfit to jump did not establish that horse was fit or disprove plaintiff's allegation that coach knew or should have known horse was unfit].)

Penske also submits Fact No. 25, that plaintiff "cannot identify any acts or omissions by Penske that caused or contributed to the Subject Accident." But this does not satisfy Penske's burden to show plaintiff cannot reasonably obtain the needed evidence. (*Gaggero v. Yura, supra,* 108 Cal.App.4th at p. 889.) Plaintiff points out that Penske itself gave plaintiff the maintenance records that describe a repair to the brand new vehicle on February 1, 2018, to "repair reefer door or structural assembly" and a repair on April 26, 2018, to "repair wiring issue at reefer ECU." (Chatoian decl., ¶ 6, ex. 2 [pp. 26, 28], capitalization omitted.) Plaintiff's attorney, Mr. Chatoian, also points out in his declaration that Penske produced maintenance records that identified individuals who performed inspections or maintenance on the Vehicle, which included Juan Garcia, Victor Cruz, Jonathan Alderete, Chris Z and Marky (last names unknown), who were Penske's employees between December 29, 2017, and August 1, 2018. (*Id.*, at ¶ 9.) Although these individuals might have knowledge of facts regarding Penske's performance of its duties of maintenance and inspection, Penske did not submit a declaration from any of these potential witnesses.

Plaintiff makes the same response to Penske's Fact Nos. 26 through 31 to establish that Penske failed to meet its burden to show plaintiff does not possess and cannot reasonably obtain the needed evidence. Had Penske presented expert testimony that there was no defect in the Vehicle, including the refrigeration unit, and its employees performed their repair and inspection duties within the applicable standard of care for their work, it would have satisfied its initial burden. (*Brantley v. Pisaro, supra,* 42 Cal.App.4th at p. 1605 [expert testimony that there was no defect in subject stairway would have satisfied initial burden].) The facts presented by Penske leave open the possibility that the refrigeration unit was defective, even after the two repairs, and a reasonable inspection by Penske's repair personnel would have or should have disclosed the defect and provided an opportunity to repair it before plaintiff's accident. When the court strictly construes Penske's evidence and resolves all doubts in favor of plaintiff, it concludes Penske failed to show, as a matter of law, that plaintiff cannot prove the

essential element of breach of duty and plaintiff does not possess and cannot reasonably obtain the needed evidence.

On the essential element of causation, Penske argues nonsensically that:

> Plaintiff also cannot establish the causation element of the Negligence or Premises Liability causes of action because Plaintiff did not see any foreign substances on the floor where the fall occurred before, during, or after the incident, and her clothing was not damp after getting up off the floor.

(Penske's memo., p. 14:25-28.) This appears to be another cut-and-paste failure to revise a previous document. Penske presents no other argument to show plaintiff cannot prove the causation element. The court concludes Penske failed to show that plaintiff cannot establish the essential element of causation as a matter of law. Therefore, Penske falls to meet its initial burden of persuasion and production on the negligence cause of action and burden does not shift to plaintiff to raise a triable issue of material fact,

Penske Did Not Move for Summary Adjudication

When a defendant moves for summary judgment, the defendant has the burden to show it is entitled to judgment on all theories of liability alleged by the plaintiff. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.*)* If a defendant moves for summary judgment, without seeking summary adjudication in the alternative, the court should stop as soon as it determines that the defendant has failed to negate all pleaded theories of liability. (*Hedayati v. Interinsurance Exchange of the Automobile Club* (2021) 67 Cal.App.5th 833, 846.) Penske moved for summary judgment, but failed to negate the element of breach of duty or causation on the negligence cause of action. Therefore, the court need not address Penske's challenges to the products liability theories.

Evidentiary Objections

The court declines to rule on the evidentiary objections because none are directed to evidence that is material to the disposition of Penske's motion.

Conclusion

The court denies Penske's motion for summary judgment because it fails to meet its burden of persuasion and production to prove on the negligence cause of action that plaintiff cannot establish an essential element (breach of duty or causation) and plaintiff does not possess and cannot reasonably obtain needed evidence. Accordingly, the burden does not shift to plaintiff to raise a triable issue of material fact.

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 7/22/2024.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Cen-Cal Refrigeration, Inc. v. Maple Venture, LLC et al.***
Superior Court Case No. 20CECG01342

Hearing Date: July 23, 2024 (Dept. 403)

Motion: By Defendant Engineered Structures, Inc. on Demurrer to Fourth Amended Complaint

If oral argument is timely requested, it will be entertained on Tuesday, July 30, 2024, at 3:30 p.m. in Department 403.

Tentative Ruling:

To sustain as to the eighth cause of action for harassment, without leave to amend. (Code Civ. Proc. § 430.10, subd. (e).) To overrule on all other grounds. (Code Civ. Proc. § 430.10, subd. (e).) Defendant Engineered Structures, Inc. is directed to file an answer within ten days of service of the order by the clerk.

Explanation:

On May 4, 2020, plaintiff Cen-Cal Refrigeration, Inc. filed a Complaint against, among others defendant Engineered Structures, Inc. dba Idaho ESI, Inc. ("Defendant"). The original Complaint was subsequently amended to add plaintiffs Tua Cha, Jamal Borjquez, and Tang Vang (collectively with plaintiff Cen-Cal Refrigeration, Inc., "Plaintiffs"). Following the sustaining of demurrer to, among other causes of action of the Third Amended Complaint, the sixth cause of action for fraud, the seventh cause of action for intentional infliction of emotional distress, the eighth cause of action for harassment, and the tenth cause of action for violation of the Business and Professions Code section 17200, on June 30, 2022, Plaintiffs filed a Fourth Amended Complaint ("4AC").[1] On April 2, 2024, Defendant filed the instant demurrer.

Plaintiffs oppose on a threshold inquiry of timeliness. The time to file a demurrer is within 30 days after service of the complaint. (Code Civ. Proc. § 430.40, subd. (a).) The proof of service attached to the 4AC is unsigned, but dates service to June 30, 2022. No other date establishes the date of service. In any event, on reply, Defendant submits statements from counsel for Plaintiffs' office indicating, in effect, an open continuance to respond to the 4AC. (Chrissinger Decl. in support of Reply, ¶ 7, and Ex. 1.)[2] There was no duty Defendant owed to aid in the prosecution against it, to seek clarification or affirmation of when Plaintiffs intended to amend their pleading. Neither is there any evidence suggesting that Plaintiffs rescinded the open continuance. Accordingly, the demurrer is timely filed, and the court proceeds.

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[1] Plaintiffs' Request for Judicial Notice is granted.

[2] Generally, evidence on reply is inappropriate. However, the emails submitted appear to be statements transmitted from opposing counsel's office.

On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. A demurrer is simply not the appropriate procedure for determining the truth of disputed facts. (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 113-114.) It is error to sustain a demurrer where plaintiff "has stated a cause of action under any possible legal theory. In assessing the sufficiency of a demurrer, all material facts pleaded in the complaint and those which arise by reasonable implication are deemed true." (*Bush v. Cal. Conservation Corps* (1982) 136 Cal.App.3d 194, 200.)

In determining a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) On demurrer, the court must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) A plaintiff is not required to plead evidentiary facts supporting the allegation of ultimate fact; the pleading is adequate if it apprises defendant of the factual basis for plaintiff's claim. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

Here, Defendant challenges the sufficiency of the facts alleged as to the sixth and tenth causes of action by plaintiff Cen-Cal Refrigeration, Inc., for, respectively, fraud, and violation of the Business and Professions Code, section 17200.; and the seventh and tenth causes of action by plaintiffs Tua Cha, Jamal Borjquez and Tang Vang, for, respectively intentional infliction of emotional distress, and harassment.

Fraud

Defendant argues that the sixth cause of action fails to allege actionable misrepresentation, instead alleging bases for breaches of contract.

The elements which give rise to a tort action for fraud are: (1) a misrepresentation (or concealment); (2) knowledge of the falsity; (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) resulting damages. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) Fraud must be pled specifically; general and conclusory allegations do not suffice. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) The policy of liberal construction of pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect for allegations of fraud. (*Ibid.*) The requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Ibid.*)

Here, the 4AC sufficiently alleges a cause of action for fraud. The 4AC alleges that defendant Adam Bancroft ("Bancroft") is an officer and project manager for Defendant. (4AC, ¶ 54.) Bancroft stated and made general representations in or around November and December 2018, that plaintiff Cen-Cal Refrigeration would be hired, perform work, and get paid for that work. (*Id.*, ¶¶ 53, 56.) Defendant did so without the intent to do any of those represented actions. (*Id.*, ¶ 57.) Contrary to those representations, Defendant intended to obtain labor and materials from plaintiff Cen-Cal Refrigeration without payment and terminate plaintiff Cen-Cal Refrigeration from the project. (*Id.*, ¶¶ 58-59.) Accordingly, Bancroft and Defendant made those representations knowing they were false. (*Id.*, ¶ 60.) Plaintiff Cen-Cal Refrigeration relied on the representations and rejected

other work while incurring substantial debt to perform on those representations, therefore suffering damages as a consequence of that reliance. (*Id.*, ¶¶ 61-62.)

Based on the above, the 4AC states sufficient facts, with particularity, to state a claim for fraud. Defendant's argument that the facts stated in support of the fraud cause of action mirroring the facts stated in support of the breach of contract cause of action is of no moment to the fraud cause of action. As Defendant's authority reveals and as Plaintiffs argue in opposition, a fraud cause of action may be concurrently pled with a breach of contract as an alternative basis for relief. (*E.g.*, *Tenzen v. Superscope, Inc.* (1985) 39 Cal.3d 18, 28-30.) The substantial difference, as highlighted by the California Supreme Court, is that an action on a fraudulent promise must also produce evidence of the promisor's intent to mislead. (*Id.* at p. 30.) A mere promise made and unfulfilled alone does not support a claim for fraud. (*Ibid.*)

As noted above, the 4AC alleges that Defendant intended to mislead with the representations made. While contentions, deductions, and conclusions of law are not presumed as true (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967), a plaintiff is not required to plead evidentiary facts supporting the allegation of ultimate facts; the pleading is adequate if it apprises the defendant of the factual basis for the plaintiff's claim (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6). Here, Defendant is apprised of the statements that were made, by whom, when, and the substances thereof. Defendant is sufficiently positioned to answer as to whether it agrees to those allegations and what it intended on those allegations. The demurrer is overruled as to the sixth cause of action for fraud.

Intentional Infliction of Emotional Distress

Defendant demurs to the seventh cause of action for intentional infliction of emotional distress, arguing that the conduct alleged is insufficiently outrageous to constitute a cause of action. Specifically, Defendant submits that mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities do not rise to the level of actionable conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) Defendant does not challenge any of other elements of the cause of action.

Previously, the court found that the allegations as to racial slurs was not specific enough to support the otherwise conclusory allegations that Defendant's conduct was inherently outrageous, distasteful and morally questionable. The subsequent 4AC amends to provide context of the racial slurs previously alleged. (4AC, ¶¶ 70-75.) Consequently, the 4AC alleges sufficient facts to support the conclusion of law. Whether such conduct actually rises to the level of outrageous is a factual inquiry that is inappropriate on demurrer. (*See Hughes v. Pair*, *supra*, 46 Cal.4th at pp. 1050-1051 [review on summary judgment]; *see also Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1613-1614 [considering whether a jury could reasonably conclude that alleged acts constituted outrageous conduct intended to inflict emotional distress].) The demurrer is overruled as to the seventh cause of action for intentional infliction of emotional distress.

Harassment

Defendant submits that a demurrer to the eighth cause of action for harassment was previously sustained, and the 4AC contains no changes. In opposition, Plaintiffs appear to concede the challenge and do not address the eighth cause of action at all. The demurrer to the eighth cause of action for harassment is sustained, without leave to amend.

Unfair Business

Defendant relies on the arguments against the fraud cause of action to conclude that the tenth cause of action for violation of the Business and Professions Code section 17200 also fails to state sufficient facts to support the cause of action. Specifically, Defendant argues that the 4AC fails to allege the existence of any fraudulent statement. As above, the fraudulent statements are sufficiently identified in the fraud cause of action. (4AC, ¶¶ 53, 56.) As the demurrer to the sixth cause of action for fraud is overruled, the demurrer to the tenth cause of action is also overruled.

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 7/22/2024.
(Judge's initials) (Date)