

1. MAISEL v. BUSSELL, ET AL., 23CV1464**Demurrer**

Pursuant to Code of Civil procedure section 430.10, defendant Ryan Bussell (“defendant”) generally and specially demurs to plaintiff Ashley Maisel’s complaint. In his reply brief, defendant raises for the first time a statute of frauds argument related to the First Cause of Action for breach of contract. (Reply at 3:10–15.) “The general rule of motion practice ... is that new evidence is not permitted with reply papers.” (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.) Strictly speaking, defendant’s reply presents new argument rather than new evidence. But the principle explained in *Jay*—which is based upon the unfairness to the opponent of not being able to address the new matter raised in a reply (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316)—applies here. As such, the court finds it appropriate to continue the matter to February 23, 2024, to provide the parties an opportunity for further briefing on the statute of frauds issue. Plaintiff’s supplement to opposition is due by January 29, 2024; and defendant’s supplement to reply is due by February 5, 2024.

TENTATIVE RULING # 1: MATTER IS CONTINUED TO 1:30 P.M., FRIDAY, FEBRUARY 23, 2024, IN DEPARTMENT FOUR TO ALLOW FOR FURTHER BRIEFING ON THE STATUTE OF FRAUDS ISSUE. PLAINTIFF’S SUPPLEMENT TO OPPOSITION IS DUE BY JANUARY 29, 2024; AND DEFENDANT’S SUPPLEMENT TO REPLY IS DUE BY FEBRUARY 5, 2024.

2. TURNER v. FEAGLEY REALTORS, ET AL., 23CV0314

Order to Show Cause Re: Dismissal

**TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
JANUARY 19, 2024, IN DEPARTMENT FOUR.**

3. BARSTOW v. WILLIAMS, PC20210229**Motion for Attorney Fees**

Pending before the court is plaintiff's motion for attorney fees in the total amount of \$7,428.46 related to the following: (1) a filing fee in the Court of Appeal of \$390.00; (2) costs to e-file the motion to dismiss the appeal in the amount of \$32.70, along with mailing costs of \$5.76, for a total of \$38.46; and (3) attorney fees charged to plaintiff at a flat rate of \$7,000.00 for representation as to the appeal in this matter.

1. Background

This matter arises from a dispute over an easement shared by the parties to this litigation. On June 24, 2021, the court granted a Civil Harassment Restraining Order against defendant and awarded plaintiff \$5,000.00 in fees and costs. On May 6, 2022, defendant filed an appeal. On March 3, 2023, the Third District Court of Appeal dismissed the appeal due to the fact that defendant failed to file a designation as required by rule 8.121 of the California Rules of Court. Now, plaintiff seeks fees and costs associated with opposing the appeal.

2. Preliminary Matters

Pursuant to Evidence Code section 452, subdivision (d), the court grants plaintiff's request for judicial notice of Exhibits 1 through 5, as well as the Memorandum of Costs on Appeal and the Proof of Service filed in this case on June 23, 2023.

3. Discussion

California Rules of Court Rule 8.278 provides, in relevant part, "(1) Except as provided in this rule or by statute, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal. [¶] (2) The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal." (Cal. Rules of Ct., rule 8.278, subds. (a)(1)–(2).) "Within 40 days after issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file

in the superior court a verified memorandum of costs under rule 3.1700.” (Cal. Rules of Ct., rule 8.278, subd. (c)(1).)

Here, plaintiff is the prevailing party because the appellate court dismissed the appeal. Additionally, the remittitur issued on May 19, 2023, explicitly states that plaintiff shall recover costs on appeal. On June 23, 2023, plaintiff submitted a Memorandum of Costs on Appeal, which identifies \$7,000.00 of attorney fees, amongst other costs. In his declaration supporting the instant motion, plaintiff’s counsel indicates that the attorney fee charged was a flat fee. (Weiner Decl., ¶ 9.) Plaintiff’s counsel also declares, “Although I based my flat rate fee of \$7,000.00 on a legal effort that would likely consume some 20 hours of time at a rate of \$350.00 per hour, the actual time expended related to this appeal has so far been more than 30 hours, not including the time required to prepare this application for fees and costs.” (*Ibid.*) Considering the time required to review defendant’s appeal, and prepare the motion to dismiss the appeal, the court finds that the requested attorney fees are reasonable.

Therefore, the motion is granted. Defendant is ordered to pay plaintiff’s counsel \$7,428.46 for costs on appeal.

TENTATIVE RULING # 3: MOTION FOR ATTORNEY FEES IS GRANTED. DEFENDANT MUST PAY PLAINTIFF’S COUNSEL \$7,428.46 NO LATER THAN 30 DAYS FROM THE FILING OF PROOF OF SERVICE OF THE NOTICE OF ENTRY OF ORDER. 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.

4. KUMAR v. KOHS, ET AL., SC20180225

Oral Argument

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
JANUARY 19, 2024, IN DEPARTMENT FOUR.

5. GABLER v. AIG PROPERTY CASUALTY COMPANY, 23CV1433

Order to Show Cause Re: Dismissal

**TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
JANUARY 19, 2024, IN DEPARTMENT FOUR.**

6. GABLER v. SOUTH LAKE TAHOE PUBLIC UTILITY DISTRICT, 23CV1396

Order to Show Cause Re: Dismissal

**TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
JANUARY 19, 2024, IN DEPARTMENT FOUR.**

7. PAVLOVA v. FORD MOTOR CO., ET AL., 22CV1701**Motion to Reconsider Order Compelling Arbitration and Staying Action**

On May 19, 2023, the court granted defendant Ford Motor Company's ("Ford") motion to compel arbitration on the grounds that (1) under *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, plaintiff is estopped from refusing to arbitrate her claims against Ford; and (2) Ford is a third-party beneficiary of the arbitration provision in the sales contract with dismissed defendant Performance Automotive Group, Inc., dba Elk Grove Ford.

Pending before the court is plaintiff's motion for reconsideration of the May 19, 2023, Order.

1. Preliminary Matters

Plaintiff's request for judicial notice of Exhibits A through G is granted. (Evid. Code, § 452, subd. (d)(1); Cal. Rules of Ct., rule 8.1115, subd. (d) ["A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published."].)

2. Discussion

Code of Civil Procedure section 1008, subdivision (a) provides that any party affected by an order may apply for reconsideration based on new or different facts, circumstances, or law within 10 days after service of notice of entry of the order. (Code Civ. Proc., § 1008, subd. (a).) Here, the deadline to file such a motion expired on June 12, 2023.¹

However, plaintiff claims her motion is brought under Section 1008, subdivision (c), which provides: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." (Code Civ. Proc., § 1008, subd. (c).)

Plaintiff points to the recent rulings in *Kielar v. Superior Court* (2023) 94 Cal.App.5th 614, *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, *Ford Motor Warranty*

¹ The proof of service indicates that the court mailed a copy of the May 19, 2023, ruling to plaintiff on May 25, 2023.

Cases (2023) 89 Cal.App.5th 1324, and *Yeh v. Superior Court* (2023) 95 Cal.App.5th 264. Each of these cases has held that the manufacturer could not compel arbitration based on the doctrine of equitable estoppel, in disagreement with *Felisilda*, supra, 51 Cal.App.5th 486. Whether a manufacturers' express or implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable estoppel is a question now pending before our Supreme Court.

In the meantime, however, *Felisilda*, which the court relied on in its May 19, 2023, ruling, remains good law. Therefore, the motion for reconsideration is denied.

TENTATIVE RULING # 7: MOTION TO RECONSIDER IS DENIED. 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.