Tentative Rulings for December 11, 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.***

24CECG00554 ***Cisneros v. Reyna et al.***

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(03)

Tentative Ruling

Re: ***Ponce v. Balanced Comfort, Inc.***
Case No. 23CECG00573

Hearing Date: December 11, 2024 (Dept. 403)

Motion: Plaintiff's Motion for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To deny plaintiff's motion for preliminary approval of the class action and PAGA settlement, without prejudice.

Explanation:

1. Class Certification

a. Standards

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313.)

b. Numerosity and Ascertainability

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, the class appears to be ascertainable, as defendants' personnel records should be sufficient to allow the parties to identify the class members. The class is also sufficiently numerous to justify certification, as plaintiff's counsel claims that there are approximately 305 class members who worked for defendant during the class period. Therefore, the court intends to find that the class is sufficiently numerous and ascertainable for certification.

c. Community of Interest

"[T]he 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.) "The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.) "[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669.)

Here, it does appear that there are common questions of law and fact, as all of the proposed class members worked for the same defendant and allegedly suffered the same type of Labor Code violations. Therefore, the proposed class involves common issues of law and fact.

With regard to the requirement of typicality of the representative's claims, it does appear that Mr. Ponce's claims are typical of the rest of the class and that he seeks the same relief as the other class members based on his allegations and prayer for relief in the complaint. There is no evidence that he has any conflicts between his interests and the interests of the other class members that would make him unsuitable to represent their interests. Therefore, plaintiffs have shown that Mr. Ponce has claims typical of the other class members.

On the other hand, the declaration of plaintiff's counsel fails to establish that she is experienced and qualified to represent the class. Counsel's declaration does not discuss her background, education, or experience in class action litigation. She states vaguely that she has "handled a number of class actions" and that she has "successfully prosecuted and defended such actions." (Lovegren-Tipton decl., ¶ 19 d.) However, she offers no specific information about how many class actions she has prosecuted or defended, which class action cases she worked on, or what the results of those cases were. Based on the extremely vague and limited information provided by plaintiff's counsel, the court cannot reach a conclusion about her competency to act as class counsel here. Therefore, counsel has not shown that she will be an adequate representative for the class.

d. Superiority of Class Certification

It does appear that certifying the class would be superior to any other available means of resolving the disputes between the parties. Absent class certification, each employee of defendants would have to litigate their claims individually, which would result in wasted time and resources relitigating the same issues and presenting the same testimony and evidence. Class certification will allow the employees' claims to be resolved in a relatively efficient and fair manner. (*Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Therefore, it does appear that class certification is the superior means of resolving the plaintiff's claims.

Conclusion: Due to the lack of information about plaintiff's counsel's adequacy as class counsel, plaintiff has not met her burden of showing that the class should be certified for the purposes of settlement.

2. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 129.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the … court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id*. at p. 129.)

b. Fairness and Reasonableness of the Settlement

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–245, internal citations omitted, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Here, plaintiff's counsel has not presented a sufficient discussion of the strength of the case if it went to trial, the risks, complexity, and duration of further litigation, and an explanation of why the settlement is fair and reasonable in light of the risks of taking the case to trial. Plaintiff's counsel fails to provide a detailed explanation of the claims and defenses raised by the parties, and the problems and risks inherent in plaintiff's case. She simply makes vague statements about the risks of going to trial, defendant's defenses, and the delays and uncertainties inherent in the case. However, she gives no specific information or analysis about the unique strengths of this particular plaintiff's case, the defenses raised by the defendant here, or why it was reasonable for plaintiff to settle his claims for $60,000. Therefore, plaintiff has not shown that the settlement is fair,

reasonable, or adequate in light of the unique facts and legal issues raised by the plaintiff's case.

c. Proposed Class Notice

The proposed notice appears to be generally adequate, although it does have some problems. The notices will provide the class members with information regarding their time to opt out or object, the nature and amount of the settlement, the impact on class members if they do not opt out, the amount of attorney's fees and costs, and the service award to the named class representatives.

However, the amount of the service award is incorrectly stated in the notice as being $3,500, when it is actually $6,000. This is a fairly substantial difference, and could potentially affect a class member's decision as to whether to oppose or opt out of the settlement. Therefore, this issue needs to be fixed before the court should approve the notice. As a result, the court intends to find that the proposed class notice is not adequate at this time.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks attorney's fees of $20,000. However, plaintiff's counsel has not provided any evidence that would explain why she should be awarded the amount of fees requested here. She does not describe her education, skill, and experience, or the challenges presented in the litigation. She does not even state whether her firm took the case on a contingent basis, which might support the requested fees due to the risk that she would receive nothing if she were unsuccessful. Counsel also provides no explanation of whether the fees she requests here are within the range of fees typically awarded in similar class actions. Nor has she provided any evidence of the hours she spent on the case, the tasks performed, or her hourly rate, so she has failed to provide enough information for the court to perform a lodestar cross-check of the requested fees. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 504.) As a result, the court will not grant preliminary approval of the requested fees at this time.

In addition, counsel also seeks an award of up to $3,500 in costs. Again, however, counsel has not provided the court with a summary of the costs incurred in the case or an explanation of why the court should approve the requested amount of costs. Therefore, the court intends to deny preliminary approval of the requested costs without prejudice.

4. Payment to Class Representative

Plaintiff seeks preliminary approval of a $6,000 service award to the named plaintiff/class representative, Mr. Ponce. Mr. Ponce has provided a declaration which supports the request for a service award, as he states that he worked closely with plaintiff's counsel, provided documents, answered questions, and participated in meetings about the case with counsel. Therefore, plaintiff has shown that the incentive award to the named plaintiff is fair, adequate, and reasonable.

5. Payment to Class Administrator

Plaintiff's counsel states that the fee of the claims administrator, ILYM Group, has yet to be determined, so that amount has not yet been deducted from the total gross settlement. However, without information about the amount that the claims

administrator will charge to administer the settlement, the court cannot grant preliminary approval of the settlement. The fees of the claims administrator could potentially be substantial and will likely affect the total net amount recovered by the class. Therefore, the court will not approve the settlement without more information about the administrator's fees.

6. PAGA Settlement

Plaintiff proposes to allocate $5,000 of the settlement to the PAGA claims, with 75% of that amount being paid to the LWDA as required by law and the other 25% being paid out to the aggrieved employees.[1] However, plaintiff's counsel does not state whether she sent notice of the settlement to the LWDA, or whether they have objected to the settlement. Thus, plaintiff's counsel has not shown that she complied with PAGA's requirement to give notice of the settlement to the LWDA. (See Labor Code, § 2699, subd. (s)(2), requiring the settlement to be served on the LWDA at the same time it is submitted to the court for review and approval.)

Plaintiff's counsel has also not given an adequate explanation of the reasons why they accepted $5,000 to settle the PAGA claim. In fact, plaintiff's counsel has not discussed any of the reasons why accepting $5,000 was fair, reasonable or adequate under the circumstances of the case. Therefore, counsel has failed to show that the court should approve the PAGA portion of the settlement. (See Labor Code, § 2699, subd. (s)(2), requiring the court to review and approve any settlement of a PAGA claim.)

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 12/6/2024.
(Judge's initials) (Date)

[1] The motion and counsel's declaration incorrectly state that the amount paid to the LWDA for the PAGA penalties will be $5,000. In fact, the settlement agreement provides that the total PAGA settlement allocation is $5,000, with $3,750 paid to the LWDA and the other $1,250 paid to the aggrieved employees. (See Settlement Agreement, ¶ 3.2.4.)

(34)

Tentative Ruling

Re: ***Golden State Environmental Justice Alliance v. City of Fresno, et al.***
Superior Court Case No. 24CECG00900

Hearing Date: December 11, 2024 (Dept. 403)

Motion: by Respondents to Bifurcate Trial

Tentative Ruling:

To deny without prejudice.

Explanation:

Respondents City of Fresno and City of Fresno City Council have not met their burden of showing that bifurcation would further convenience, avoid prejudice, or be conducive to expedition and economy.

Under Code of Civil Procedure section 1048, subdivision (b),

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States. (Code Civ. Proc. § 1048, subd. (b).)

Also, under Code of Civil Procedure section 598,

> The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5. (Code Civ. Proc. § 598.)

"It is within the discretion of the court to order a severance and separate trials of such actions, and the exercise of such discretion will not be interfered with on appeal except when there has been a manifest abuse thereof." (*McLellan v. McLellan* (1972) 23 Cal. App. 3d 343, 353, internal citations omitted.)

Here, Respondents argue that bifurcation of the issue of standing from the merits of Petitioner's CEQA challenge will serve convenience, efficiency and economy because the proposed evidentiary hearing on the issue of standing and findings thereon potentially moot the remaining issues in the petition. However, Respondents point to no particular evidence that they are likely to prevail on the issue of standing. Rather, the problem appears to be that Respondents are seeking further or verified responses to discovery from Petitioner on the issue of standing. Respondents have attempted to meet and confer regarding Petitioner's responses to discovery but have not received the further responses sought or verifications. (Huston Decl., ¶¶ 6-8.) An evidentiary hearing is not necessary to resolve this issue. Respondents may avail themselves of the appropriate remedies within the Civil Discovery Act to obtain verified responses or further responses.

The motion to bifurcate the trial in order to conduct an evidentiary hearing on the issue of standing is denied.

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 12/9/2024.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Ma Gonzalez v. General Motors LLC***
Superior Court Case No. 23CECG00743

Hearing Date: December 11, 2024 (Dept. 403)

Motion: By Defendant for Summary Judgment

Tentative Ruling:

To grant summary judgment in favor of the defendant, General Motors LLC (GM). GM is directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

The court must determine whether a buyer who purchases a vehicle with an unexpired manufacturer's new car warranty is entitled to the specific remedies provided by the Song-Beverly Consumer Warranty Act (the Act or Song-Beverly) for buyers of "new motor vehicles" as defined by the Act. The plaintiff, Ma Elena Gonzales (Plaintiff), purchased a pre-owned 2020 GMC Sierra (Sierra) from dealer M.K. Smith Chevrolet on February 4, 2022. A year later Plaintiff sued GM seeking remedies under the Act. GM now moves for summary judgment, which Plaintiff opposes.

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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.) 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.)

GM Satisfies Its Initial Burden

In the operative complaint against GM, Plaintiff alleges three causes of action under the Act: (a) the first and third for breaches of express warranties under Song-Beverly, and (2) the second for breach of implied warranty under Song-Beverly. Plaintiff demands a repurchase, plus a civil penalty, and attorney fees and costs.

The Act gives buyers of "new" vehicles specific remedies, such as a refund-or-replace remedy. (*Rodriguez v. FCA US, LLC* (2024) 17 Cal.5th 189, ___ [*1] (*Rodriguez*).) The California Supreme Court explained this remedy as follows:

> It requires manufacturers to "promptly replace" a defective new motor vehicle or "promptly make restitution" to the buyer when the manufacturer is "unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of [Civil Code] Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts." These enhanced remedies under the Act for breach of express warranty are "distinct from" and "in addition to" remedies otherwise available in contract under the California Uniform Commercial Code. [Citation.]

(*Rodriguez, supra,* 17 Cal.5th at p. ___ [*1].) The Supreme Court considered the wording of the statutory definition of a "new" vehicle and concluded a pre-owned (used) vehicle purchased with an unexpired manufacturer's new car warranty is not "new" unless a new car warranty is also issued with the sale:

> We conclude that a motor vehicle purchased with an unexpired manufacturer's new car warranty does not qualify as a "motor vehicle sold with a manufacturer's new car warranty" under [Civil Code] section 1793.22, subdivision (e)(2)'s definition of "new motor vehicle" unless the new car warranty was issued with the sale.

(*Rodriguez, supra,* 17 Cal.5th at p. ___ [*1].)

Undisputed Facts

GM establishes the following undisputed facts. The Plaintiff was not the Sierra's original consumer owner. Fremont Buick GMC Cadillac delivered the Sierra to its original (consumer) owner on March 24, 2020, with 24 miles on its odometer. (Fact Nos. 4, 5.) In connection with the delivery to the Sierra's original owner, GM issued a New Vehicle Limited Warranty with bumper-to-bumper coverage for the earlier of 36 months or 36,000 miles and powertrain coverage for the earlier of 60 months or 60,000 miles. (Fact No. 6.) Coverage under the warranty began when Fremont Buick GMC Cadillac delivered the Sierra to its original owner on March 24, 2020. (Fact No. 7.)

When Plaintiff purchased the Sierra from M. K. Smith Chevrolet in February 2022, the written contract between the dealer and Plaintiff describes the Sierra as "used," with 9,181 miles on the odometer. (Fact Nos. 1, 2.) GM was not a party to that transaction and provided no new or additional warranty coverage to Plaintiff, who received only the balance of coverage under the original warranty issued in March 2020. (Fact Nos. 3, 8.)

GM's undisputed facts show Plaintiff purchased a used vehicle with 9,181 miles from a dealer. Plaintiff received no new or additional warranty coverage with her purchase from the manufacturer. Under these circumstances, the purchaser of a used vehicle from a dealer cannot sue the original manufacturer for breach of an express or implied warranty under the Act. Therefore, Plaintiff's Song-Beverly causes of action fail. (*Rodriguez, supra,* 17 Cal.5th at p. ___ [*1]; *Nunez v. FAC US LLC* (2021) 61 Cal.App.5th 385, 399 [only distributors or sellers of used goods-- not manufacturer of new goods--have implied warranty obligations].) The court finds GM meets its initial burden to show Plaintiff

cannot establish one or more element of each cause of action as a matter of law. Therefore, the burden shifts to Plaintiff to raise a triable issue of material fact.

Plaintiff Fails to Raise a Triable Issue of Material Fact

A party opposing summary judgment must present admissible evidence, including "declarations, admissions, answers to interrogatories, deposition, and matters of which judicial notice" must or may "be taken." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843, quoting Code Civ. Proc., § 437c, subd. (b).) Plaintiff fails to do so.

For example, in the separate statement Plaintiff purports to dispute Fact No. 2, which states: "Plaintiff did not buy the Sierra new; Plaintiff bought it used, with 9,181 miles, from M.K. Smith Chevrolet in Chino CA." Yet, the second line of her opposing memorandum describes the Sierra as "pre-owned," and the word "used" appears on the first page of Plaintiff's purchase contract. Plaintiff presents no evidence to dispute Fact No. 2. Instead she makes an improper legal argument that she is entitled to the Act's remedies because the Sierra should be classified as "dealer-owned." The court finds Fact No. 2 is undisputed.

Plaintiff takes the same approach in an attempt to dispute Fact No. 3, that GM was not a party to the transaction between Plaintiff and M.K. Smith. The court finds Fact No. 3 is undisputed. Plaintiff provides no evidence to dispute Fact No. 4, that she was not the Sierra's original owner or Fact No. 8, that GM did not provide new or additional warranty coverage when Plaintiff bought the Sierra. As GM succinctly observes, "the separate statement of material facts is not the place for legal argument." (Rpy., p. 3:25, citing Cal. Rules of Court, rule 3.1350(f)(2).) Accordingly, the court finds all eight of GM's facts are undisputed.

Plaintiff's additional facts to show she purchased a "dealer-owned" vehicle from an authorized GM dealer are immaterial. The distinguishing characteristic of a "new motor vehicle" for purposes of Plaintiff's Song-Beverly causes of action is not that the vehicle was "dealer-owned" or used as a "demo" at some time in the vehicle's history. The California Supreme Court has affirmed the test to qualify as a new motor vehicle is whether a new car warranty is issued with the sale. (*Rodriguez, supra,* 17 Cal.5th at p. ___ [*1].) A manufacturer's unexpired new car warranty does not qualify. Plaintiff has presented no facts to show a new car warranty was issued when Plaintiff bought the Sierra on February 4, 2022. For these reasons, Plaintiff fails to meet her burden to raise a triable issue of material fact.

Leave to Amend

Plaintiff's request to amend her complaint under Code of Civil Procedure section 473, subdivision (a)(1) is denied for the reasons set forth in the court's order in this action filed on December 3, 2024.

Conclusion

The court finds GM meets its burden to show Plaintiff cannot prove at least one essential element of her causes of action. The burden then shifts to Plaintiff to raise a

triable issue of material fact, which she fails to do. Therefore, the court grants GM's motion for summary judgment.

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 12/9/2024.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Trendwest Enterprises, Inc. v. DRE36, LLC***
Superior Court Case No. 24CECG01973

Hearing Date: December 11, 2024 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To grant and sign the proposed order. No appearances necessary.

Explanation:

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 12/10/2024.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***Frank Cruz v. Oscar Bibiano***
Superior Court Case No. 24CECG03603

Hearing Date: December 11, 2024 (Dept. 403)

Motion: Cross-defendant Frank Cruz's Demurrer and Motion to Strike as to Cross-complainant Oscar Bibiano's Cross-Complaint

Tentative Ruling:

To overrule the demurrer to the cross-complaint of Oscar Bibiano. To deny the motion to strike portions from the cross-complaint of Oscar Bibiano. To order cross-defendant Frank Cruz to serve and file his answer to the cross-complaint within 10 days of this order, with the time to run from the service of the minute order by the clerk.

Explanation:

Demurrer to Cross-Complaint

Legal Standard

A demurrer challenges defects apparent from the face of the complaint and matters subject to judicial notice. (*Blank v. Kirwan* (1985) 30 Cal.3d 311, 318.) A general demurrer is sustained where the pleading is insufficient to state a cause of action or is incomplete. (Code Civ. Proc., § 430.10, subd. (e); *Estate of Moss* (2012) 204 Cal.App.4th 521, 535.) 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.) Similarly, failure to comply with rules promulgated to promote clear and understandable pleadings "may render a complaint confusing and subject to a special demurrer for uncertainty." (*Williams v. Beechnut Nutrition Group* (1986) 185 Cal.App.3d 135, 139 fn. 2.)

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.) A demurrer "admit[s] all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The grounds for a demurrer are set forth in Code of Civil Procedure, section 430.10, and include:

(a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.
(d) There is a defect or misjoinder of parties.
(e) The pleading does not state facts sufficient to constitute a cause of action.
(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.
(g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.
(h) No certificate was filed as required by Section 411.35.

Application

First, cross-defendant does not bring his demurrer on one or more of the grounds listed in Code of Civil Procedure section 430.10. However, inconsistencies in pleadings are often the subject of a demurrer, and generally brought on the grounds of either failure to state sufficient facts (subd. (e)) and/or uncertainty (subd. (f).)

When a pleader is in doubt about what actually occurred or what can be established by the evidence, the pleader may plead in the alternative and make inconsistent factual allegations. (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402; *Adams v. Paul (1995)* 11 Cal.4th 583, 593—"a party may plead in the alternative and may make inconsistent allegations.") Complaints often contain alternative and inconsistent legal theories. However, while inconsistent theories of recovery are permitted, a pleader cannot blow hot and cold as to the facts positively stated. (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449 [applicable to verified and unverified complaints].) This applies to facts, not legal conclusions to be drawn from the facts. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 949.)

It was not incorrect for cross-complainant to raise causes of action that may be inconsistent or alternative to each other. The cross-complaint pleads facts that could support multiple causes of action at issue (i.e. fraud-based or contract-based).

All fraud-based claims 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.*)

Here, cross-complainant specifically alleges that cross-complainant Bibiano entered into an agreement with HHH to sell his property (Cross-Complaint, ¶ 16) and HHH's right to purchase was assigned without Bibiano's knowledge or consent. He also alleges that an escrow was opened and a settlement agreement generated, but then escrow was closed without Bibiano's consent. (*Id.*, ¶¶ 18-20.) It is alleged that the settlement generated and a grant deed were sent to Bibiano for signatures, but that he wasn't informed the escrow was cancelled. (*Id.*, ¶ 21.) The documents are alleged to have been provided only in English "despite the fact that Cruz knew that Bibiano could not read or understand them." (*Ibid.*) Bibiano did not know that the agreement was "fake" and that he would not be receiving the money promised in the settlement statement. (*Id.*, ¶ 22.) Cross-complainant specifically alleges these facts in an attempt to support claims for fraud and/or breach of contract. The demurrer is overruled.

Motion to Strike Portions of the Cross-Complaint

Legal Standard

A motion to strike may be used to address defects in pleadings otherwise not challengeable by a demurrer. (See Code Civ. Proc., § 435.) A motion to strike can be used to attack either a portion or the entirety of a pleading. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.) A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. (*Blakemore v. Superior Ct.* (2005) 129 Cal. App. 4th 36, 53 citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Application

Here, the "Introduction and Summary of Case" set forth in Bibiano's cross-complaint is relevant to the causes of action raised in the cross-complaint. The allegations are necessary for cross-complainant to make his case. It is not prejudicial to the cross-defendant for cross-complainant to lay a factual foundation for his arguments. The motion to strike is denied.

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 12/10/2024.
(Judge's initials) (Date)