1. HAMILTON, ET AL. v. THE VAIL CORPORATION, ET AL., SC20210148

Motion to Set Aside and Vacate Judgment and Enter Another Judgment

On August 19, 2022, the court granted Plaintiffs' Motion for Order Finally Approving Class Settlement and Motion for Attorneys' Fees and Costs and Class Representative Service Awards. On September 26, 2022, the Colorado Plaintiffs filed a Motion to Set Aside and Vacate Judgment and Enter a Different Judgment pursuant to Code of Civil Procedure section 663. The motion is opposed by Plaintiffs and Defendants.

"Code of Civil Procedure section 663 permits the court to vacate its judgment if it determines the judgment is '[i]ncorrect or erroneous' as a matter of law or inconsistent with or unsupported by the facts. In ruling on a motion to vacate the judgment the court cannot ' "in any way change any finding of fact." ' [Citation.]" (*Glen Hill Farm*, *LLC v. Cal. Horse Racing Bd*. (2010) 189 Cal.App.4th 1296, 1302.)

The court has reviewed and considered the parties' papers, declarations, and exhibits. The motion is denied on the basis that the Colorado Plaintiffs have not met their burden of demonstrating that the court reached incorrect conclusions of law or rendered an erroneous judgment on the basis of uncontroverted evidence. (See *Simac Design*, *Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.)

Oral argument will not assist the court in determining the motion, and therefore the court will not hear oral argument. (See *Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, 1490 [a judge is not required to listen to oral argument on a motion, but has the discretion to decide the matter solely on the basis of the declarations, memoranda, and other documents in the file].)

FINAL RULING: THE MOTION IS DENIED. THE COURT WILL NOT HEAR ORAL ARGUMENT.

2. WING, ET AL. v. DECKSIDE VILLAS HOMEOWNERS' ASSN., 22CV0966

Motion to Transfer Venue

This matter was continued from October 14, 2022.

Plaintiffs' complaint asserts causes of action for (1) defamation at common law and pursuant to Code of Civil Procedure ("CCP") section 46, (2) intentional interference with economic advantage, (3) violation of Business and Professions Code section 17200, et seq., and (4) injunctive relief.

Pending is defendant Deckside Villas Homeowners' Association's motion to transfer venue to Ventura County pursuant to CCP section 397. Plaintiffs allege in their complaint that the proper venue is El Dorado County for the following reasons: plaintiffs currently reside here and they resided here when the purported defamatory letter was mailed to over 100 residents of the HOA; plaintiffs suffer extreme anxiety and health issues when they return to the site of their home in Deckside Villas in Ventura County, and therefore venue should be in El Dorado County for the sake of their health and well-being; and plaintiffs' physicians are located in El Dorado County.

CCP section 397 states in relevant part: "The court may, on motion, change the place of trial in the following cases: [¶] (a) When the court designated in the complaint is not the proper court. [¶] … [¶] (c) When the convenience of witnesses and the ends of justice would be promoted by the change." (*Id*., subds. (a), (c).)

Defendant's motion is well taken. First, pursuant to CCP section 395(a), "the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (*Ibid.*) Defendant states it is a nonprofit California Corporation which maintains a principal place of business in Ventura County. (Mot., Declaration of Jeffery C. Long, ¶ 5 & Ex. B.)

Second, venue in a defamation action is also "where the defendants or some of them reside at the commencement of the action." (CCP § 395(a).) Again, defendant maintains a principal place of business in Ventura County.

And third, the convenience of witnesses and the ends of justice would be promoted by transfer to Ventura County. Defendant's place of business is in Ventura County. In reviewing plaintiffs' complaint, multiple incidents involving plaintiffs and other individuals occurred in or around Ventura County, and therefore it appears that many, if not most of, the potential witnesses likely reside in or around Ventura County. While plaintiffs and their physicians are located in El Dorado County, it appears that the majority of the witnesses are located in or around Ventura County.

The court has reviewed and considered plaintiffs' late-filed opposition. Plaintiffs argue that venue is proper in El Dorado County because they resided in this county when they signed the contract to purchase property in Deckside Villas and became members of the HOA. This argument is not persuasive. First, plaintiffs' complaint asserts tort causes of action, not contract causes of action. Second, venue for breach of contract actions (other than consumer obligations, which do not apply here) are triable in the county where the defendant resides or where the contract was entered into or where it was to be performed. (CCP § 395(a).) As such, the fact that plaintiffs resided in El Dorado County when the contract to purchase the property in Deckside Villas was entered into is not a conclusive factor.

For the foregoing reasons, the court finds that venue is proper in Ventura County. The motion is granted. Plaintiffs are responsible for paying any transfer fees. (CCP § 399.)

TENTATIVE RULING # 2: DEFENDANT'S MOTION TO TRANSFER VENUE TO THE COUNTY OF VENTURA IS GRANTED. PLAINTIFFS ARE RESPONSIBLE FOR THE PAYMENT OF ANY TRANSFER FEES. 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. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

3. MASSARWEH v. CAMP RICHARDSON RESORT, INC., ET AL., SC20200086

Motion for Summary Judgment

Plaintiff Julia Massarweh, a minor, by and through her guardian ad litem Munther Massarweh, asserts causes of action for (1) general negligence, (2) premises liability, and (3) motor vehicle against defendants Camp Richardson Resort, Inc., and L T Leasing, Inc. Pending is defendants' motion for summary judgment or, alternatively, summary adjudication. (Code Civ. Proc., § 437c(f).)

1. ALLEGATIONS OF THE COMPLAINT

"[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. Nat. Football League* (2005) 131 Cal.App.4th 621, 648.) The complaint alleges that on July 9, 2018, near the Camp Richardson Marina on Jameson Beach Road, a boat collided with plaintiff while she was a paying visitor on property owned, leased, rented, managed, operated, possessed, and/or controlled by defendants. The subject boat was owned, repaired, leased, maintained, entrusted, controlled, supervised, and operated by defendants. As a result of defendants' purported negligence, carelessness, and wrongdoing, plaintiff suffered severe injuries to her leg requiring medical intervention and resulting in permanent discoloration, disfigurement, and scarring. (Compl., pp. 4–6.)

2. STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid*.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet*, *Inc*. (1965) 62 Cal.2d 412, 417.)

3. PRELIMINARY MATTERS

3.1 Evidentiary Objections

Defendants' evidentiary objections to the Declaration of Craig N. Rosler:

Objection No. 1: sustained on the basis of relevance.

Objection Nos. 2 & 3: overruled.

3.2 Defendants' Objection to Plaintiff's Late-Filed Opposition

In their reply, defendants object to the untimeliness of plaintiff's opposition and they request that the opposition be stricken.

The objection is overruled. "Rigid rule following is not always consistent with a court's function to see that justice is done." (*Kapitanski v. Von's Grocery Co*. (1983) 146 Cal.App.3d 29, 32.) "It is the policy of the law to favor, wherever possible, a hearing on the merits …." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854.) A trial court has the discretion to consider a late-filed brief, therefore relieving an innocent party from her counsel's mistake, even in the absence of a motion for relief pursuant to Code of Civil Procedure section 473(b). (*Kapitanski*, *supra*, 146 Cal.App.3d at pp. 32–33.) In exercising its discretion, however, the trial court must apply the standards under section 473. (*Ibid*.)

Here, any mistake or neglect was the fault of plaintiff's counsel, and there is no evidence plaintiff herself is at fault. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248.) Further, defendants do not argue they were prejudiced by the late filing, they did not request a continuance to draft their reply, and their reply brief is well written even though

it was written in haste. On its own motion, the court continued the hearing from October 7, 2022, to October 28, 2022. During that time, defendants did not request permission to amend or supplement their reply brief.

4. DISCUSSION

Defendants move for summary judgment on the following grounds: (1) express assumption of risk bars all of plaintiff's causes of action; (2) plaintiff failed to establish an essential element for premises liability by demonstrating that a dangerous condition existed and that the property owner had actual or constructive notice of a dangerous condition in sufficient time to correct it; (3) defendant L T Leasing does not own, lease, maintain, control, supervise, or operate the subject boat; (4) L T Leasing is not an agent, ostensible agent, servant, partner, licensee, joint venturer, or employee of defendant Camp Richardson Resort, Inc.; and (5) plaintiff's motor vehicle cause of action pleads the same facts and is essentially a claim for general negligence that has no merit against defendants.

4.1 Plaintiff's Action is Not Barred by Express Assumption of Risk

As an affirmative defense to plaintiff's complaint, defendants argue that an express waiver of liability serves as a complete and independent basis for barring plaintiff's action.

A. Legal Principles Re: Express Waivers

"With respect to the question of express waiver, the legal issue is *not* whether the particular risk of injury appellant suffered is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*." (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1484 [italics in original].)

"[C]ases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.' " (*Tunkl v. Regents of University of Cal*. (1963) 60 Cal.2d 92, 96.) "Releases of negligence claims are not per se against the public interest." (*Brown v. El Dorado Union High School Dist*. (2022) 76 Cal.App.5th 1003, 1023.) "[N]o public policy opposes private, voluntary transactions in which one party, for a

consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party ….” (*Tunkl*, *supra*, 60 Cal.2d at p. 101.)

A waiver that is invalid for public policy reasons typically has the following characteristics: “The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.” (*Tunkl*, *supra*, at pp. 98–101 [footnotes omitted].)

Exculpatory agreements in the context of recreational activities do not implicate the public interest. (*Lhotka v. Geographic Expeditions*, *Inc*. (2010) 181 Cal.App.4th 816, 823 [“[O]ur courts consistently hold that recreation does not implicate the public interest, and therefore approve exculpatory provisions required for participation in recreational activities”].) An exception to the rule exists where the defendant violated a statute, committed fraud, or intentionally injured the plaintiff. In such cases, even if the defendant is a recreational activities provider, an express assumption of risk will not allow the defendant to avoid liability for these acts. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 751.)

Contract principles apply when interpreting an express assumption of risk. (*Cohen*, *supra*, 159 Cal.App.4th at p. 1483.) “ ‘In its most basic sense, assumption of risk means

that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.… The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.' " (*Coates v. Newhall Land & Farming*, *Inc*. (1987) 191 Cal.App.3d 1, 8 [alteration omitted, italics in original], quoting Prosser & Keeton, Torts (5th ed. 1984) § 68, pp. 480–481.) The meaning of the language in the release is a question of law. (*Solis v. Kirkwood Resort Co*. (2001) 94 Cal.App.4th 354, 360.)

To be effective, "a release need not achieve perfection." (*Nat. & Int'l Brotherhood of St. Racers*, *Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 938.) "As long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 597.) However, use of the word "negligence" or any particular verbiage is not required, and every possible act of negligence need not be specifically included. (*Sanchez v. Bally's Total Fitness Corp*. (1998) 68 Cal.App.4th 62, 68–69.) Rather, the waiver must inform the releasor that it applies to misconduct on the part of the releasee. (*Cohen*, *supra*, 159 Cal.App.4th at p. 1489.)

B. The Release Does Not Constitute a Clear and Unequivocal Waiver of Negligent Acts by Defendants

The Rental Contract for the subject boat contains a Release of Liability and Indemnity Agreement ("Release"). The Release includes the following:

> ## RELEASE OF LIABILITY AND INDEMNITY AGREEMENT
>
> **READ CAREFULLY BEFORE SIGNING – THIS RELEASE LIMITS CAMP RICHARDSON RESORT, INC.'S LIABILITY AND YOUR LEGAL RIGHTS**
>
> "Participant" shall mean the person listed on this form who is participating in any activity, using any equipment, or present at the facilities of **CAMP**

> **RICHARDSON RESORT**, **INC**., **and dba CAMP RICHARDSON RESORT & MARINA**, **and dba CAMP RICHARDSON MARINA**, **and L T LEASING**, **INC**., referred to herein collectively as "CRR." "Facilities" shall mean the physical areas in and around the Camp Richardson Resort & Marina, 1900 Jameson Beach Road, South Lake Tahoe, CA 96150, and any other locations where Participant is associating with CRR for the purposes of engaging in, or observing, the activities listed herein.
>
> I or my child (collectively, "Participant," "I," "me," or "my") have voluntarily agreed to participate in activities offered by CRR. "Activities" may include boat, personal watercraft, pedal boat, kayak, or SUP rental and use, in addition to parasailing, swimming, diving, tubing, waterskiing, wakeboarding, and/or any other activities incidental to those offered by CRR (collectively, "the Activities"). I understand that **MY PARTICIPATION IN THE ACTIVITIES CAN BE HAZARDOUS AND POSE RISKS OF INJURY AND DEATH** to me and/or my property. I further understand and acknowledge that **ATTENDING**, **OBSERVING**, **OR MERELY BEING IN THE PROXIMITY OF THE ACTIVITIES**, **EQUIPMENT**, **OR FACILITIES EXPOSES ME TO RISKS** posed by conditions, individuals, equipment, or events which have potential to cause death, serious injury, disability or property loss.
>
> **THE LESSEE HAS READ AND AGREES TO THE CONDITIONS PRINTED ON BOTH SIDES OF THIS CONTRACT**.

(Defs. Index of Exhibits, Ex. B, p. 1.)

The court finds that defendants have not met their initial burden of demonstrating a prima facie showing that plaintiff's action is barred by express assumption of risk. The Release is ambiguous as to whether the risks referred to in the Release encompass the risk of harm from the conduct of defendants and/or its employees. While the Release

mentions conduct by "individuals," that language does not constitute "a clear and unequivocal waiver with specific reference" to defendants' negligence. It could also be interpreted as simply referring to the misconduct of an individual from the general public. (See *Madison*, *supra*, 203 Cal.App.3d at p. 597.)

It should be noted that while defendants raised primary assumption of risk as the ninth affirmative defense in their answer to the complaint, they did not assert this as another basis for judgment in their motion. Primary and express assumption of risk are not identical defenses. While primary assumption of risk imposes a duty on a defendant not to increase an inherent risk, an express waiver of liability serves as a complete bar even if the defendant is negligent, and negates the need to discuss negligence duty.

The motion for judgment on the basis of express assumption of risk is denied.

4.2 Plaintiff's Cause of Action for Premises Liability

Next, defendants argue that plaintiff failed to establish the essential element of a dangerous condition for premises liability, and therefore they are entitled to judgment as to the 2nd cause of action.

The court finds that defendants did not meet their initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact. In support of their motion, defendants cite page 5 of plaintiff's complaint wherein it merely states "dangerous condition," with no further description of the condition. (Defs. UMF No. 8.) That is arguably a pleading issue, but this case is beyond the pleading stage. For summary judgment, "in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant *must present evidence* that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true …." (*Kahn v. E. Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003 [italics added].)

It is not enough to point to plaintiff's complaint as establishing the lack of evidence of a dangerous condition. Indeed, defendants' own memorandum in support of the motion

states that the complaint's "allegations are not evidence." (Defs. Mem. of P&As, 4:4.) Any ambiguity as to what the dangerous condition was should have been clarified during discovery. (*Khoury v. Maly's of Cal.*, *Inc*. (1993) 14 Cal.App.4th 612, 616 [ambiguities in a party's pleading can be clarified under modern discovery procedures].) Defendants did not provide any admissible evidence sufficient to make a prima facie showing of the nonexistence of a triable issue of material fact as to a dangerous condition.

The motion for judgment on the basis that plaintiff failed to establish an essential element for premises liability is denied.

4.3 Whether L T Leasing is Entitled to Judgment

Defendant L T Leasing moves for judgment as to all causes of action on the basis that it is an entirely separate corporation from Camp Richardson Resort, Inc. L T Leasing asserts that it does not own, lease, maintain, control, supervise or operate the subject boat that allegedly caused plaintiff's injuries, and L T Leasing is not an agent, ostensible agent, servant, partner, licensee, joint venturer, or employee of Camp Richardson Resort. (Defs. UMF Nos. 4–7.)

L T Leasing cites to the Declaration of Robert Hassett in support of its arguments. Mr. Hassett declares that he is a principal and shareholder of both Camp Richardson Resort, Inc., and L T Leasing. (Mot., Hassett Decl., ¶¶ 2–3.) He further declares that L T Leasing "is an entirely separately corporation from Camp Richardson Resort, Inc." (*Id.*, ¶ 3.) He continues on to state that "L T Leasing, Inc. does not own, lease, maintain, control, supervise, or operate [subject boat] Regal R7 (vessel number CF8732LE). [¶] L T Leasing, Inc. is not an agent, ostensible agent, servant, partner, licensee, joint venturer, or employee of Camp Richardson Resort, Inc. (CRR) or CRR's premises at or near 1900 Jameson Beach Road, South Lake Tahoe, California. [¶] L T Leasing, Inc. has an office located at 1900 Jameson Beach Road, South Lake Tahoe, California. L T Leasing, Inc. does not own, lease, rent, manage, operate, possess, maintain, or control Camp Richardson Resort, Inc." (*Id.*, ¶¶ 5–7.)

This evidence is sufficient to shift the burden of production to plaintiff to demonstrate a triable issue of fact as to defendants' alleged corporate relationship.

In response, plaintiff argues that defendants have not provided sufficient documentation about the corporate relationship, and thus "the defense has not shown that a triable issue 'cannot be … established." (Pl. Opp'n, 11:6–7.) That argument is not persuasive, and plaintiff should have developed this argument during discovery and provided the court with sufficient admissible evidence to raise a triable issue of material fact.

The motion on the basis that defendants are separate corporate entities and that L T Leasing is entitled to judgment as to all causes of action is granted.

4.4 Defendants' Motion as to the Motor Vehicle Cause of Action Fails

Lastly, defendants move for judgment as to plaintiff's 3rd cause of action for motor vehicle on the basis that the claim pleads the same facts and is essentially a claim for general negligence. Because defendants' express assumption of risk argument fails, the argument as to this cause of action also fails.

The motion as to the 3rd cause of action for motor vehicle is denied.

TENTATIVE RULING # 3: DEFENDANTS' MOTION IS GRANTED IN PART AND DENIED 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. PARTIES MAY APPEAR IN PERSON AT THE

HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

4. COSTANZA-MAJOR v. UPTON, 22CV0544

Motion to Compel Plaintiff's Responses to Discovery Requests

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 28, 2022, IN DEPARTMENT FOUR TO ADDRESS PLAINTIFF'S REQUEST FOR CONTINUANCE IN LIGHT OF HEALTH ISSUES.

5. DUO v. VAIL RESORTS, INC., ET AL., 22CV0091

Motion to be Relieved as Counsel of Record

TENTATIVE RULING # 5: MOTION TO BE RELIEVED AS COUNSEL OF RECORD IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT.

6. FAGEN v. DELACOUR, ET AL., 22CV1129

Petition to Compel Arbitration and Stay Action

Plaintiff Patrick Fagen's complaint asserts causes of action for (1) violations of the Home Equity Sales Contracts Act (Civ. Code, § 1695, et seq.); (2) declaratory relief; (3) constructive trust; (4) quiet title, (5) injunctive relief; (6) resulting trust; (7) elder financial abuse; (8) cancellation of deed; (9) unjust enrichment/restitution; (10) usury; (11) breach of implied covenant of good faith and fair dealing; and (12) cancellation of deed of trust against defendants Julee Ann Delacour, William D. Killebrew, and Bradley Towne as Trustee of the William D. Killebrew Dynasty Trust ("Trust"). Pending is plaintiff's petition to compel arbitration and to stay this action until the completion of arbitration. The petition is opposed.

1. LEGAL PRINCIPLES

Plaintiff's petition is made pursuant to the California Arbitration Act ("CAA"), Code of Civil Procedure section 1280, et seq. The CAA sets forth "a comprehensive scheme regulating private arbitration in this state." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) California has a " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.]" (*Ibid*.) "Consequently, courts will ' "indulge every intendment to give effect to such proceedings." ' " (*Ibid*.) "In cases involving private arbitration, '[t]he scope of arbitration is ... a matter of agreement between the parties' [citation] …." (*Id*. at pp. 8–9.) "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) Furthermore, except for specifically enumerated exceptions, the court must order the parties to arbitrate a controversy if the court finds that a written agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.)

Arbitration agreements are governed by state contract law and are "construed like other contracts to give effect to the intention of the parties." (*Crowell v. Downey*

Community Hosp. Foundation (2002) 95 Cal.App.4th 730, 734, disapproved of on other grounds in *Cable Connection*, *Inc. v. DIRECTV*, *Inc*. (2008) 44 Cal.4th 1334.) A petition "to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Assn. v. Community Development Dept*. (1994) 30 Cal.App.4th 644, 653.) If the contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) " 'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citations.]" (*Adajar v. RWR Homes*, *Inc*. (2008) 160 Cal.App.4th 563, 569.)

The moving party always bears the burden of persuasion to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence. (*Rosenthal v. Great W. Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) The court's determination involves a three-step burden-shifting process.

In the first step of the process, the moving party bears the initial "burden of producing 'prima facie evidence of a written agreement to arbitrate the controversy.' [Citation.] The moving party 'can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature.' [Citation.] Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. [Citations.] For this step, 'it is not necessary to follow the normal procedures of document authentication.' [Citation.] If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

"If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. [Citation.] The opposing party can do this in several ways. For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not

remember seeing the agreement, or that the party never signed or does not remember signing the agreement. [Citations.]

"If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. [Citation.]" (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165–166.)

2. DISCUSSION

In support of the petition, plaintiff declares that in 2019 his home was in foreclosure. (Pet., Declaration of Patrick A. Fagen, ¶ 1.) In May and June 2019 he had multiple conversations with William D. Killebrew about entering into an agreement so that the foreclosure process could be stopped and Fagen could keep his home. (*Ibid.*) Killebrew indicated to Fagen that the agreement would be between Fagen and Killebrew's Trust, and not with Killebrew in his individual capacity. (*Ibid.*) As a result of those conversations, several agreements were executed, including: (1) May 30, 2019, Promissory Note for $315,722.14, executed by Fagen in favor of Bradley Towne, Trustee of the Trust (Pet., Ex. 1); (2) Lease and Option Agreement ("LOA") (Pet., Ex. 2; Compl., Ex. B); (3) Deed of Trust, dated June 13, 2019 (for purpose of securing the May 30, 2019, Promissory Note) (Pet., Ex. 3; Compl., Ex. H); and (4) Agreement for Purchase and Sale of Real Property (Pet., Ex. 4.)

Relevant for this petition is the LOA. Paragraph 26 of the LOA states:

> Mediation/Arbitration. Any controversy or claim arising out of or relating to this LOA, or breach thereof, shall be settled by mediation. If a party fails to respond to a written request for mediation within thirty (30) days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute. If the mediation does not result in settlement of the dispute within thirty (30) days

> after the initial mediation conference, or if a party has waived its right to mediate any issues in dispute, then any unresolved controversy or claim arising out of or relating to this LOA, or breach thereof, shall be settled by arbitration, which shall be administered by JAMS in accordance with the statutes and rules of California governing such arbitrations, and shall take place in Sacramento, California, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The parties agree that the prevailing party in any such dispute shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which he, she, or it may be entitled.

(Pet., Fagen Decl., Ex. 2, p. 5, ¶ 26.) Fagen and Towne expressly consented to the mediation/arbitration provision by initialing Paragraph 26 of the LOA. (*Ibid.*) The LOA was signed by Fagen on June 13, 2019, and Towne signed on behalf of the Trust on June 20, 2019. (*Id.*, Fagen Decl., Ex. 2, p. 7.) In August 2019, Towne, as Trustee of the Trust, assigned all rights to the LOA to defendant Delacour. (Pet., Fagen Decl., Ex. 5.) This action was commenced on August 11, 2022.

Paragraph 6 of Fagen's complaint states, "This Complaint hereby constitutes and Fagen demands mediation and arbitration, providing that all Defendants agree, and the Superior Court proceedings are stayed while such are conducted." (Pet., Declaration of Robert M. Henderson, ¶ 2 & Compl., ¶ 6.) Shortly after the complaint was filed, plaintiff's counsel communicated in writing and spoke with defense counsel about plaintiff's formal demand for resolution by arbitration and whether defendants would agree to binding arbitration. (Pet., Henderson Decl., ¶¶ 4–5 & Exs. 1, 6.) Ultimately, defendants declined to mediate or arbitrate. (*Id.*, Ex. 7.)

Based on the foregoing, the court finds that plaintiff met his initial burden of producing prima facie evidence of the existence of a written agreement to arbitrate. The burden now shifts to defendants to establish a defense to the enforcement of the

arbitration agreement, including the burden of demonstrating that an exemption from arbitration applies.

In this regard, defendants argue that the mediation/arbitration provision upon which Fagen relies expired on May 31, 2021, and the agreement is not part of Fagen's holdover tenancy. The LOA states the agreement was "entered into effective as of the 13th day of June, 2019 (the 'Effective Date') by and between BRADLEY TOWNE, AS TRUSTEE OF THE WILLIAM D. KILLEBREW DYNASTY TRUST ('Landlord') and PATRICK A. FAGEN ('Tenant')." (Pet., Fagen Decl., Ex. 2, p. 1.) "The term of the lease of the Property is twenty-four (24) months, commencing June 1, 2019 (the 'Commencement Date'), *and ending May 31, 2021 (the 'Termination Date')*. Tenant shall vacate the Property on the Termination Date unless Landlord and Tenant have in writing extended this agreement or signed a new agreement of unless Tenant exercises the Option in Paragraph 6 herein." (*Id.*, Ex. 2, p. 1, ¶ 2 [italics added].)

Thus, the LOA expired on May 31, 2021, over a year before this action was filed. However, "[A] party's contractual duty to arbitrate disputes may survive termination of the agreement giving rise to that duty." (*Ajida Technologies*, *Inc. v. Roos Instruments*, *Inc.* (2001) 87 Cal.App.4th 534, 545.) In *Ajida Technologies*, the appellate court did not state that any specific language is required to secure an arbitration provision's survival beyond the termination date of a contract. Here, if the parties wanted to limit the application of the mediation/arbitration provision to only those controversies and claims arising *during* the term of the LOA, they could have included language to that effect. The parties did not do so, and the court cannot read additional language into the LOA in interpreting the agreement. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted"].)

Beyond arguing that the mediation/arbitration agreement expired, defendants did not make any other argument against the enforceability of the agreement.

Given that the LOA does not clearly provide that the mediation/arbitration agreement applies only during the term of the LOA, and that this action involves controversies and/or claims "arising out of *or relating to this LOA*," (italics added), the court finds that defendants did not meet their burden of establishing a defense to the enforcement of the mediation/arbitration agreement, and there is a valid and enforceable mediation/arbitration agreement between the parties.

Accordingly, the petition to compel arbitration and to stay the action is granted.

TENTATIVE RULING # 6: PLAINTIFF'S PETITION TO COMPEL ARBITRATION AND MOTION TO STAY THIS ACTION 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. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

7. PERFECT UNION SLT, LLC v. CITY OF SOUTH LAKE TAHOE, SC20210172

Motion to be Relieved as Counsel

The attorney for plaintiff, who substituted in on August 3, 2022, moves to be relieved as counsel of record. Counsel's moving papers do not indicate whether plaintiff has retained new counsel. Plaintiff is an LLC. A corporation is not a natural person and cannot appear in an action in propria persona. It must be represented through counsel. (*Merco Const. Engineers*, *Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731.) As such, the court needs information about the status of new counsel for plaintiff.

Additionally, counsel did not use the correct declaration form. Her declaration must be on mandatory Judicial Council form MC-052. Further, counsel needs to submit a proposed order to the court (Judicial Council form MC-053). (Cal. Rules of Ct., rule 3.1362, subds. (d), (e).)

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, OCTOBER 28, 2022, IN DEPARTMENT FOUR.

8. MEDINA v. EL DORADO SENIOR CARE, PC20190064

Oral Argument Re: 10/14 Tentative Ruling

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 2:00 P.M., FRIDAY, OCTOBER 28, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.