

**1. CALLAHAN v. POTTS, ET AL., 23CV0236****Motion to Vacate Default Judgment**

Default was entered on December 14, 2023, and default judgment was entered on December 18, 2023. On January 16, 2024, defendants moved to set aside default and default judgment pursuant to Code of Civil Procedure section 473.5 on the ground that plaintiff failed to serve defendants with the Summons and Complaint. On February 23, 2024, the court denied defendants' motion without prejudice.

Now pending before the court is defendants' motion to vacate default judgment pursuant to Code of Civil Procedure section 473, subdivision (b) on the grounds of excusable neglect, and alternatively, attorney fault.<sup>1</sup> Attached to defendants' motion is a proposed Answer to Complaint.

It is implied from their motion that defendants seek to set aside both default and default judgment. However, the motion does not expressly include a request to set aside default. Entry of default and entry of default judgment constitute separate procedures, and it is possible to grant relief from the default judgment, leaving the default in effect. (See *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970.) As such, the court needs written clarification by way of declaration from defense counsel as to whether defendants seek an order setting aside both default and default judgment.

**TENTATIVE RULING # 1: THE MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, APRIL 19, 2024, TO ALLOW DEFENDANTS TO SUBMIT WRITTEN CLARIFICATION REGARDING THEIR MOTION.**

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<sup>1</sup> Plaintiff characterizes the instant motion as a motion for reconsideration under Code of Civil Procedure section 1008. However, defendants' motion is a motion to vacate default and default judgment made pursuant to Code of Civil Procedure section 473, subdivision (b). It is not a motion for reconsideration.

**2. PEOPLE v. \$64,736.00 UNITED STATES CURRENCY, 23CV2219**

**Petition for Forfeiture**

**TENTATIVE RULING # 2: MATTER IS DROPPED FROM THE CALENDAR.**

**3. LOPEZ, ET AL. v. MARTINEZ MEZA, ET AL., 23CV0580**

**Order of Examination Hearing**

To date, there is no proof of service in the court's file showing that judgment debtor Juan Martinez Meza was personally served with the order to appear for examination. (Code Civ. Proc., § 708.110, subd. (c).)

**TENTATIVE RULING # 3: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS EFFECTED NO LATER THAN TEN (10) DAYS PRIOR TO THE HEARING DATE. (CODE CIV. PROC., § 708.110, SUBD. (d).) IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.**

**4. NAME CHANGE OF SIMOTAS, 24CV0339**

**OSC Re: Name Change**

**TENTATIVE RULING # 4: PETITION IS GRANTED.**

5. TAHOE EVENTS CO., LLC v. BUDGELL, ET AL., 24CV0277

Motion to Compel Arbitration and Stay Action

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,  
APRIL 12, 2024, IN DEPARTMENT FOUR.

**6. FLANAGAN, ET AL. v. ROCCA, 23CV0768 (See Related Item No. 7)****Demurrer to Defendant Rocca's Third Amended Cross-Complaint**

Pending before the court is plaintiffs' unopposed general demurrer to defendant's Third Amended Cross-Complaint ("TACC") pursuant to Code of Civil Procedure sections 92, subdivision (a), and 430.10, subdivision (e).

**1. Request for Judicial Notice**

Pursuant to Evidence Code section 452, subdivisions (d) and (h), the court grants plaintiffs' request for judicial notice of Exhibits 1 through 4, including the date of recordation in Exhibit 1. (See *RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 418, fn. 2.)

**2. Legal Principles**

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank, supra*, 39 Cal.3d at p. 318.)

**3. Discussion****3.1. First C/A for Breach of Contract**

"A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

Plaintiffs contend that: (1) defendant failed to attach a complete copy of the contract to the TACC (it appears that page 3 of 4 is missing) or plead the contract verbatim or plead the legal effect of the contract; and (2) defendant failed to plead facts establishing performance or excuse for nonperformance.

As to the issue regarding the contract, it appears to the court that defendant made a clerical error in not including page 3 of the contract. As plaintiffs point out, three of defendant's prior cross-complaints include the full four-page contract. Therefore, defendant should be granted leave to amend to correct this mistake. The demurrer on this basis is sustained with leave to amend.

As to the issue regarding performance or excuse for performance, the TACC alleges, "Plaintiff duly performed work in all the conditions of the Project Scope of Services listed in the contract." (See TACC.) Plaintiffs, however, claim that defendant incorporated exhibits by reference "which show she never completed the scope of her work under the purported contract." (Dem. at 10:23–28, citing "Homes Decl., ¶ 2 – Exhibit 'A': Defendant's TACC ¶¶ BC-1 and Exhibits thereto.") Yet, plaintiffs do not articulate how the exhibits attached to defendant's TACC show she never completed the scope of work under the contract. The court overrules the demurrer on this ground.

### **3.2. Second C/A to Foreclose on Mechanic's Lien**

Plaintiffs claim that defendant's Second C/A to Foreclose on the Mechanic's Lien fails because: (1) it alleges that *plaintiffs* bring the claim against *defendant*; and (2) the cause of action is barred by the statute of limitations. As to the first issue, it appears to the court that defendant made another clerical error by inserting plaintiffs' names in the "plaintiff" section, when really, it is defendant (the cross-complainant) who brings the claim against plaintiffs. The court finds that defendant should be granted leave to amend this clerical error. The demurrer on this basis is sustained with leave to amend.

As to the statute of limitations issue, Civil Code section 8460, subdivision (a) provides, "[t]he claimant shall commence an action to enforce a lien within 90 days after

recordation of the claim of lien. If the claimant does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable.” Here, defendant recorded the mechanic’s lien on May 11, 2023. (See Request for Judicial Notice, No. 1.) Accordingly, the 90-day deadline to commence an action to foreclose on the mechanic’s lien expired on August 9, 2023. Defendant did not file a claim to foreclose on the mechanic’s lien until her TACC, which was filed on January 29, 2024.

Under the “relation back” doctrine, however, an amendment alleging a new theory of liability against the defendant relates back to the original complaint, so long as based on the same set of facts previously alleged. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199–1200.) Defendant filed her original cross-complaint in this matter on July 11, 2023, within the 90-day deadline period. The original cross-complaint states four causes of action against plaintiffs for breach of contract, based on the same underlying contract at issue in the TACC. The court finds that defendant’s TACC relates back to her original cross-complaint for statute of limitations purposes. Therefore, the demurrer is overruled on this ground.

**TENTATIVE RULING # 6: THE DEMURRER IS SUSTAINED IN PART WITH LEAVE TO AMEND AND OVERRULED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT’S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.**



**7. FLANAGAN, ET AL. v. ROCCA, 23CV0768 (See Related Item No. 6)****Petition for Order Releasing Property from Claim of Mechanic's Lien**

On May 11, 2023, respondent Christina Rocca recorded a mechanic's lien against petitioner's property in the amount of \$3,000 for "professional design, drafting [and] consulting services." On March 13, 2024, petitioners filed a petition to release their property from respondent's claim of a mechanic's lien on the ground that respondent failed to bring an action to foreclose upon the lien within 90 days of recording the lien. (See Civ. Code, § 8460, subd. (a).)

Civil Code section 8486 provides, "[t]he petitioner shall serve a copy of the petition and a notice of hearing on the claimant at least 15 days before the hearing. Service shall be made in the same manner as service of summons, or by certified or registered mail, postage prepaid, return receipt requested, addressed to the claimant as provided in Section 8108." (Civ. Code, § 8486, subd. (b).) To date, there is no notice of hearing in the court's file. Plaintiff must select a new hearing date and properly notice the hearing on defendant. This matter is dropped from the calendar.

**TENTATIVE RULING # 6: MATTER IS DROPPED FROM THE CALENDAR. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.**