1. SOWERS v. CAL. TAHOE CONSERVANCY, 23CV1008

Demurrer

Pending before the court is defendant California Tahoe Conservancy's ("defendant") demurrer to the Second, Third, and Fifth Causes of Action ("C/A") in plaintiff Damian Sowers' ("plaintiff") First Amended Complaint ("FAC").

1. Background

This action arises from a multimillion-dollar project called the Upper Truckee Marsh Project ("Project"), undertaken by defendant to convert approximately 250 acres of Upper Truckee Marsh—located adjacent to plaintiff's residence—to a wetlands environment. (FAC, ¶¶ 2, 3, 24.)

One of the "Project Objectives" identified in defendant's Environmental Impact Report ("EIR") for the Project is, "Avoid increasing flood hazards on adjacent property." (FAC, ¶ 8.) In an attachment to the EIR, defendant states, "The Project will improve the natural processes and functions of the [Upper Truckee River], including the beneficial overbank inundation processes in the middle of the marsh, ***without increasing flood hazards to neighboring private properties***." (*Id.*, ¶ 8 [emphasis added].)

In 2020, defendant began construction on the Project. (FAC, ¶ 6.) Defendant constructed new channels for re-directed river flow from the Upper Truckee River toward the middle of the marsh area, as well as Trout Creek, which runs near plaintiff's property. (*Ibid.*) Defendant also constructed "check dams"[1] along Trout Creek. (*Ibid.*) "These combined man-made alterations to the marsh raised the water table, changed the floodplain, and created the conditions for elevated backwater to develop in a manner well above the maximum levels estimated in [defendant's EIR]." (*Id.*, ¶ 9.)

In December 2021, plaintiff emailed defendant out of concern for his observations of the rising water levels caused by the Project. (FAC, ¶ 12.) Defendant sent employees to

[1] The FAC describes these as "flow dispersion features." (FAC, ¶ 9.)

investigate the issue. (*Id.*, ¶ 13.) Thereafter, defendant emailed plaintiff stating that " 'the grade control structures that the Conservancy constructed are not a primary factor contributing to the inundation you reported near your home.' " (*Id.*, ¶ 14.) Plaintiff voiced his concerns with defendant again in January and November 2022. (*Id.*, ¶¶ 15–16.)

During a meeting at plaintiff's home on November 17, 2022, plaintiff asked defendant to remove at least some of the check dams along Trout Creek to try to protect his house during the upcoming winter season. (FAC, ¶ 17.) "Plaintiff explained that water flow out of the marsh during the winter is impeded by predictable ice and snow conditions, as a result of the new check dams. During this meeting, [defendant] stated that the [EIR] calculations for water levels done by the Conservancy may not have factored in the impact of predictable ice and snow in relation to the check dams built by the Conservancy. However, the Conservancy did not take sufficient action to correct the mistakes they made in advance of the 2022/2023 winter season…." (*Ibid.*)

Plaintiff claims he had to vacate his home on December 31, 2022, due to extreme flooding caused by the Project. (FAC, ¶ 18.) His home remained severely flooded through March 21, 2023 (*id.*, ¶ 19), and flooded again in June 2023. (*Id.*, ¶ 21.)

2. Preliminary Matters

Plaintiff claims that defendant's brief in support of its demurrer exceeds the 15-page limit set forth in California Rules of Court, rule 3.1113, subdivision (d), and therefore, the court should refuse to consider defendant's arguments and legal citations beginning on Page 16 of defendant's brief. However, the court finds that defendant's brief meets the 15-page requirement because "[t]he page limit does not include the caption page, … the table of contents, [or] the table of authorities …." (Cal. Rules of Ct., rule 3.1113, subd. (d).) Without considering these pages, defendant's brief is exactly 15 pages.

Pursuant to Evidence Code section 452, the court grants defendant's request for judicial notice of Exhibits A through I, with the exception that the truth of the matters stated within Exhibits C, E, and I are not subject to judicial notice. (Evid. Code, § 452,

subds. (a)–(c), (d); see *In re Joseph H.* (2015) 237 Cal.App.4th 517, 541–542 ["[w]e can take judicial notice of official acts and public records, but we cannot take judicial notice of the truth of the matters stated therein"].)

3. 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.)

4. Discussion

4.1. Second C/A for Violation of Mandatory Duty

Except as otherwise provided by statute, "[a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity[.]" (Gov. Code, § 815, subd. (a).) Government Code section 815.6 is one of the statutory exceptions to this rule of governmental immunity. It provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.) An "enactment" is defined as "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.)

Application of Government Code " 'section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.' " (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898.) Courts construe this requirement "rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' " (*Ibid.*; see *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1240 ["If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty."].)

Government Code section 815.6 also requires that the mandatory duty be "designed" to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is " 'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.' " (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 939, fn. omitted.) The court's "inquiry in this regard goes to the legislative purpose of imposing the duty. That the enactment 'confers some benefit' on the class to which plaintiff belongs is not enough; if the benefits is 'incidental' to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under [Government Code] section 815.6. [Citation.]" (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499.)

Whether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function, is a question of statutory interpretation for the courts. (*Nunn v. State of Cal.* (1984) 35 Cal.3d 616, 624.)

Here, the FAC alleges that "the [EIR] prepared and submitted by the Conservancy created a mandatory duty to abide by the statements in the report and to not increase

flood hazards to neighboring private residences." (FAC, ¶ 45.) However, the EIR is not a constitutional provision, statute, charter provision, ordinance or regulation. Rather, it is "an informational document which, when its preparation is required by this division [of the Public Resources Code], shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Res. Code, § 21061.) The court finds that the EIR does not impose a mandatory duty, and thus it cannot serve as a predicate for liability under Government Code section 815.6.

Additionally, the FAC alleges that "[defendant] has violated the mandatory duties imposed upon it in [City of South Lake Tahoe ("CSLT")] City Code sections 6.65.080, 6.65.090, 6.65.230; Tahoe Regional Planning Agency (TRPA) Code section 35.4.2; Water Quality Control Plan for the Lahontan Region pages 4.9-13 to 4.9-14, 5.1-8, 5.7-1 to 5.7-6; Cal. Code Regs. tit. 23, § 3950; and NFIP Floodplain Management Requirements including 44 C.F.R. section 60.3." (FAC, ¶ 49.)

CSLT City Code section 6.65.080 provides, "No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this chapter and other applicable regulations." However, CSLT City Code section 6.65.080, itself, does not create a mandatory duty that subjects the public entity to liability under Government Code section 815.6. Rather, CSLT City Code section 6.65.080 provides a general rule of compliance with the terms of this chapter and other applicable regulations.

CSLT City Code section 6.65.090 provides, in relevant part, "Where this chapter and the TRPA's, basin plan's, or any other ordinance, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restrictions shall prevail." Again, this code section does not create a mandatory duty that subjects the public entity

to liability under Government Code section 815.6. It merely states that the provision with greater restrictions shall apply.

CSLT City Code section 6.65.230 concerns the nature of variances, which are granted for a parcel of property with physical characteristics so unusual that complying with the requirements of this chapter would create an exceptional hardship to the applicant or the surrounding property owners. CSLT City Code section 6.65.230 does not create a mandatory duty subject to liability under Government Code section 815.6.

TRPA Ordinance 35.4.2 includes a prohibition of additional development, grading, and filling of lands within the 100-year floodplain with limited exceptions. Each of the enumerated exceptions, however, involves the exercise of discretion (e.g., "TRPA may permit projects to effect access across a 100-year floodplain to otherwise buildable sites … if TRPA finds that 1. There is no reasonable alternative that avoids or reduces the extent of encroachment in the floodplain; and 2. The impacts on the floodplain are minimized." (TRPA Ordinance 35.4.2, subd. (C))). Because TRPA Ordinance 35.4.2 involves the exercise of discretion, it does not create a mandatory duty subject to liability under Government Code section 815.6.

Next, the FAC alleges that defendant is subject to a mandatory duty under Water Quality Control Plan for the Lahontan Region pages 4.9-13 to 4.9-14, 5.1-8, 5.7-1 to 5.7-6. However, plaintiff does not specify any constitutional provision, statute, charter provision, ordinance, or regulation on the cited pages.

California Code of Regulations, title 23, section 3950 lists regulatory provisions that are included in the revised Water Quality Control Plan for the Lahontan Basin, as adopted on September 9, 1993, and subsequently amended on October 14, 1994. It does not create a mandatory duty subject to liability under Government Code section 815.6.

Code of Federal Regulations, title 44, section 60.3 relates to the requirements regarding the placement and construction of manufactured homes, not the filling in of a floodplain. Therefore, it does not create a mandatory duty in this case.

Based on the foregoing, the court sustains the demurrer to the Second C/A for violation of mandatory duty with leave to amend.

4.2. Third C/A for Injury by Independent Contractor

Government Code section 815.4 provides, "A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity." (Gov. Code, § 815.4.)

The FAC alleges that "independent contractors caused Plaintiff's damages by tortious acts or omission." (FAC, ¶ 54.) However, plaintiff does not allege any specific act or omission that defendant committed. Therefore, the court finds that plaintiff has failed to allege an ultimate fact required to state a cause of action for tortious act or omission by an independent contractor. The demurrer as to the Third C/A is sustained with leave to amend.

4.3. Fifth C/A for Private Nuisance

Civil Code section 3479 describes the acts which constitute a nuisance as "[a]nything which is injurious to health … or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any … street, or highway…." (Civ. Code, § 3479.) "In this state it has long been recognized that a governmental unit is liable for creating and maintaining a nuisance. [Citations.]" (*Mulloy v. Sharp Park Sanitary Dist.* (1958) 164 Cal.App.2d 438.)

In *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, our Supreme Court set out the elements of an action for private nuisance. "First, the plaintiff must prove an interference with his use and enjoyment of its property. Second, the

invasion of the plaintiff's interest in the use and enjoyment of the land must be substantial, i.e., it caused the plaintiff to suffer substantial actual damage. Third, the interference with the protected interest must not only be substantial, it must also be unreasonable, i.e., it must be of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land." (*Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1176.)

"However, Civil Code section 3482 bars an action for nuisance against a public entity where the alleged wrongful acts are expressly authorized by statute. The Supreme Court has 'consistently applied a narrow construction to [Civil Code] section 3482 and to the principle therein embodied.' [Citation.]" (*Today's IV, Inc.*, *supra*, 83 Cal.App.5th at p. 1177.) " 'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.' " (*Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171.)

Here, defendant argues that the permits issued by the TRPA and the U.S. Army Corps of Engineers specifically authorized construction of the Project. (Dem. at 16:19–27.) However, Civil Code section 3482 calls for express authorization by statute, not by permit. Defendant does not cite any statute that expressly authorizes the alleged wrongful conduct at issue. Therefore, the court finds that Civil Code section 3482 does not apply.

The demurrer as to the Fifth C/A for private nuisance is overruled.

TENTATIVE RULING # 1: 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.

2. IMPERIUM BLUE TAHOE HOLDINGS v. TAHOE CHATEAU LAND HOLDING, 22CV1204

Defendant's Motion to Compel Further Responses

Pending before the court is defendant Tahoe Chateau Land Holding, LLC's ("defendant") motion to compel plaintiff Imperium Blue Tahoe Holdings, LLC's ("plaintiff") further responses to Form Interrogatories—General Numbers 9.1 and 50.2, and for monetary sanctions against plaintiff in the amount of $5,985.

As a preliminary matter, plaintiff argues that defendant's motion to compel is untimely. Code of Civil Procedure section 2030.300, subdivision (c) provides, "Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or on or before any specific later date to which the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response to the interrogatories." (Code Civ. Proc., § 2030.300, subd. (c).) The 45-day limitation is mandatory and jurisdictional. (*Prof. Career Colleges, Magna Institute, Inc. v. Superior Court* (1989) 207 Cal.App.3d 490, 492–493.)

There is no dispute that verified responses were served electronically on November 3, 2023, and that the deadline to give notice of this motion was December 20, 2023. Defendant argues that while Code of Civil Procedure section 2030.300 provides when notice must be "given," "the statute governing filing of the motion should be Code Civ. Proc. Section 1005(b), which requires filing and service of the motion at least sixteen days before a court hearing." (Reply at 3:5–7.) However, the caselaw states otherwise. (E.g., *Prof. Career Colleges, Magna Institute, Inc. v. Superior Court* (1989) 207 Cal.App.3d 490, 494 ["The Legislature has explicitly stated that unless a party moves to compel further response within 45 days of the unsatisfactory response, he waives *any* right to compel a further response." (original italics)].)

Plaintiff's counsel submitted a declaration stating that defendant did not electronically serve plaintiff with the notice of motion until 12:01 a.m. on December 21,

2023.[1] (Sherman Decl., ¶ 4.) Defense counsel submitted a declaration stating that he hit the "send" button on his email with the notice of motion on December 20, 2023, at 11:59 p.m.[2] (Bluto Decl., ¶ 1.) Code of Civil Procedure section 1010.6, which sets forth the rules for electronic service generally, provides in relevant part, "Electronic service of a document is complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent." (Code Civ. Proc., § 1010.6, subd. (a)(4).)

Even if the court were to find that defendant gave timely *notice* of the motion, the fact remains that the motion was not filed until December 21, 2023. Therefore, the court denies the motion as untimely.

TENTATIVE RULING # 2: MOTION 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.

[1] The electronic timestamp on the email coversheet reads December 21, 2023, at 12:00:48 a.m. (Sherman Decl., Ex. B.)

[2] The proof of service for the motion indicates that notice was not given until December 29, 2023.

3. WADE v. 7-ELEVEN, INC. ET AL., 23CV1857

Motion to Strike

Plaintiff's Complaint alleges causes of action for negligence and premises liability. Pending before the court is defendant 7-Eleven, Inc.'s ("defendant") motion to strike plaintiff's request for punitive damages pursuant to Code of Civil Procedure section 436.

1. Legal Standard

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Memorial Hospital* (1989) 216 Cal.App.3d 340, 342.) Further, "[t]he court may, upon a motion [to strike] …, or at any time in its discretion … [¶] … [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 463, subd. (a).) Like a demurrer, the grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.) A motion to strike is the procedure to attack an improper claim for punitive damages.

2. Discussion

"In order to state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294." (*Turman v. Turning Point of Central Cal., Inc.* (2010) 191 Cal.App.4th 53, 63.) Civil Code section 3294 states: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).)

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others…. [¶] 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights…. [¶] 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c).)

In support of plaintiff's claim for punitive damages, the Complaint alleges, "Defendants, and each of them, invited patrons, including Plaintiff, onto their business establishment but failed to make the establishment safe for patrons by allowing a dangerous ice buildup to accumulate in a natural and probable walkway and primary ingress/egress path for the storefront. Defendants, and each of them, failed to notify Patrons of the danger, failed to take reasonable steps to mitigate or prevent the danger, and failed to minimize the risk of harm from the danger once Defendants, and each of them, knew it was there. [¶] Plaintiff slipped and was injured as a direct and proximate result of the ice buildup and of Defendants' lack of warning of the same." (Compl. at p. 4.)

The court finds that the allegations in the Complaint do not rise to the level of malice, fraud, or oppression required to support a punitive damages award. (See *Turman*, *supra*, 191 Cal.App.4th at p. 63.)

Further, Civil Code section 3294, subdivision (b) provides, "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advanced knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of

oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).)

Here, plaintiff does not plead any facts establishing that defendant had advanced knowledge of any wrongdoing.

The motion to strike punitive damages is granted without leave to amend.

TENTATIVE RULING # 3: MOTION TO STRIKE IS GRANTED. 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.